Date: 20070912

Docket: A-366-06

Citation: 2007 FCA 282

CORAM: **LINDEN J.A.**
LÉTOURNEAU J.A.
SEXTON J.A.

BETWEEN:

CANADA (THE MINISTER OF CITIZENSHIP AND IMMIGRATION)

Appellant

and

PETER ANTHONY COLACO and SAVITA COLACO

Respondents

and

CANADIAN ASSOCIATION FOR COMMUNITY LIVING and ETHNO-RACIAL PEOPLE WITH DISABILITIES COALITION OF ONTARIO

Interveners

Heard at Toronto, Ontario, on September 12, 2007.

Judgment delivered from the Bench at Toronto, Ontario, on September 12, 2007.

REASONS FOR JUDGMENT OF THE COURT BY: LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on September 12, 2007)

LÉTOURNEAU J.A.

[1] Notwithstanding the thorough and forceful arguments of counsel for the appellant, we are of the view that this appeal should be dismissed.

[2] Barnes J. (judge) of the Federal Court ruled that, in assessing under paragraph 38(1)(*c*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 whether the respondents "might reasonably be expected to cause excessive demand on health or social services", the appellant erred when he failed or refused to consider the financial ability and willingness of Mr. and Mrs. Colaco to contribute to their daughter's future social services support requirements. The respondents' daughter, Jocelyn, suffers from a mild cognitive disability which may require limited social services support.

[3] Paragraph 38(1)(*c*) of 1 the *Immigration and Refugee Protection Act* reads:

38. (1) A foreign national is inadmissible on health grounds if their health condition … (c) might reasonably be expected to cause excessive demand on health or social services.	**38.** (1) Emporte, sauf pour le résident permanent, interdiction de territoire pour motifs sanitaires l'état de santé de l'étranger constituant vraisemblablement un danger pour la santé ou la sécurité publiques ou risquant d'entraîner un fardeau excessif pour les services sociaux ou de santé.

[4] This statutory provision requires an assessment of the health condition of a foreign national and of the resulting risk that that person will cause excessive demand on social services. The very concept of "excessive demand" conveys the notion that a certain level of demand is acceptable and is no impediment to the admissibility of a foreign national.

[5] In our view, in assessing both the risk of demand and the extent of that demand, the foreign national's ability and willingness to pay for the services are relevant factors to take into

consideration. These factors are not necessarily conclusive or determinative in making the assessment, but they cannot be ignored because they may influence the level of risk and demand for social services support.

[6] The learned judge concluded that the rationale enunciated by the Supreme Court of Canada in *Hilewitz v. Canada*, [2005] 2 S.C.R. 706 applied and that an individualized assessment of the respondents' needs for social services support as well as their capacity to assume them is required to determine whether the needs might reasonably be expected to cause excessive demand of these services. We agree with him.

[7] We believe that the following statements by Abella J. in the *Hilewitz* case are opposite here. At paragraphs 56 to 58 of her decision she wrote:

> 56 This, it seems to me, requires individualized assessments. It is impossible, for example, to determine the "nature", "severity" or probable "duration" of a health impairment without doing so in relation to a given individual. If the medical officer considers the need for potential services based only on the *classification* of the impairment rather than on its particular manifestation, the assessment becomes generic rather than individual. It is an approach which attaches a cost assessment to the disability rather than to the individual. This in turn results in an automatic exclusion for all individuals with a particular disability, even those whose admission would not cause, or would not reasonably be expected to cause, excessive demands on public funds.
>
> 57 The issue is not whether Canada can design its immigration policy in a way that reduces its exposure to undue burdens caused by potential immigrants. Clearly it can. But here the legislation is being interpreted in a way that impedes entry for all persons who are intellectually disabled, regardless of family support or assistance, and regardless of whether they pose any reasonable likelihood of excessively burdening Canada's social services. Such an interpretation, disregarding a family's actual circumstances, replaces the provision's purpose with a cookie-cutter methodology. Interpreting the legislation in this way may be more efficient, but an efficiency argument is not a valid rebuttal to justify avoiding the

> requirements of the legislation. The Act calls for individual assessments. This means that the individual, not administrative convenience, is the interpretive focus.
>
> 58 The clear legislative threshold provides that to be denied admission, the individual's medical condition "would" or "might reasonably be expected" to result in an excessive public burden. The threshold is reasonable probability, not remote possibility. It should be more likely than not, based on a family's circumstances, that the contingencies will materialize. See *Hiramen v. Minister of Employment and Immigration* (1986), 65 N.R. 67 (F.C.A.), and *Badwal v. Canada (Minister of Employment and Immigration)* (1989), 64 D.L.R. (4th) 561 (F.C.A.), both by MacGuigan J.A.
>
> (Italics appear in the original)

[8] If a skilled worker applicant, like the respondents, can establish that his or her admissibility in Canada cannot reasonably be expected to cause excessive demand on social services, there is, in our respectful view, no reason to exclude that applicant on that basis.

[9] The appeal will be dismissed and the following certified question:

> Does the reasoning of the Supreme Court of Canada decision of *Hilewitz* and *de Jong* apply to individuals applying to immigrate to Canada as skilled workers?

will be answered in the affirmative.

"Gilles Létourneau"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-366-06
STYLE OF CAUSE:	CANADA (THE MINISTER OF CITIZENSHIP AND IMMIGRATION) v. PETER ANTHONY COLACO et al.
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