Federal Court  Cour fédérale

Date: 20100208

Docket: IMM-3589-09

Citation: 2010 FC 127

Ottawa, Ontario, February 8, 2010

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MOHAMMED BICHARI
AND KHEDOUJA BICHARI

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants challenge the legality of a decision rendered by Jillan Sadek, a director from the Case Management Branch of Citizenship and Immigration Canada (the Director) on July 7, 2009, refusing the applicants' application for permanent resident status.

[2] The Director found that there were insufficient humanitarian and compassionate considerations to overcome Mrs. Khedouja Bichari's medical inadmissibility under subsection 38(1)(c) of the *Immigration and Refuge Protection Act*, S.C. 2001, c.27 (the Act).

[3] As a result of his wife's medical inadmissibility, the second applicant, Mr. Mohammed Bichari, is an inadmissible family member pursuant to section 42 of the Act.

I LEGISLATIVE AND REGULATORY PROVISIONS

[4] For ease of reference, the relevant provisions in the Act read as follows:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25**. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.
38. (1) A foreign national is inadmissible on health grounds if their health condition (a) is likely to be a danger to public health; (b) is likely to be a danger to public safety; or (c) might reasonably be	**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.

expected to cause excessive demand on health or social services.	
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.

[5] The rules that govern the determination of whether a foreign national is medically inadmissible are set out in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). Of particular relevance to the determination of whether a foreign national might reasonably be expected to cause excessive demand on health services are sections 20 and 34 of the Regulations:

20. An officer shall determine that a foreign national is inadmissible on health grounds if an assessment of their health condition has been made by an officer who is responsible for the application of sections 29 to 34 and the officer concluded that the foreign national's health condition is likely to be a danger to public health or public safety or might	**20**. L'agent chargé du contrôle conclut à l'interdiction de territoire de l'étranger pour motifs sanitaires si, à l'issue d'une évaluation, l'agent chargé de l'application des articles 29 à 34 a conclu que l'état de santé de l'étranger constitue vraisemblablement un danger pour la santé ou la sécurité publiques ou risque d'entraîner un fardeau excessif.

reasonably be expected to cause excessive demand.	
34. Before concluding whether a foreign national's health condition might reasonably be expected to cause excessive demand, an officer who is assessing the foreign national's health condition shall consider	**34**. Pour décider si l'état de santé de l'étranger risque d'entraîner un fardeau excessif, l'agent tient compte de ce qui suit :
(a) any reports made by a health practitioner or medical laboratory with respect to the foreign national; and	a) tout rapport établi par un spécialiste de la santé ou par un laboratoire médical concernant l'étranger;
(b) any condition identified by the medical examination.	b) toute maladie détectée lors de la visite médicale.

[6] Moreover, according to the Operational Bulletin 021 – June 22, 2006, immigration officers are not allowed to grant exemptions from the application of section 38 of the Act. If they are of the opinion that an exemption on humanitarian and compassionate grounds may be warranted, or if one is sought, the file must be forwarded to the Director of Case Review at National Headquarters.

II FACTUAL BACKGROUND

[7] The applicants are an elderly couple from Algeria. Mr. Bichari is 77 years old and his wife is around 74 years old. They have 11 children, 8 of whom remain in Algeria, one who is in Spain and two who reside in Canada. While they initially lived with their daughter in Quebec, the Bichari's relocated towards the end of 2007 to live with their son in British Columbia.

[8] The applicants were issued visitor visas from the Canadian Embassy in Paris on October 18, 1999. They arrived in Canada on November 28, 1999, and applied for refugee status on January 13, 2000, in addition to submitting an application for permanent resident status based on humanitarian and compassionate grounds (H & C application). On July 24, 2000, the applicants were informed that they did not meet the definition of a Convention refugee.

[9] In October of 2000, Mrs. Bichari was diagnosed with glomerulosclerosis, a chronic kidney condition. On December 18, 2001, while the Bicharis were still living with their daughter in Quebec, Mrs. Bichari received a kidney transplant. Since her transplant, Mrs. Bichari is dependant on anti-rejection (immunosuppressant) medicines for survival.

[10] On April 27, 2006, the applicants were informed that their H & C application was approved in principle. While it was acknowledged that the applicants would face “unusual, undeserved or disproportionate hardship” if they were forced to return to Algeria to apply for permanent resident status, before the applicants could officially be granted permanent resident status, they had to demonstrate their compliance with the remaining requirements of Act, which included, *inter alia*, demonstrating that they are not medically inadmissible under section 38 of the Act.

[11] In 2006, the applicants became aware that they were not granted a Certificate of Selection from the Quebec government. Since this is a condition precedent to the grant of permanent resident status for foreign nationals residing in Quebec, they decided to move in with their son in British Columbia.

[12] On January 22, 2007, Mrs. Bichari was informed that she was medically inadmissible due to her renal insufficiency post-transplantation. According to the medical officer who examined her case, Dr. Quevillion, as a result of her transplant, Mrs. Bichari would require follow-up care and a daily regimen of expensive immunosuppressant medicines. Since the prescription medicines are guaranteed by provincial health insurance, Dr. Quevillion concluded that Mrs. Bichari's medical condition might reasonably be expected to cause excessive demand on Canadian health services.

[13] Since the applicants' application was based on humanitarian and compassionate grounds, the Bicharis' application was sent to the Case Management Branch at Citizenship and Immigration Canada in Ottawa to have the Director make a determination as to whether or not an exemption to Mrs. Bichari's medical inadmissibility was warranted in the circumstances.

[14] As is customary when dealing with determinations of medical inadmissibility, the Bicharis were sent a fairness letter disclosing Mrs. Bichari's inadmissibility and granting the applicants the opportunity to make submissions or provide documentary evidence.

[15] In response to this letter, the applicants submitted three letters from different medical doctors attesting to Mrs. Bichari's excellent physical condition. None of these letters, however, dealt with Mrs. Bichari's need for immunosuppressant medicines. In an e-mail sent October 8, 2009, Dr. Quevillion reiterated that "although her renal function is excellent and her prognosis is good, her requirements for immunosuppressant medications might reasonably be expected to cause excessive

demand on health services and [therefore, the letters do] not modify the current assessment of medical inadmissibility."

[16] On June 17 2009, the Director sent an e-mail to Dr. Hindle, the medical attaché responsible for the Maghreb region, asking whether post-renal transplant treatment is available in Algeria. Two days later, Dr. Hindle replied that while both public and private treatment is available, "private is usually much better access."

[17] A second letter was sent to the applicants on June 19, 2009 disclosing the fact that the inadmissibility determination had been maintained. In addition to the letter, the Director sent the applicants the Field Operating Support System (FOSS) notes from the applicants' immigration file, the e-mail from Dr. Quevillion, the email from Dr. Hindle and two articles relating to the treatment of renal conditions in Algeria. The applicants were once again invited to make submissions and/or submit documentary evidence.

[18] In his response on July 6, 2009, the applicants' counsel raised many of the same arguments which are incidentally raised in the present application, but no new documentary evidence was filed by the applicants.

III THE IMPUGNED DECISION

[19] On July 7, 2009, the Director rendered her decision and concluded that:

…

On June 17, 2009, I wrote the Medical Officer responsible for the Maghreb asking whether post-renal-transplant treatment is available in Algeria and whether it is public or private. The Medical Officer, Dr. Valerie Hindle, stated "both available, although private is usually much better access."

The articles disclosed to Counsel indicate that renal transplantation does take place in Algeria and that 40 had been done by 1994. I also note that one of the articles states "the outcome of renal transplantation in terms of patient and graft survival conforms to international standards."

I conclude from this that adequate post-renal-transplant care is available in Algeria.

…

I also note that the current security situation in Algeria, generally speaking, has greatly improved since 1999. In the 1990's there was nearly a civil-war-like- conflict between the government and "terrorist" groups. Now the conflict is all but at an end…

I am not satisfied that Mr. and Mrs. Bichari would suffer any particular hardship if forced to return to Algeria based on lack of medical services or based on a risk of generalized random violence.

…

Algeria was the home of Mr. and Mrs. Bichari for 60+ years, they speak the language and know the culture well, they have 8 children remaining there, at least on sibling and likely many grandchildren; I do not find that they would suffer hardship if they relocated to Algeria.

Conversely, they have spent the last decade in Canada and have not demonstrated that they have been able to contribute significantly economicaly to Canada or even establish themselves in the community. I also note that Mrs. Bichari, while never having been granted permanent residence, was fortunate enough to have received the benefit of a renal transplant while in Canada as well as post-transplantation care.

I am not satisfied that sufficient humanitarian and compassionate considerations exist to grant an exemption to Mrs. Bichari's medical

> inadmissibility. I have also taken into consideration the issuance of a Temporary Resident Permit and similarly do not find sufficient humanitarian and compassionate considerations to do so, based on the same rationale.

[20] It is this latter decision that the applicants ask this Court to set aside.

IV GROUNDS OF ATTACK

[21] Although a number of grounds of attack were raised in the applicants' written material, at the hearing the applicants' counsel focused on the alleged unreasonableness of the Director's finding of fact that there is adequate post-renal transplant treatment available in Algeria. Essentially, the applicants submit that this finding is speculative and not supported by the evidence.

[22] The applicants argue that it is incumbent on the Director to base her decision on reliable information. In this regard, the applicants question the reliability and value of the answer provided by Dr. Hindle. According to the applicants, the question posed was vague, and the response elicited by the question was not much better. There was no mention of the type of care Mrs. Bichari would require and no details surrounding the affordability or the availability of treatment were requested. There is also no way of knowing why Dr. Hindle has the required expertise to provide an accurate response to the question; all we know about her is that she is a medical attaché working in Paris, and that she is responsible for the Maghreb region.

[23] With regard to the two articles referred to by the Director, the applicants argue that (i) the 1994 article does not refer to the current situation in Algeria, and (ii) the other article does not

specifically deal with the situation in Algeria and does not indicate whether immunosuppressant medicines are readily available in Algeria. Indeed, according to applicants' counsel, both articles actually contradict the Director's finding that there exists adequate post-renal transplant treatment in Algeria. Since the Director failed to explain why the contradictory evidence from the articles was not relevant, the applicants submit that the Director erred by making an erroneous finding of fact without regard for the evidence (*Cepeda-Gutierrez v. Canada (Minsiter of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 at paragraphs 16 and 17 (FC) (QL)). Indeed, if Canada, as one of the richest countries in the world, is not willing to provide Mrs. Bichari with the necessary drug treatment because of the excessive cost to the health system, the applicants ask how can we expect Algeria, a poor, war-torn country to provide such treatment reliably, and at an affordable cost?

V ANALYSIS

[24] Before entering Canada, foreign nationals are required to apply for a visa, which may or may not be granted depending on whether the foreign national complies with the other requirements of the Act (see subsection 11(1)). Subsection 25(1) of the Act provides an exemption to the requirement of having to apply for a visa from outside of Canada, in addition to providing an "exemption from <u>any</u> applicable criteria or obligation of [the] Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to [the applicant], taking into account the best interests of a child directly affected, or by public policy considerations" (emphasis added).

[25] Given the discretionary nature of these decisions, it is widely accepted that the Court must show deference to the immigration officer making the determination. Since the Supreme Court of Canada's decisions in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), it is clear that the Court will review a humanitarian and compassionate decision on the reasonableness standard. In conducting its review, the Court is concerned with the existence of justification, transparency and intelligibility within the decision-making process. As long as the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, the Court will not intervene with the immigration officer's decision (*Dunsmuir*, above, at paragraph 47).

[26] In an application based on humanitarian and compassionate considerations, the onus is always on the applicants to provide the documentation upon which the determination will be based (*Zambrano v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 481 at paragraph 39 (*Zambrano*); *Melchor v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1327 at paragraph 13 (*Melchor*); *Arumugum v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 985 at paragraph 16). Again, it has been reiterated by this Court numerous times that the humanitarian and compassionate decision making process is a highly discretionary one (*Quiroa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 495 at paragraph 19; *Kawtharani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 162 at paragraph 15; *Jasim v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1017 at paragraph 11 (*Jasim*)). Furthermore, the decision of an officer not to grant an exemption under subsection 25(1) of the Act takes no right

away from an applicant, who may still apply for landing from outside of Canada, which is the usual requirement under Canadian Immigration legislation (*Jasim*, above, at paragraph 11).

[27] With these general principles in mind, I will first deal with the ancillary issue raised by the applicants with respect to the reliability and weight of the two articles mentioned in the impugned decision. From a reading of same, it is clear that both articles are relevant to the issue of post-renal transplant treatment in Algeria in that they outline the strengths and the shortcomings of the North African health care system with regard to kidney patients. While the 1994 article (Hottman Salah, "An Overview of Renal Replacement Therapy in Algeria" (1994) 5:2 Saudi Journal of Kidney Diseases and Transplantation 190) may be dated, it is not up to the Court to tell the Director how this information should be weighed. Notably however, in the more recent article (Rashad S. Barsoum, "End-stage renal disease in North Africa" (2003) 63: S83 Kidney Journal S111), it is stated that "[t]he transplant activity in North Africa is impressive…[t]he outcome of renal transplantation in terms of patient and graft survival conforms to international standards." That said, the Court readily recognizes that the two articles do not deal directly with the availability of drug treatments, however, they relate to post-transplant health care, which can be inferred to include any necessary drug treatments. If the applicants wanted to question the conclusions or the inferences that could be drawn from these articles, they had ample opportunity to submit, and should have submitted, their own evidence, which they failed to do.

[28] This brings us to the reproach concerning the Director's reliance on Dr. Hindle's comments concerning the availability of health services. While we may not know whether Dr. Hindle has

actually been to Algeria, the fact that she is the medical attaché for the North African region means that it was not unreasonable for the Director to rely on her statement. Indeed, she can be expected to have some expertise related to the nature of the health services provided by countries in that region. If the applicants did not agree with her conclusion, it was up to them to submit documentation to the contrary. The respondent further submits that based on Dr. Hindle's response that treatment is offered in the public sector, we may not infer that Mrs. Bichari would be able to receive her immunosuppressant medicine for free in Algeria. I agree with the applicants that the fact that the public sector offers medication does not necessarily mean that it is offered for free. That said, even if Mrs. Bichari were required to pay a subsidized price for the medication, it would not render the Director's decision unreasonable. The standard on a humanitarian and compassionate application cannot be whether the applicants will get better or more affordable treatment in Canada, because if this were the case, virtually all medically inadmissible persons would be entitled to stay.

[29] The present application must fail. It should also be noted that while better questions could have been asked by the Director in the e-mail, that is not the legal test. Suffice it to say that based on Dr. Hindle's answer provided, post-renal transplant health services are available in Algeria. Thus, without evidence to the contrary, it was reasonable for the Director to decide how she did. A recent decision of this Court confirms that an applicant cannot simply rest his or her case on the fact that the evidence relied upon by the decision-maker is speculative when he or she has simply failed to discharge the burden of proof in establishing that proper medical care is not available in their country. My colleague, Justice Phelan in *Gomes v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 98 at paragraphs 10 to 12, noted that:

> …
>
> [10] This decision turns principally on the onus of proof which an applicant bears. The underlying reason for the negative decision is the failure of the Applicant to discharge the burden of proof in respect of the critical elements of the claim.
>
> [11] The Applicant argued that many of the Officer's findings were based upon speculation. This included the ability of Portugal to provide medical care and the existence of one or more members of the family in Portugal who could supply financial and emotional support for the Applicant. The Applicant also questioned the Officer's conclusion that the Applicant's mother may require assistance to continue to care for him in the future.
>
> [12] The speculative elements of the decision arose as the result of the failure of the Applicant to adduce evidence to the contrary, as was his obligation. The Officer, in concluding that Portugal could provide medical care, undoubtedly took judicial notice of the fact that Portugal is a member of the EU and as such, has a reasonable medical system. The Applicant acknowledges that he provided no evidence that medical care sufficient for the Applicant was not available in Portugal. While it might have been preferable for the Officer to simply state that the Applicant had failed to discharge the onus of proof in respect of this matter, the conclusion that Portugal, on a balance of probabilities, could provide medical care was not unreasonable.
>
> …

[30] The applicants had the burden of establishing that they would suffer unusual, undeserved or disproportionate hardship if they were sent back to Algeria. The applicants argued that they are elderly and have been in Canada for the last ten years and that they no longer feel safe in Algeria. In making a determination based on humanitarian and compassionate grounds, a number of factors had to be weighed by the Director. The applicants also stressed in their written representations that prior to the finding of medical inadmissibility, the Bicharis were deemed to merit permanent resident

status based on humanitarian and compassionate grounds. While not raised at the hearing, suffice it to say that the emphasis on their approval in principle is misplaced in any event. This approval was contingent on the applicants satisfying the remaining requirements in the Act including, but not limited to, the requirement that the applicants be medically admissible. Once it was determined that Mrs. Bichari was medically inadmissible, the Director had to re-weigh the humanitarian and compassionate considerations against the requirements of the Act.

[31] Having read the impugned decision in its totality, the Court finds that it is based on the evidence and on relevant factors. In the case at bar, the applicants were informed on two different occasions that Mrs. Bichari was found to be medically inadmissible. Included with the letter sent June 19, 2009, was the evidence the Director was considering. While the applicants' lawyer made submissions as to why the evidence was inadequate, he, nor they, ever submitted documentary evidence to contradict the Director's finding that adequate treatment is available. The only evidence submitted by the applicants were the letters from medical doctors attesting to Mrs. Bichari's good health. In the case at bar, the Director did not make an unreasonable finding of fact in concluding that there were appropriate medical services available for Mrs. Bichari in Algeria. Based on the evidence before the Director, while perhaps it is not the only determination which may have been made, it was nevertheless open to the Director to find that the applicants would not suffer unusual, undeserved or disproportionate hardship if denied an exemption to section 38 of the Act.

VI CONCLUSION

[32] For these reasons, this application for judicial review shall be dismissed. Counsel agrees that there is no question of general importance in this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the present judicial review application be dismissed. No question is certified.

"Luc Martineau"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-3589-09
STYLE OF CAUSE:	**MOHAMMED BICHARI AND KHEDOUJA BICHARI v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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