Federal Court		Cour fédérale

Date: 20100413

Docket: IMM-3861-09

Citation: 2010 FC 398

Toronto, Ontario, April 13, 2010

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

RAVINDER KUMAR SHARMA
KIRAN JAY SHARMA
RRIT SHARMA
SHRUT SHARMA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The principal Applicant is an adult male citizen of India; the other Applicants are his wife and two children. All are resident in Kuwait.

[2] The Applicants applied for a permanent resident visa to enter into and reside in Canada. That request was denied, as set out in a letter to the principal Applicant from the High Commission of Canada in London, England dated 27 May 2009. The basis for the denial was stated as being that one of the family members, the son, Shrut, had a health condition – mental retardation – which

might reasonably be expected to cause excessive demand on health or social services. It is this decision that is the subject of this judicial review application.

[3] For the reasons that follow, I am dismissing this application. No question is to be certified.

[4] The principal Applicant applied for a visa so that he and his family could enter Canada as permanent residents in January, 2004. The application was made under the entrepreneur category. The record shows that the principal Applicant was engaged in the construction business in Kuwait as a co-owner of a company, and had assets of just under three million dollars. Since the principal Applicant was not a Kuwaiti national he had to pay for his children's education there.

[5] This application was considered a first time and, by what is called a "fairness letter" dated May 24, 2007, the principal Applicant was advised by an Officer at the High Commission that a developmental assessment made upon his son Shrut revealed a history indicating mild mental retardation, such that he might require a variety of services, including special education, speech therapy, and so forth. As a result the Officer indicated that it might reasonably be expected to cause excessive demand on Canadian social services. The principal Applicant was invited to make submissions with a special warning that the principal Applicant would be responsible for the fees of doctors and other professionals that he might retain.

[6] The principal Applicant responded by a five-page letter dated 6 July, 2007. In that letter, the principal Applicant referred to, but did not produce, medical tests to the effect that his son suffered no physical disabilities. The principal Applicant attested to his son's abilities to look after himself

and offered to bear any expenses related to his health and special education. The principal Applicant asserted that he had sufficient personal resources to look after his son's needs and that he intended to bring him into the family business at an appropriate time.

[7] The High Commission responded by letter dated 21 January 2009, reiterating that they were of the view that the child had special needs and would be likely to make excessive demands on Canadian health and social services. It was estimated that such demands would cost at least sixty thousand ($60,000.00) dollars. The principal Applicant was invited to make submissions:

> *Before I make a final decision, you have the opportunity to submit additional information that addresses any or all of the following:*
>
> - *The medical condition(s) identified*
> - *Social services required in Canada for the period indicated above*
> - *Your individualized plan to ensure that no excessive demand will be imposed on Canadian social services for the entire period indicated above and your signed Declaration of Ability and Intent.*
>
> *You must provide any additional information within 60 days of the date of this letter. If you choose not to respond, I will make my decision based on the information before me, which may result in your application being refused.*
>
> *In order to demonstrate that you/your family member will not place an excessive demand on social services, if permitted to immigrate to Canada, you must establish to the satisfaction of the assessing officer that you have a reasonable and workable plan, along with the financial means and intent to implement this plan, in order to offset the excessive demand that you would otherwise impose on social services, after immigration to Canada. The sections of the Immigration and Refugee Protection Regulations that define the meanings of "social services" and "excessive demand" are included for your reference.*

[8] The principal Applicant responded by letter dated 24 February 2009. That letter reiterated the principal Applicant's position that his son was medically healthy and had made sufficient progress as to development. No medical or other professional reports or opinions were provided. As to a plan, while I appreciate counsel's argument that the whole letter is a plan, the only portion of that letter clearly directed to a plan is as follows:

> ***Individualized Plan:***
>
> *I have been managing my own Engineering business in the capacity of General Manager for a period of twenty eight years. As per local laws I own 49% of our business. We have to work to generate profits for us after paying all liabilities of materials, labor, staff and office. Likewise we have to establish our entrepreneur credentials in Canada as well within specified period and we are confident of doing this. Shrut is working on a plan designed for imparting him specific training besides learning language, Math and Computer Applications. He has already acquired skills of handling office mechanism e.g. handling data files, scanning and photocopying documents. He is now learning to work Point of Sales machines and cash handling activities. These activities do not involve serious language. He will be able to handle these activities in a few months time efficiently. Therefore one thing is definite that he will be in near future an Important part of our entrepreneur organization. He will be a contributor to the success story and shall not be any excessive demand on social services. I am also enclosing declaration of ability and intent form duly signed by me for your reference and records.*

[9] The principal Applicant reiterated his ability and willingness to pay for the services as may be required for his son and signed a Declaration of Ability and Intent in the form provided by the High Commission, which included the following statement:

> *I hereby declare that I will assume responsibility for arranging the provision of the required social services in Canada and that I am including a detailed plan of how these social services will be provided, along with appropriate financial documents that represent a true picture of my financial situation over the entire duration of the required services.*

[10] The final rejection letter dated 27 May 2009, which is the decision under review, stated, in part:

> *Pursuant to subsection 38(1) of the Immigration and Refugee Protection Act, your family member, Shrut, is a person whose health condition, Mental Retardation, might reasonably be expected to cause excessive demand on health or social services. The regulatory definitions of these terms are attached. As a result, your family member is inadmissible to Canada on health grounds.*
>
> *My letter of 26 January 2009 invited you to provide additional information or documents in response to the preliminary assessment. Your materials were received on 3 march 2009 and were carefully considered but did not change this assessment of your family member's health condition, which has now become final.*
>
> *Subsection 42(a) of the Act states that a foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible. Your accompanying family member is inadmissible to Canada. As a result, you are also inadmissible.*

[11] The CAIPS notes made by the Officer were provided to the Applicants. They say, in part:

> *The submissions by the father state that there is only a question of language delay but does not submit any proof that this is the case. The applicant has not submitted a supporting plan other than the fact that he has the necessary funds (which he does), and is willing to pay. He does not however, explain how he would pay and does ot provide a viable and credible plan to mitigate the costs. The applicant has not addressed my concerns. Having fully reviewed the information at hand, I am satisfied that Shrut's health condition will reasonably be expected to cause excessive demand on health or social services in Canada. Therefore, pursuant to A38(1) and A42, the applicant is inadmissible on health grounds.*

[12] The Applicants' counsel raised three grounds for review at the hearing:

1. The decision was unreasonable;
2. The assessment that the cost of services would be about $60,000 was based on old data and should be rejected; and
3. The Officer failed to consider whether the services expected to be required would be partly funded by the Ontario government.

Issue #1: Was the Decision Reasonable?

[13] Justice Mosley of this Court in *Sapru v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 240 recently made a thorough review of the jurisprudence as to the standard of review to be applied in respect of decisions of the type presently under consideration. He concluded, and I agree, that where an issue of law is raised, the standard of review is correctness; however, where the issues are directed to the content of a decision that is essentially factual, the standard is reasonableness. He wrote at paragraphs 16 and 17:

> *[16] In the case at bar, the applicants allege that the Medical Officer failed to comply with her obligations as set down in Hilewitz. That is an issue of law which should be reviewed on a standard of correctness. The applicants also raise issues of procedural fairness which should be reviewed on a correctness standard: Canadian Union of Public Employees v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539. In other words, this standard should apply to issues (b) and (c).*
>
> *[17] On the other hand, issues (d) and (e) concern the content of the Officers' decisions, which are essentially factual. Those issues will be considered on a standard of reasonableness.*

[14] In the present case, the issue raised is directed simply to the factual part of the Officer's decision. Since the decision of the Supreme Court of Canada in *Hilewitz v. Canada (Minister of Citizenship and Immigration),* [2009] 2 S.C.R. 706 it is understood that an Officer in circumstances such as these is to have regard not only to the medical evidence as to an Applicant and family members, but also must consider on an individualized basis, the Applicant's ability to pay and carry some of the burden that may be imposed by any health issues.

[15] In *Jafarian v. Canada (Minister of Citizenship and Immigration),* 2010 FC 40 Justice Harrington of this Court wrote that consideration as to whether a provincial system would pay for medical and social services could come into consideration when dealing with an Applicant's ability and willingness to pay. He noted at paragraph 25 that an undertaking to pay is simply not enforceable:

> *[25] One of the relevant factors in this case is whether Mr. Jafarian has the legal right to pay for his daughter's Rebif. An undertaking not to call upon the government to pay what it is obliged to pay under statute is simply not enforceable. This principle was clearly set out by Mr. Justice Evans, speaking for the Court of Appeal, in Deol v. Canada (Minister of Citizenship and Immigration), 2002 FCA 271, [2003] 1 F.C. 301, and by Mr. Justice Campbell in Lee v. Canada (Minister of Citizenship and Immigration), 2006 FC 1461.*

[16] Here the Applicants were asked to supply medical information to support their assertions as to Shrut's condition. Nothing was provided. They were asked to provide a plan as to what support would be given to Shrut. An offer to pay was made, but no specific plan was provided other than a suggestion that the son would be brought into whatever business the Applicants would establish in Canada. The Officer's rejection of these submissions was not unreasonable.

Issue #2 and Issue #3

[17] I treat both these issues together because the Applicants' counsel in effect argued that the Officer had a positive duty to secure all up-to-date information as to funding costs in Ontario (where the Applicants stated they intended to settle) and the extent to which Ontario legislation would assist the Applicants or oblige them to pay.

[18] I disagree. The Applicants are seeking admission into Canada. The medical and developmental condition of one of them has been raised as an issue. The Applicants were twice invited to address the situation, including providing medical and professional opinions of their own, which they did not; and to provide a plan, which was scanty at best. The onus rests on the Applicants to make out their case, including such factors as may be relevant in setting out a workable plan. The Officer committed no reviewable error in dealing with the matter based on the information available.

Conclusion

[19] The application will be dismissed. No party requested certification.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed;

2. There is no question for certification; and

3. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	IMM-3861-09
STYLE OF CAUSE:	RAVINDER KUMAR SHARMA, KIRAN JAY SHARMA, RRIT SHARMA and SHRUT SHARMA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 12, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	HUGHES J.
DATED:	April 13, 2010

APPEARANCES:

Mr. Matthew Jeffery	FOR THE APPLICANTS
Mr. Lorne McClenaghan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Matthew Jeffery Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT