Federal Court  Cour fédérale

Date: 20100105

Docket: IMM-307-09

Citation: 2010 FC 4

Ottawa, Ontario, January 5, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

SHAFQAT ULLAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (the IAD), dated December 23, 2008, wherein the IAD refused to grant the appeal made by Shafqat Ullah (the Applicant) on a sponsorship application for his family members. The Applicant is a self-represented litigant.

Factual Background

[2] The Applicant was born in Pakistan, on November 15, 1967. He arrived in Canada as a member of the skilled worker class and became a permanent resident in August 2000. He currently lives in Lac La Biche, Alberta with his wife and three children and is employed as an accountant.

[3] In 2002, the Applicant sought to sponsor certain members of his family. He decided to sponsor his parents, Karamat Ullah (the father) and Ghulam Zohra (the mother) and his brother Quamar Shazad Nomi (the brother). The Applicant's brother is 34 years old and has a mild or moderate mental delay handicap. A visa officer refused the sponsorship application on the grounds that the Applicant's brother is inadmissible under paragraph 38(1)(*c*) of the Act. The reason being that the brother would require excessive demand on social services in Canada. The father and the mother were consequently held to be inadmissible under paragraph 42(*a*) of the Act.

[4] Pursuant to subsection 63(1) of the Act, the Applicant appealed the visa officer's decision to the IAD. The decision rendered by the IAD is the subject of this judicial review.

Impugned Decision

[5] After briefly stating the grounds under which the brother, the father and the mother have been found inadmissible, the IAD specifies that the Applicant is not contesting the legal validity of the visa officer's refusal. Rather, he is asking that the appeal be granted on the basis of humanitarian and compassionate considerations.

[6] The IAD goes on to conclude that the refusal is valid in law. This conclusion is based on the existence of two medical reports provided in the appeal record that confirm a diagnosis of moderate mental retardation affliction for the Applicant's brother and the fact that the Applicant did not bring any documentary evidence to dispute the medical determination.

[7] At the outset, the IAD states that the issue in this case is whether or not the brother will be a burden on the social services system and, thus, the family's capacity to support the social services which will be required must be considered.

[8] The IAD then examines a variety of evidence related to the brother's current care and living situation and the proposed situation should he come to Canada. It notes that currently the mother is his primary caregiver and he assists in the father's shop. Should the Applicant's family come to Canada, the IAD writes that the Applicant has made clear his intention to care for his brother if his parents are unable to do so and that the entire family would live with him and his wife. The Appellant also testified his wife would be willing to care for his brother if need be. It seems that at one point, the Applicant testified he would continue to live in Lac La Biche and at another that he would move to Edmonton with his family. The IAD also notes that the Applicant has provided letters from various organizations in Edmonton which state that the brother could volunteer with them and potentially learn Urdu.

[9] In response to these submissions, the IAD finds that the Applicant's parents are currently not in good health and are elderly. Based on this and the Applicant's testimony that he wants his parents to come live with him because they are ill, the IAD concludes that the parents may not be able to provide home based care for the brother for much longer. It adds that there will be an additional strain on the parents in adapting to life in Canada. Also, the Applicant's responsibility for his brother is limited to a ten-year commitment. By the time the commitment expires, the parents will be well into their seventies and may well be unable to care for the brother at that point.

[10] On the balance of probabilities, it is found that the brother will require support outside the home. Also, it is noted that there is no concrete plan for care or social integration outside of the immediate family. The IAD notes that the Applicant's wife does not have any experience in caring for the elderly or a person like his brother and that she is currently the primary caregiver for her three young children. The IAD concludes that the Applicant has not submitted sufficient evidence to show that his wife is capable of caring for the brother. Finally, the IAD writes that the letters of involvement are only from organizations in Edmonton and no clear plans have been made for community involvement should the brother live in Lac La Biche.

[11] The IAD finds that there is no evidence that the Applicant's parents rely on him for financial support. The Applicant provided evidence showing that he sent money to his parents over the years but this support has decreased. The Applicant testified that these funds are for extras and because he feels guilty for not being there himself, he will continue to provide this support even if his family does not come to Canada.

[12] The IAD then notes that many of the Applicant's siblings still live in Pakistan along with most of their extended family. It also concludes that the Applicant's family will continue to have family support in Pakistan and there is no evidence that they would suffer undue hardship by remaining in Pakistan.

[13] The IAD continues its analysis by commenting on the Applicant's financial situation. It summarizes his employment history which demonstrates that he has been employed by different companies since 2000 and has been self-employed since 2006. He started a new company in 2007 and currently works for that company. Furthermore, he holds five income generating rental properties in Edmonton. However, the Applicant has been incurring a loss on those properties and his financial situation has deteriorated over the last three years. The bank statement submitted showed his account to be in overdraft. In light of the Applicant's financial situation, the IAD concludes that the Applicant has not demonstrated that he is able to pay for the services which would be required by his brother. It relies on, and says this case is factually similar to another IAD decision where it was held that insufficient evidence of family resources and how those resources would be actualized to defray the cost of care required even in the face of a supportive family could not persuade the panel (*Ahmed v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 567 (QL)).

[14] Furthermore, the IAD observes that the Applicant has visited his family three times since 2004 as have his wife and children and nothing prevents future visits. It notes that the Applicant's

elder brother lives with his parents and is financially dependent on them. The Applicant has expressed that he would return to Pakistan should his family's application not be granted and the IAD remarks that this would be a decision of his own choosing. It also observes that the parents do not speak English, that no concrete plans have been made to integrate them into society nor are there any concrete settlement arrangements for them.

[15] The IAD further concludes that the allegation of undue hardship due to the political situation in Pakistan is merely speculation and no evidence has been submitted on this point.

[16] The IAD writes that it has considered the best interests of the Applicant's children and acknowledges that it would be beneficial to them to have a relationship with their grandparents but that the interests of the other grandchildren currently residing in Pakistan are also relevant. It also considered the brother's best interests. It finds that based on the documentary evidence, he functions fairly well and has some independence in his current environment. Also, he speaks the local language and is familiar with his environment – this would not be the case should he come to Canada as the evidence shows that he is shy and he would have difficulty learning a new language. Also, the Applicant and his family are busy with their own lives and activities. Accordingly, it is in the brother's best interest to remain in Pakistan.

[17] Finally, the IAD explains that the mere desire of the Applicant to have his parents in closer proximity does not, in light of all the facts, constitute sufficient grounds to override the negative elements of the case. The IAD considers the Applicant's desire to reunite with his family and his

desire to care for his brother but these grounds are not sufficient to justify the granting of special relief.

Questions at Issue

[18] The Applicant disputes the IAD's statement that he did not wish to contest the legality of the determination. He also raises a number of issues regarding the appreciation and the review of the evidence by the IAD. I would phrase the issues as follows:

a. Did the IAD err by not considering the legality of the determination that the Applicant's brother is inadmissible on a health ground?

b. Did the IAD fail to take into account several important factors in determining whether or not the circumstances warranted the granting of special relief?

Pertinent Legislation

[19] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

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.
42. A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if	42. Emportent, sauf pour le résident permanent ou une personne protégée, interdiction de territoire pour inadmissibilité

	familiale les faits suivants :
(a) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or	a) l'interdiction de territoire frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas réglementaires, ne l'accompagne pas;
(b) they are an accompanying family member of an inadmissible person.	b) accompagner, pour un membre de sa famille, un interdit de territoire.

Standard of Review

[20] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada established that in determining the appropriate standard of review, the Court can look to past jurisprudence and ascertain whether it has already determined a satisfactory standard of review (paragraph 62). This Court has held that the IAD's decisions on medical admissibility on questions of facts and mixed fact and law should be reviewed on a standard of reasonableness (*Vashishat v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1346, 337 F.T.R. 283). The first question at issue constitutes a claim that there was a misapprehension of the facts and evidence. Whereas the second addresses the appreciation of the evidence by the IAD. Accordingly, both questions at issue will be held to a standard of reasonableness and the Court will only intervene if the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, at paragraph 47).

Did the IAD err by not considering the legality of the determination that the Applicant's brother is inadmissible on a health ground?

[21] The Applicant insists that he did contest the legal validity of the refusal and did not renounce his right to contest the decision on this ground at any point. He points to submissions that were prepared by his counsel before the IAD's oral hearing (the Applicant was no longer represented by counsel at the time of the hearing) and adds that he clearly indicated that he intended to contest the legal validity of the inadmissibility determination. He claims that he submitted medical reports that contradict the decisions of the visa officer and the opinion of the medical officer. Furthermore, he submitted a video showing his brother accomplishing daily tasks. The Applicant claims that this clearly shows that he intended to contest the legality of the inadmissibility determination.

[22] The Respondent, on the other hand, admits that the Applicant did contest the legal validity of the visa officer's refusal and despite the fact that the IAD stated that the Applicant did not contest that issue, the IAD went on to consider it. The reasons show that the IAD gave an individualised assessment of the Applicant's ability to pay as well as the likelihood of excessive social services being used. The Respondent claims that in doing so, the IAD actually did consider the legal validity of the decision and then went on to consider the humanitarian and compassionate grounds in the case.

Analysis

[23] The Applicant's argument on this point is essentially that his brother is more capable than described and, with family support, would not require excessive social services in Canada. He

claims that the IAD did not entertain this argument which would go to the legal validity of the inadmissibility determination.

[24] In *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 706 (*Hilewitz*), the Supreme Court of Canada ruled that an inadmissibility determination based on excessive demands on social services requires the taking into account of both medical and non-medical factors, including an individualized assessment of the persons' condition, their capabilities and actual needs and the availability of family support and willingness and ability to pay for services (at paragraphs 54 to 61; see also *Vashishat*, at paragraphs 19 and 20).

[25] While it is true that the IAD explicitly stated that the legal validity of the medical determination was not being contested in this case, it did go on to consider the issue and address all of the necessary factors laid out in *Hilewitz*. The IAD recognized in its reasons that this is a case where *Hilewitz* should be applied and its analysis shows that it went on to do so. It noted that no additional medical reports had been submitted that disputed the diagnosis of a mental handicap. It also noted that the brother is able to accomplish certain tasks on his own and the current arrangements for his care in Pakistan. It discussed the proposed care should admittance to Canada be granted. It concluded that it was unlikely that the proposed care would be sufficient and that social services would still be called upon. The IAD found that the Applicant is not in a financial position to assume the cost of social services that his brother might require if admitted to Canada.

[26] It is clear in its reasons, that when determining what demands would be placed on the social services system, the IAD balanced the brother's current condition and needs, the availability and proposed alternative arrangements and the Applicant's ability to pay. Based on these factors and the analysis presented in the reasons, I find that the IAD did speak to the legal validity of the inadmissibility determination.

Did the IAD fail to take into account several important factors in determining whether or not the circumstances warranted the granting of special relief?

[27] The Applicant has raised numerous evidentiary elements that he submits were ignored or used selectively by the IAD. With regard to the health ground determination, he points to a video that he submitted showing his brother accomplishing daily tasks that is not mentioned in the reasons and that the IAD said it had not yet seen at the time of the hearing. He also calls upon medical reports that he submitted to the IAD as well as the visa officer. The Applicants submits that the IAD was selective in analyzing and reading the medical reports. He claims that the medical reports show that his brother's condition is not as severe as made out to be in the reasons and the IAD ignored this.

[28] Furthermore, the Applicant alleges that he explained to the IAD that his wife does not need any particular type of training to care for his elderly parents or his brother and would be willing to do so as this comes from values in his culture and religion. He also explained that his wife is a homemaker and would have ample time to care for his family members. He urges that the tribunal ignored this important fact and erred by concluding that a professional caregiver would be required.

[29] In terms of his financial ability to pay for social services, the Applicant argues that the IAD made an unreasonable negative inference from the fact that his rental properties are losing money. He suggests that because he can still make his mortgage payments, despite the losses this clearly shows that he has other income and this was ignored by the IAD. He has also provided a calculation of his income that includes his business income and that of this wife which shows it to be much higher than in the decision. He also points to the statement that his bank account is in overdraft when other bank statements show there is a surplus. He says that once again, the IAD made a selective use of the income information and the evidence clearly shows that he has the financial ability to pay for social services if need be.

[30] With regard to the humanitarian and compassionate grounds, the Applicant submits that one of the grounds he called upon was that he will be able to provide better care for his parents and brother than they are currently receiving in Pakistan and this was completely ignored by the IAD. He adds that at the hearing, he explained the political situation in Pakistan and why this warranted special relief for his family and this was also ignored.

[31] In reply to these submissions, the Respondent argues that the IAD did not misunderstand or ignore any piece of evidence presented by the Applicant. The decision is clear and shows that the documents and evidence presented by the Applicant were considered carefully in relation to all of the circumstances of the case. The Respondent submits that the assessment of the evidence was reasonable on the facts of the case and there is no reviewable error.

Analysis

[32] The Applicant is arguing that the IAD ignored certain elements of the evidence before it or used the evidence selectively. In support of his argument, he has pointed out what he deems to be key pieces of evidence which are not mentioned in the reasons or are interpreted incorrectly in his view. There is of course a refutable presumption that a tribunal has weighed all of the evidence before it even if it has not mentioned each element. However, the more important the evidence that is not mentioned, the greater the assumption that the tribunal erred and made a finding without regard to the evidence (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, at paragraph 17 (F.C.T.D.)).

[33] With regard to the medical inadmissibility, even though the IAD did not watch the video before rendering its decision, there were numerous other elements of evidence that demonstrated the brother's ability to complete tasks and live somewhat independently. It is clear in the reasons that the IAD had a solid understanding of the brother's abilities and the care that he currently requires. It did not rely only on the medical evidence in its analysis but also on the evidence presented by the Applicant and his family. Although it did not explicitly mention the videotape in its reasons, I am satisfied that the IAD did consider the evidence on the brother's capabilities as a whole and that the failure to mention this one piece of evidence does not render the decision unreasonable.

[34] This Court viewed the video in question before the present hearing and considers that without analyzing the medical reports filed in this case, it is very difficult to express an opinion on the brother's capabilities.

[35] Furthermore, as to the conclusion on the Applicant's wife's ability to care for the Applicant's brother and her lack of professional qualifications, the IAD does mention that the wife is not a professional caregiver and that she has had little contact with the brother over the years and has never been in a situation where she was responsible for his care. The Applicant relies on a portion of his testimony where he spoke to reasons why his wife would be willing and able to care for his brother. It is clear in the reasons, that despite this willingness, the IAD had concerns of the amount of time required to care for the Applicant's brother, particularly in a new environment where he would no longer have his routine tasks, and found that it was unlikely given all the circumstances that the wife would be able to provide the necessary level of care. The Applicant's explanation did not directly contradict this finding and is not sufficient to lead me to conclude that a finding was made without regard to the evidence. This is a finding that was open to the IAD and is reasonable based on the evidence before it.

[36] On the point of his financial situation, the Applicant claims that the IAD used his information selectively in concluding that he does not have the means required to finance social services if required. He has also provided alternative calculations of his income. The first thing to note is that his alternative calculations include his business income and his wife's income but no evidence of either of these was put before the tribunal and as such will not be considered by this Court. Clearly, the IAD cannot be faulted for not analysing evidence that was not before it. Secondly, the onus is on the Applicant to prove that he has the financial means to pay for social services if he wants this factor be considered. The IAD analysed the financial information before it

and made a finding accordingly. It mentioned the different sources of income claimed by the Applicant, over a period of three years, and was still not satisfied of his ability to pay. It did not limit itself to a particular point in time and used the financial information as a whole. Furthermore, ability and willingness to pay for social services are not necessarily determinative factors even if they are taken into consideration (*Colaco v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 282, 64 Imm. L.R. (3d) 161, at paragraph 5).

[37] With regard to the cited humanitarian and compassionate grounds, the situations that unfolded in Pakistan (the alleged political instability that took place after the hearing) on which the Applicant is now basing his claim could not be analyzed by the IAD. Also, his general claims on political instability at the hearing were determined by the IAD as unsubstantiated. The Court finds that there is no reviewable error here.

[38] The Applicant further submits that the IAD ignored his wish to provide care for his parents which would be better than the care provided to them now by his elder brother. However, the IAD clearly acknowledged the parents' health situation and the fact that the Applicant is dissatisfied with the care provided by his elder brother who lives with his parents. It stated that the Applicant did not want his parents to work in Canada and that he would provide for them. It also found that there are family members living in Pakistan who provide support to the parents and on whom they can rely. It found that overall there would not be an undue hardship if the parents were to stay in Pakistan. The IAD clearly understood that the Applicant wishes for his parents to come to Canada because they

are ill and that he intends to care for them. It did not ignore this ground even if it did not phrase it in the same way as the Applicant.

[39] In light of the above analysis, the Applicant’s arguments on this ground cannot succeed. The IAD did not err in her appreciation and analysis of the evidence.

[40] The Court wishes to state that the issue here concerns the reasonableness of the decision and not the opinion of the Court on whether or not the Applicant's brother should be admitted in Canada. The Court might have had a different opinion than the one rendered by the IAD, but finds that the IAD's conclusions are in the range of possible and acceptable outcomes (*Dunsmuir*, at paragraph 47).

[41] The Applicant submits the following questions for certification:

> 1. Is an applicant's wealth a relevant consideration in determining whether his or her admission to Canada would cause excessive demands on social services in Canada and is a determination by medical officers in this regard determinative or is the decision-maker in respect of the applicant's application for permanent residence in Canada required to consider the reasonableness of the medical officers' determination regarding "excessive demands" in light of all the relevant material provided to the respondent by the applicant?
>
> 2. Was IAD wrong in law not to give preferential consideration to the best interests of children who are Canadian citizens as compared to those children who are neither Canadian citizens nor permanent residents and have never been to Canada?
>
> 3. Is s. 38 (2) infringe Charter rights of Canadian citizens or permanent residents as it excludes parents from the exceptions? Is it contrary to the objective if IRPA as described in s. 3(1)(d)?

[42] The Respondent opposes such questions. The Court agrees that the present case is fact driven and no questions arise for certification.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-307-09
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