Federal Court  Cour fédérale

Date: 20151026

Docket: IMM-8027-14

Citation: 2015 FC 1204

Ottawa, Ontario, October 26, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

FARHAT MAJEED

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant applied in 2004 in the skilled worker category for a permanent residence visa. His application was denied due to the medical inadmissibility of his 20 year old son who, most recently, has been diagnosed with "borderline intellectual functioning". The visa officer at the High Commission of Canada in London, United Kingdom, was not satisfied with the

Applicant's plan for his son's care and determined that the son would place excessive demand on social services.

[2] The Applicant alleges that the medical and visa officers who assessed his application failed to properly perform their duties under section 20 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, as am. Pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], the Applicant now applies for judicial review of the visa officer's decision rendered by letter dated October 7, 2014, and asks the Court to set the decision aside and return the matter to a different visa officer for re-determination.

[3] This is not the first time the Applicant has sought judicial review of his application for permanent residence. An earlier decision by a visa officer at the High Commission in 2013 had found the Applicant inadmissible because of his son's medical condition which was then diagnosed as being one of "moderate mental retardation". The Applicant sought judicial review of that decision, but the parties settled the matter on the basis that a second visa officer would reconsider the application and a new procedural fairness letter sent for purposes of the re-determination. It is the decision of the visa officer [the Officer] resulting from this re-determination which is the subject matter of this application for judicial review.

II. Should the Second Certified Tribunal Record be Accepted?

[4] The parties have raised a preliminary issue as to whether a second Certified Tribunal Record [2nd CTR] dated August 21, 2015, should be accepted by the Court in lieu of the first Certified Tribunal Record [1st CTR] dated July 10, 2015. The Respondent argues that the 2nd

CTR should be the one against which the Officer's decision is reviewed, while the Applicant argues that it should not be accepted by the Court. The cover letter for the 2nd CTR states that: "The previous certified tribunal record was missing documents and this one replaces the previous one, dated: 10th July, 2015."

[5] It is noteworthy that neither the 1st nor the 2nd CTR contain any notes entered into the Global Case Management System [GCMS] by the medical officers who reviewed the Applicant's application for permanent residence. The medical notes pertaining to the Applicant's application were provided, though, in two letters addressed to the Court from two different immigration officers at the High Commission, one being dated December 24, 2014, and the other dated December 29, 2014, pursuant to Rule 9 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, as am.

[6] The 2nd CTR was produced only after the Applicant filed an affidavit on July 31, 2015. This affidavit states that most of the documents submitted by the Applicant in May 2014, in response to the procedural fairness letter, are absent from the 1st CTR. Both CTRs, however, contain a copy of the letter from the Applicant's counsel dated May 2, 2014, written in response to the new procedural fairness letter sent to the Applicant in February 2014. This letter contains detailed submissions on the Applicant's behalf and enclosed dozens of documents totalling some 165 pages. Almost all of these documents were omitted from the 1st CTR, but they were included in the 2nd CTR along with some other documentation which predates the date on which the parties agreed to a re-determination of the Applicant's application for permanent residence.

[7] Prior to the hearing of this matter, the Court directed the Respondent to provide an explanation as to why the 2nd CTR had been filed. In response to this direction, the Respondent advised as follows by letter dated September 11, 2015:

> The visa office in London has provided the following explanation for the second CTR:
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> The Applicant's hard copy response package to the procedural fairness letter (the "pf response") was received at the visa office in May 2014 and was referred to the Visa Officer, who then referred it to the Medical section of the office. The Medical section of the High Commission in London is on the same floor as the main immigration section, so the pf response was physically taken across the floor. The package was catalogued in the Medical section registry and assigned to the Medical Officer for his review. No photocopy of the package was created to be included in the physical immigration file at that time.
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> (In March 2015, a new office policy was issued regarding the handling of medical responses, and the new procedure now is that a copy of the medical procedural fairness response should be made and retained on the physical immigration file before it is referred to the Medical section. This new procedure was the result of a similar instance to the present case, in Amjad v. M.C.I., IMM-7922-13, where a CTR was created that did not include the pf response from the applicant because it was housed in the Medical section, and no copy had been made for the physical file. In that instance, once the exclusion of the pf response was realized (as a result of letter from counsel to the Court), an amended CTR was created and re-sent which included the pf response. The Court accepted the amended CTR and the explanation of why it had accidentally been excluded in the initial CTR.)
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> With respect to the present case, referral of the pf response to the Medical section in May 2014 pre-dated the new procedure (of March 2015) that ensured a copy of the pf response was made for the physical immigration file, so that these occurrences would not arise in the future.
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> In the present case, the Medical Officer reviewed the pf response and concluded that the initial assessment that the applicant was inadmissible was still valid. Once this assessment was completed, it was inputted into GCMS.

> The Visa Officer was notified that the pf response was reviewed and completed by the Medical Officer. In this case, because there was no copy of the pf response on the physical immigration file, the Visa Officer went to the Medical section and retrieved the pf response when reviewing all evidence during the decision-making process. This is clear from the notes in his decision, including the listing of the documents in the pf package and multiple references to weighing specific items in the pf response as part of the decision. Once he completed his decision, the Visa Officer returned the pf response to the Medical section.
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> In July 2015, as a result of this case being granted leave, a Rule 17 request was received at the visa office. The CTR was prepared by the Visa Officer. He reviewed the physical immigration file, which did not include the medical pf response for the reasons set out above, and prepared the CTR based on the documentation in the file itself. He inadvertently forgot to include the pf response as it was in the Medical section.
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> In Aug 2015, after the visa office was advised that counsel had noticed that the pf response documents had not been included in the CTR, the visa office created the second CTR that included the pf response, which had been housed in the Medical section, and sent it out as a replacement CTR on August 21, 2015.

[8] In view of the foregoing, it is clear that the 1st CTR is incomplete because it does not contain a number of documents which are contained in the 2nd CTR. If the Court accepts that the Officer considered only the documentation in the 1st CTR, the Officer's decision should be set aside on that basis alone because it would be difficult, to say the least, for the Officer to have considered the reasonableness of the medical officer's opinion without examining the documentation underlying that opinion. This is the foundation for the Applicant's objection to the 2nd CTR being accepted by the Court.

[9] My colleague Mr. Justice Noël recently reviewed the jurisprudence concerning incomplete CTRs in *Ajeigbe v Canada (Citizenship and Immigration)*, 2015 FC 534, where he stated as follows:

> [17] …In *Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 498, at para 15, Justice Layden-Stevenson explained that:
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> > [15] […] While the failure to provide a certified record in accordance with the Rules does not, in itself, warrant automatic quashing of the decision: *Hawco v. Canada (Attorney General)* (1998), 150 F.T.R. 106 (F.C.T.D.); *Murphy v. Canada (Attorney General)* (1997), 131 F.T.R. 33 (F.C.T.D.), there is authority for the proposition that Rule 17 of the *Federal Court Immigration and Refugee Protection Rules*, SOR/93-22 is mandatory. The tribunal must prepare and produce a record containing all documents relevant to the matter that are in the possession or control of the tribunal. The decision may be set aside when the record is incomplete: *Gill v. Canada (Minister of Citizenship and Immigration)* (2003), 34 Imm. L.R. (3d) 29 (F.C.); *Kong et al. v. Canada (Minister of Employment and Immigration)* (1994), 73 F.T.R. 204 (F.C.T.D.).
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> [18] In *Bolanos v Canada (Minister of Citizenship and Immigration)*, 2011 FC 388, Justice Russell stated that an "incomplete record is not necessarily grounds to set aside a decision, particularly where the decision-maker considered the material in question and the material is available to the Court" (at para 52).

[10] This case, however, is not one where the record is incomplete. The documentation missing from the 1st CTR is now before the Court and, if accepted, available for review. Furthermore, the missing documentation was clearly in the Applicant's possession because he was able to produce a list of what documentation was missing from the 1st CTR in the affidavit filed on July 31, 2015. The question, therefore, is not so much as to whether the 2nd CTR should

be accepted by the Court but, rather, whether the documentation missing from the 1st CTR was considered by the Officer.

[11] The Respondent's explanation that the Officer walked across the hall, retrieved the Applicant's procedural fairness response material, evaluated the same, and then returned the documentation to the medical department rather than putting the response with the rest of the immigration file is troublesome; it is troublesome because it raises a doubt as to whether the procedural fairness items were actually considered or assessed by the Officer despite the Officer's statements in the GCMS notes: "file reviewed, including applicant's response to the procedural fairness letter", and "I have reviewed all of the documents provided on file."

[12] Absent the Respondent's explanation, it is possible that the "file" referred to by the Officer in the GCMS notes was the 1st CTR; and if so, as the Applicant argues, the Officer made the decision to deny the Applicant's application based only upon examination of the Applicant's cover letter enclosing the procedural fairness items. This letter is detailed, running to some 12 pages, and it is contained in both CTRs. Furthermore, as the Applicant correctly points out, the Officer refers to the Applicant's procedural fairness response material in the exact same manner, with the same lack of punctuation and use of grammar, as the medical officer does in the medical notes.

[13] Despite the Court's reservation as to what documentation the Officer reviewed in making the decision under review, this is not a sufficient reason to set aside the Officer's decision. If one accepts the Respondent's explanation for the 2nd CTR at face value, and in the

absence of any evidence to the contrary, it would be speculation to find that the Officer looked only at the materials in the 1st CTR. The documentation missing from the 1st CTR is before the Court, albeit due to the Applicant's affidavit of July 31, 2015, and should be accepted to assess the reasonableness of the Officer's decision.

III. Is the Officer's Decision Reasonable?

[14] The Officer found that the health condition of the Applicant's son "might reasonably be expected to cause excessive demand on social services," pursuant to subsection 38(1) of *IRPA*, and as such, his son was deemed inadmissible. The Officer therefore found the Applicant inadmissible as well under paragraph 42(a) of *IRPA*.

[15] In making these findings, however, the Officer failed to fully analyze and assess the reasonableness of the medical officer's opinion as to the plan for care of the Applicant's son. The medical officer stated that if the plan submitted by the Applicant was followed, it would bring the costs of services required for the Applicant's son below the excessive demand threshold; nonetheless, the medical officer opined that, because he would potentially have access to services funded by the public purse (notably the Ontario Disability Support Program), the Applicant's son was medically inadmissible.

[16] It was not reasonable for the Officer to rely upon the medical officer's assessment in this regard because that assessment focused upon the eligibility of the Applicant's son for certain social services and not on whether he would actually need to access or use such services. I agree with the Applicant that the Officer could not have evaluated the reasonableness of the medical

officer's opinion because that opinion was incoherent. The medical officer found, on the one hand, that the care plan would offset the excessive demand; yet, on the other hand, stated that, if admitted to Canada, the Applicant's son could have access to publicly funded services and, therefore, medically inadmissible.

[17] In *Hilewitz v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 SCR 706 [*Hilewitz*], the Supreme Court determined that an individualized assessment is necessary, and an individual's potential ability to access social services such as the Ontario Disability Support Program is not a sufficient reason to deny admission to Canada. "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" (*Hilewitz* at paragraph 58).

[18] The evidence before the Officer in this case was such that it would be more likely than not, based on the family's financial circumstances and the detailed plan of care submitted by the Applicant, that the Applicant's son would not access those social services for which he might be eligible. The Applicant estimated the yearly cost of services for his son would be $12,840.00, an amount which the Applicant said would be covered by his employment and savings, including the investment properties owned by the Applicant and his wife. In addition, two of the Applicant's brothers also undertook to set aside $10,000 and $50,000 as accessible resources if needed; they also submitted tax returns to show their income levels.

[19] The underlying presumption in the Officer's reasons is that the plan of care presented by the Applicant would not be followed and that the Applicant's son would draw on available social services in Ontario. The Officer, however, does not explain how or why he arrived at this presumption. Furthermore, the Officer does not state upon what evidence this presumption was based. Consequently, the Officer's reasons for the decision are not transparent and thus unreasonable.

IV. Conclusion

[20] In the result, therefore, the application for judicial review is allowed and the matter is returned for re-determination by a different visa officer. Neither party suggested a question for certification, so no such question is certified. No costs are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed and the matter returned for re-determination by a different visa officer; no serious question of general importance is certified; and there is no award of costs.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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