Federal Court Cour fédérale

Date: 20100429

Docket: IMM-3992-08

Citation: 2010 FC 467

Ottawa, Ontario, April 29, 2010

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

HASHEM MAZHARI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicant, Mr. Hashem Mazhari, is a citizen of Iran who applied to come to Canada as a permanent resident (investor class) in 2005. During his medical assessment in 2007, it was discovered that the Applicant had lung cancer. A 3.5 cm tumour was removed from his left lung. The cancer had not metastasized and the Applicant, a non-smoker, remains in generally good health.

[2] Discovery of the Applicant's cancer led to a request from Citizenship and Immigration Canada (CIC) for further medical examinations. The results were sent to the senior medical officer (the Medical Officer) with CIC, stationed in Paris, France. After reviewing and evaluating the Applicant's medical file, the Medical Officer prepared a medical opinion, in which he concluded that the Applicant's condition might reasonably be expected to cause excessive demand on health and social services.

[3] In accordance with standard CIC procedure, the Applicant was provided with a copy of the Medical Officer's opinion in a letter dated September 24, 2007 (the fairness letter), and asked to respond. The Applicant responded on October 10, 2007 with a letter and a report from Dr. Kian Khodadad. Dr. Khodadad disagreed with the opinion of the Medical Officer.

[4] The Medical Officer issued his final medical opinion in an e-mail dated December 12, 2007, in which he confirmed his initial opinion. This opinion, together with the report of Dr. Khodadad and the letter of the Applicant, were reviewed by the Visa Officer. In a decision dated July 20, 2008, the Visa Officer determined that the Applicant was inadmissible under s. 38(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*) because the Applicant is a person whose health condition might reasonably be expected to cause excessive demand on the health and social services in Canada.

[5] The Applicant seeks judicial review of this decision.

II. Issues

[6] While the Applicant raised a number of issues in his Application Record, oral submissions were directed at the following issues:

1. Should the decision of the Visa Officer be overturned:

   (a) because the Medical Officer failed to conduct an individualized assessment of the Applicant, in accordance with the principles set out in *Hilewitz v. Canada (Minister of Citizenship and Immigration)*; *De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706; or

   (b) because the opinion was unreasonable?

2. Did the Visa Officer err by reaching a decision without having the entire medical file of the Applicant before her?

III. Statutory Framework

[7] The Applicant was held to be inadmissible to Canada pursuant to s. 38(1)(c) of *IRPA*, which provides that “A foreign national is inadmissible on health grounds if their health condition . . . might reasonably be expected to cause excessive demand on health or social services”. Certain of

the terms used in s. 38(1)(c) are defined in s. 1 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (*IRP Regulations*). Section 38(1)(c) and the definitions of “excessive demand”, “health services” and “social services” are set out in Appendix “A” to these Reasons.

[8] Under s. 20 of *IRP Regulations*, a visa officer “shall determine that a foreign national is inadmissible on health grounds if an assessment of their health condition has been made” by a medical officer, and the medical officer “concluded that the foreign national’s health condition is likely to be a danger to public health or public safety or might reasonably be expected to cause excessive demand.”

IV. Standard of Review

[9] The decision under review is the Visa Officer's decision dated July 20, 2008. However, as will be discussed below, the Visa Officer's primary role is to review the Medical Officer's decision. To assess whether that has been done lawfully, the Court must consider the decision of the Medical Officer. In recent decisions of this Court (see, for example, *Rashid v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 157, [2010] F.C.J. No. 183 (QL); *Sapru v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 240, [2010] F.C.J. No. 270 (QL)), the standard of review of a medical officer’s decision has been held to be that of reasonableness. The Court should not interfere with the decision of the officer if it is justified, transparent, intelligible, and falls within a range of possible outcomes that are defensible in respect of the law and facts (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47).

[10] However, where an applicant alleges that the medical officer or the visa officer failed to comply with the obligations set down in *Hilewitz*, above, the standard of review is correctness. This issue is a question of law (*Sapru*, above, at para. 16). Thus, the question of whether a medical officer conducted an individualized assessment as opposed to a generic assessment is reviewable on a standard of correctness. Questions of procedural fairness should also be reviewed on a standard of correctness (*Sapru*, above, at para. 16; *Dunsmuir*, above, at para. 50).

[11] The first issue raised by this application has two components. The first is the question of whether there was an individualized assessment (rather than generic); this question is reviewable on a standard of correctness. The second is whether the medical assessment was reasonably open to the Medical Officer. The issue of whether the Visa Officer was required to review the Applicant's entire medical file appears to be a question of law reviewable on a standard of correctness.

V. Need for an individualized assessment

[12] A medical assessment for purposes of a s. 38(1)(c) must be individualized (see *Deol v. Canada (Minister of Citizenship and Immigration)* 2002 FCA 271, [2003] 1 F.C. 301 at para. 60). As stated by the majority of the Supreme Court in *Hilewitz,* above*,* at paragraph 56:

> [An assessment of an applicant's health] 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.

[13] It is true that *Hilewitz* deals with the costs of providing social services rather than health services. However, this portion of the judgment, which stipulates individualized assessments, is, I believe, equally applicable to a medical assessment. Stated differently, the Medical Officer would err by failing to have regard to the Applicant's individual circumstances. If the medical assessment is flawed in this manner, it follows that the Visa Officer would also err in basing her decision on such a report.

[14] The next relevant consideration is the interaction between the Medical Officer and the Visa Officer. Even though the ultimate decision is made by the Visa Officer, the Visa Officer is not a medical specialist. In light of *Hilewitz* (above, at para. 70), the Medical Officer is obliged to perform a complete analysis of all factors, medical and non-medical (where relevant). The Visa Officer must then review the Medical Officer's opinion to ensure that all relevant factors were considered (see, *Sapru*, above, at para. 24).

VI. Issue #1: Was the Medical Officer's assessment individualized and was it reasonable?

[15] The Applicant submits that the Medical Officer's opinion was generic, rather than the individualized assessment required by *Hilewitz*. In his opinion, the Medical Officer, who is not an oncologist, did not take into account key individualized prognostic factors, and did not respond to extensive authorities quoted by Dr. Khodadad. There was no basis for his determination that the

Applicant would cause excessive demands on Canada's health and social systems. In particular, the Applicant submits that the Medical Officer did not take into account that:

- The tumour was discovered on screening and not because there were symptoms;
- The applicant, at age 65, was in excellent health and exercised regularly;
- The applicant was a non-smoker; and
- The tumour was just marginally greater than 3 cm.

[16] I do not agree that the Medical Officer's December 12, 2007 report was generic rather than individualized, as stipulated by *Hilewitz*. A review of the opinion of the Medical Officer demonstrates that the Medical Officer took into consideration the information submitted in response to the fairness letter – specifically, the Applicant's letter, and Dr. Khodadad's medical report.

[17] I begin by observing that the medical assessment of the Applicant was made within a few months of his original diagnosis and surgery. This makes the task of evaluating the potential for recurrence more difficult; he has minimal personal history of surviving with the disease post-surgery. Accordingly, the use of statistic information as contained in the medical literature becomes the only reasonable way of assessing the likelihood that he will require treatment in the future. The fact that the Medical Officer relied on such statistical data does not necessarily make the evaluation non-personalized.

[18] Most importantly, the Medical Officer did address authorities in Dr. Khodadad's report, and did consider the Applicant's individualized medical circumstances. The Medical Officer acknowledged that the Applicant feels he is in "excellent heath" and that his latest medical check-up indicated he was "free of disease". Further, the Medical Officer referred to Dr. Khodadad's key arguments:

- that the Applicant's "lung cancer was 'picked up' incidentally (as a result of passing an Immigration Medical Examination)";
- that Mr. Mazhari's cancer, compared to a study in the New England Journal of Medicine, has a 10 year survival rate of 92%; and
- that routine and expensive PET scans are not necessary for follow-up tests.

[19] To the study in the New England Journal of Medicine, relied on by Dr. Khodadad, the Medical Officer responded:

> […] the major difference between the patients in that study and Mr. Mazhari is that those patients were screened on a regular basis and their cancers were detected "early" with the average size of the lung tumour being 9 mm in diameter, at the time of the diagnosis, while Mr. Mazhari's cancer was 35 mm in diameter at the time of surgical resection. With the much larger size of the lesion of Mr. Mazhari's lung cancer, at the time of resection, the risk of recurrence and spread of his cancer would be considered much more likely than those patients enrolled in the study noted above. As mentioned in the Medical Notification, those patients with Stage IB lung cancer have a five year survival of 50 to 60% and this only is in reference to survival and not "disease-free" survival (which is survival without recurrence of disease) which would be lower than 50 to 60% previously quoted.

[20] It is clear from the excerpt above that the Medical Officer not only considered Dr. Khodadad's report, but applied findings of the specific journal article to the Applicant's individualized circumstances. Responding to Dr. Khodadad's opinion on the use of expensive PET scans, the Medical Officer believed that, if routine chest x-rays uncovered anomalies in the Applicant's lungs, "more sophisticated imaging such as PET and/or CT scanning would certainly be employed".

[21] After a review of the entire medical file, the Medical Officer acknowledged that the Applicant has been diagnosed with lung cancer, which was surgically treated in March 2007. Given the initial staging of IB, the Medical Officer opined that:

> […] over the next five years Mr. Mazhari will require close follow-up and in spite of this follow-up there will be a reasonable risk of recurrence (either locally or to other parts of the body) of his lung cancer, necessitating additional health and social services which are both expensive and in high demand.

[22] From the above, I find that the Medical Officer's decision was transparent, intelligible and that it falls within a realm of reasonable outcomes. The Applicant appears to be asking the Court to re-weigh evidence put before the Medical Officer – this is not the role of the Court, particularly on issues of medical diagnosis. As noted by Justice Mosley (*Sapru*, above, at para. 13):

> […] reviewing or appellate courts are not competent to make findings of fact related to the medical diagnosis, but are competent to review the evidence to determine whether the medical officers' opinion is reasonable in the circumstances of the case.

[23] In sum, the Medical Officer conducted an individualized assessment, rather than a generic one. Moreover, the Medical Officer's conclusion was reasonable in the circumstances of this case. There is no reviewable error.

VII. Issue #2: Did the Visa Officer err by not reviewing the entire medical file?

[24] The Applicant submits that the Visa Officer erred by not reviewing the entire medical file of the Applicant. I do not agree.

[25] As analyzed above, the Visa Officer does not have the expertise to assess the Applicant's medical circumstances and the effects on Canada's health and social services. Pursuant to s. 20 of *IRP Regulations*, the Visa Officer does not necessarily have the authority to overrule Medical Officer's conclusions (*Sapru*, above, at paras. 25-26). The question is whether the Visa Officer adequately reviewed the Medical Officer's decision to ensure that all relevant factors were considered. This does not require a review of each and every test result or doctor's notation. Rather, the test must be whether the Visa Officer had sufficient information before her to form an opinion on whether all relevant factors had been considered by the Medical Officer.

[26] The Applicant points to jurisprudence of this Court which concludes that the entire medical record forms part of the record before the Visa Officer (*Ismaili v. Canada (Minister of Citizenship and Immigration)* (1995), 100 F.T.R. 139 (T.D.), 29 Imm. L.R. (2d) 1; *Poste v. Canada (Minister of Citizenship and Immigration)* (1997), 140 F.T.R. 126 (T.D.), 42 Imm. L.R. (2d) 84). I do not read these cases and the facts upon which they were based as standing for the proposition asserted by the Applicant. Further, I refer to *Fei v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 F.C. 274 (T.D.), at paragraph 55 and *Tong v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1470 (QL) (T.D.), at paragraphs 5-6, where Justice Heald concluded, in both cases, that the Visa Officer was <u>not</u> required to review the entire medical file of an applicant. Even

if *Ismaili* and *Poste* can be read as supporting the Applicant's position, I observe that they pre-date the clarification of the respective duties of the Medical Officer and the Visa Officer by the Courts (including by the Supreme Court of Canada in *Hilewitz*).

[27] In this case, I am satisfied that the Visa Officer had, before her, sufficient evidence to find as she did. In her affidavit, the Visa Officer, stated:

> On July 20, 2008, I reviewed the entire case history. I reviewed the original medical assessment by Dr. Gollish, the Applicant's submissions in response to the procedural fairness letter, as well as the medical assessment rendered by Dr. Gollish's after reviewing the Applicant's submissions. My review of the materials on file satisfied me that Dr. Gollish had considered all the Applicant's submissions during his consideration of the materials in arriving at his assessment. There was no obvious error on the face of the record to cause me to question the assessment. I also reviewed the email dated July 15, 2008 from Cecil Rotenberg to ensure that all information submitted by the Applicant was duly considered prior to a decision being made. [Emphasis added.]

[28] There is simply nothing contained in the detailed medical file that would have added materially to or affected the Visa Officer's determination. There is no error.

VIII. Certified Questions

[29] The Applicant proposes three certified questions:

(a) Do paragraphs 54-57 of the Supreme Court of Canada in *Hilewitz*, above, require an active inquiry by the medical officer of health before a determination of any kind is made by that officer and then, once achieved, does that determination then have to

be forwarded to both the visa officer and the applicant with reasons, for potential rebuttal by reason of fairness.

(b) Where there is a preliminary determination (the words used in the fairness letter) without an individualized assessment, [does] the fairness procedure, utilized by the visa officer, provide the opportunity to correct this defect?

(c) Does the decision in *Poste*, above, at paragraph 61 set out good law and does the simple statement that the medical officer of health has reviewed the responses to the fairness letter of the applicant without changing his original opinion and without resolving the contrary submissions contained in the fairness response satisfy the procedural fairness or natural justice?

[30] If the first question is simply whether an individualized assessment is required, this question has been answered in the affirmative by *Hilewitz* and other jurisprudence. There is no need for certification. Alternatively, the Applicant seems to be asserting that there must be an active consultation between the Medical Officer and the Applicant's physician prior to the preliminary determination set out in the fairness letter. Neither the jurisprudence nor fairness requires such an intervention. The question is not appropriate for certification.

[31] The response to the second question is also evident from a review of the jurisprudence and the procedure followed by a Medical Officer and Visa Officer in these situations. The preliminary opinion of the Medical Officer is not subject to judicial review. Indeed, the entire point of the

fairness letter is to allow an applicant to provide individualized information and rebuttal that must then be taken into account by the Medical Officer. The question is not appropriate for certification.

[32] The third question does not arise on the facts of this case. In his final opinion, the Medical Officer responded to the submissions of Dr. Khodadad. The mere existence of a contrary opinion does not require the Medical Officer to change his opinion; medical experts may frequently disagree. Provided that the Medical Officer addresses the rebutting submissions, considers the individualized circumstances of the Applicant and his opinion is reasonable, the Court should not intervene. The question is not appropriate for certification.

[33] In conclusion, this application for judicial review will be dismissed. No question of general importance will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. no question of general importance is certified.

"Judith A. Snider"
Judge

APPENDIX "A"

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Health grounds

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.

Loi sur l'immigration et la protection des réfugiés, 2001, ch. 27

Motifs sanitaires

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.

Immigration and Refugee Protection Regulations, SOR/2002-227

Definitions

1. (1) The definitions in this subsection apply in the Act and in these Regulations.

. . .

"excessive demand" means

(a) a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the most recent medical examination required by these Regulations, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or

Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

Définitions

1. (1) Les définitions qui suivent s'appliquent à la Loi et au présent règlement.

. . .

« fardeau excessif » Se dit :

a) de toute charge pour les services sociaux ou les services de santé dont le coût prévisible dépasse la moyenne, par habitant au Canada, des dépenses pour les services de santé et pour les services sociaux sur une période de cinq années consécutives suivant la plus récente visite médicale exigée par le présent règlement ou, s'il y a lieu de croire que des dépenses importantes devront probablement être faites après cette période, sur une période d'au plus dix années consécutives;

(b) a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents.

b) de toute charge pour les services sociaux ou les services de santé qui viendrait allonger les listes d'attente actuelles et qui augmenterait le taux de mortalité et de morbidité au Canada vu l'impossibilité d'offrir en temps voulu ces services aux citoyens canadiens ou aux résidents permanents.

"health services" means any health services for which the majority of the funds are contributed by governments, including the services of family physicians, medical specialists, nurses, chiropractors and physiotherapists, laboratory services and the supply of pharmaceutical or hospital care.

« services de santé » Les services de santé dont la majeure partie sont financés par l'État, notamment les services des généralistes, des spécialistes, des infirmiers, des chiropraticiens et des physiothérapeutes, les services de laboratoire, la fourniture de médicaments et la prestation de soins hospitaliers.

"social services" means any social services, such as home care, specialized residence and residential services, special education services, social and vocational rehabilitation services, personal support services and the provision of devices related to those services,

« services sociaux » Les services sociaux — tels que les services à domicile, les services d'hébergement et services en résidence spécialisés, les services d'éducation spécialisés, les services de réadaptation sociale et professionnelle, les services de soutien personnel, ainsi que la fourniture des appareils liés à ces services :

(a) that are intended to assist a person in functioning physically, emotionally, socially, psychologically or vocationally; and

(b) for which the majority of the funding, including funding that provides direct or indirect financial support to an assisted person, is contributed by governments, either directly or through publicly-funded agencies.

a) qui, d'une part, sont destinés à aider la personne sur les plans physique, émotif, social, psychologique ou professionnel;

b) dont, d'autre part, la majeure partie sont financés par l'État directement ou par l'intermédiaire d'organismes qu'il finance, notamment au moyen d'un soutien financier direct ou indirect fourni aux particuliers.

FEDERAL COURT

SOLICITORS OF RECORD

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