Federal Court  Cour fédérale

Date: 20110111

Docket: IMM-2145-10

Citation: 2011 FC 21

BETWEEN:

RICHARD MICHAEL SHARPE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

PHELAN J.

I. INTRODUCTION

[1] This is an unfortunate case involving a family with a developmentally challenged child and their efforts to immigrate to Canada from the U.K. commencing at the beginning of 2004. This is the second judicial review of the Respondent's refusal to grant a visa because of the family's developmentally challenged child. The first judicial review was consented to on terms that included discontinuance of the judicial review and a reconsideration of the visa application by a different visa officer.

[2] This case turns on whether a child's learning disability is moderate or severe. As such, that conclusion turns on the medical evidence and opinions put before the Visa Officer as to the nature and extent of the child's developmental handicap and therefore whether the child would cause an "excessive demand on health or social services" in Canada as set forth in s. 38(1)*(c)* of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

38. (1) A foreign national is inadmissible on health grounds if their health condition	**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.
…	
(*c*) might reasonably be expected to cause excessive demand on health or social services.	

II. FACTUAL BACKGROUND

A. *Preliminary History*

[3] The Applicants are a British family and the principal Applicant, Richard Michael Sharpe (the Applicant), made an application for permanent residence on January 1, 2004, under the Federal Skilled Worker category by virtue of his educational credentials and work experience.

[4] The Applicant's son, Conor, had medical issues and, at the request of the 1st Medical Officer, the Applicant provided reports on Conor's condition. The Applicant contended that these reports were out of date.

[5] On July 21, 2006, the 1st Medical Officer provided the London Visa Office with a report which concluded that Conor had a health condition that might reasonably be expected to cause an "excessive demand on Canadian social services".

[6] A month later the Applicants were warned in the First "Fairness Letter" that their application might be turned down because of the "excessive demands" of their son's condition. Conor was found to have sensory-neuro and conductive hearing, severe speech and language delay, fine and gross motor difficulties and significant learning delays. The Applicant was invited to provide additional information relating to Conor's medical condition or diagnosis.

[7] As a result, on October 10, 2006, the Applicant provided the London Visa Office with five (5) additional and more current letters and reports from different medical professionals including a psychologist, a pediatric physiotherapist, an occupational therapist and a speech and language therapist. All of the letters and reports were to the same effect; that Conor's needs were such that he no longer required the health and social services earlier reports suggested he did.

[8] Despite the more current reports, the application for permanent residence was refused on May 9, 2007 on the grounds that Conor is a person whose health condition might reasonably be expected to cause an excessive demand on health or social services.

[9] The Applicant immediately responded to the London Visa Office requesting that Conor's new medical evidence be reviewed as he was concerned that it had not been correctly assessed. He also undertook to pay for schooling and any other social services that Conor might require.

[10] On May 25, 2007, the London Visa Office responded stating that the new medical evidence had been fully considered and Conor was still inadmissible.

[11] This response was a barefaced falsehood. The medical report of the 1st Medical Officer on which the decision was based was made in July 2006, three months prior to the receipt of the current medical evidence, and two months prior to the London Visa Office receiving information from the Alberta Ministry of Education related to its criterion for categorizing levels of learning disability. This later information is a critical document as it describes the criteria for different levels of disability which are directly relevant to the consideration of "excessive demand".

[12] As a consequence of this discovery of the London High Commission's false representation, a judicial review proceeding was commenced which resulted in a consent to judicial review on terms of the filing of a Notice of Discontinuance and a reconsideration of the permanent resident application by a different visa officer.

[13] Despite the concession by the Respondent, the Applicants' reconsideration was the subject of protracted delay. A year after the filing of the Notice of Discontinuance, the Applicants' file was still awaiting review. It was not until a further six months later that the Applicants received a Second Fairness Letter.

B. *Current History*

[14] A week after the 1st Medical Officer forwarded his original report, the 2nd Medical Officer sent a medical report on October 21, 2008 to the Visa Office which was nearly identical to the report of the 1st Medical Officer.

[15] Approximately five months later, on March 9, 2009, the new Visa Officer (2nd Visa Officer) sent the Applicant a Second Fairness Letter which maintained the Visa Office's conclusion that Conor "might reasonably be expected to cause excessive demand on health or social services in Canada". This Second Fairness Letter advised that the Applicant could submit additional information addressing Conor's medical condition, the social services required in Canada and the Applicant's individualized plan to ensure that no excessive demand would be imposed on Canadian social services.

[16] The Applicant challenged the description of Conor's disability as "severe" and contended that his disabilities were mild/moderate. He submitted further documentary evidence which included evidence that Conor's current school in the U.K. was designated as a school for pupils with moderate learning disabilities and that it did not admit pupils with severe, profound or multiple learning disabilities; that Conor was conditionally admitted to a private school in Alberta; a psychological report by Robert Sellwood (Sellwood) which assessed Conor as against the Alberta Department of Education criteria and concluded that "Conor's results place him within Alberta Education's category of mild cognitive disability" (Court's underlining).

[17] On June 8, 2009, the 2nd Medical Officer, having considered this new evidence, provided a preliminary conclusion, the salient parts of which are:

- The demand on Canadian health and social services is likely to be reduced to a degree such that it is no longer excessive;
- Conor is no longer in need of speech therapy, physiotherapy or occupational therapy;
- Conor has been accepted into a private school where the majority of the costs are paid for by the Applicant.

[18] What followed were some internal communications between the 2nd Visa Officer and the 2nd Medical Officer, which, if not challenging the medical assessment, at best could be described as close questioning. (The Applicant in oral argument did not challenge this aspect of the case.) The 2nd Visa Officer went so far as to say that she was "having difficulty drawing the same conclusions as you" without describing on what basis she could reach such a medical conclusion.

[19] The final result was that the 2nd Medical Officer changed his assessment and concluded as follows:

> In summary, my interpretation of the educational psychologist's report is that Conor is severely disabled as regards his cognitive skills. Furthermore, as pointed out by their consultant, they would have been receiving $6,805 support for attendance in a [Designated Special Education Private Schools] for moderate disabilities which is above the average health care cost ($5,425 Cdn) per Canadian and he is now in a school that accepts students with severe disabilities.

[20] On March 1, 2010, the Applicant's application was denied on the basis that the March 9, 2009 Visa Office's assessment of Conor's health condition was unchanged.

III. ANALYSIS

A. *Standard of Review*

[21] The issue of the standard of review on medical admissibility decisions by visa officers and/or medical officers is the subject of an appeal from a decision by Justice Mosley in *Sapru v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 240. The thrust of the *Sapru* decision is that both types of decisions are subject to the reasonableness standard in contrast to earlier jurisprudence which applied the correctness standard.

[22] It is this Court's view that the reasonableness standard of review is the proper analytical framework. It is particularly the case in respect of s. 38(1)*(c)* of IRPA which speaks in terms of "reasonably be expected to cause excessive demand …". It is also appropriate where the decision is, as here, based upon expert opinion in the form of medical advice.

[23] Whether one considers that it is the medical opinion which is being challenged or the decision of the 2nd Visa Officer is not particularly important in this case. The essence of the matter being challenged is the conclusion of "severe disability" whether it is considered as a stand alone matter by the 2nd Medical Officer or one where the medical opinion was adopted by the 2nd Visa Officer and became part of the 2nd Visa Officer's decision. Indeed the ability of a visa officer to come to a different conclusion from a medical officer (as the 2nd Visa Officer suggested in her questioning) raises issues about the visa officer's expertise and legal and practical ability to make such judgments.

[24] Therefore, on the question of the decision itself, it is subject to the reasonableness standard of review. The Applicant also raised issues of procedural fairness related to an entitlement to further respond to concerns expressed by the 2nd Medical Officer. These issues would be subject to the correctness standard of review but they were not pressed at the hearing nor should they have been.

[25] This case, as indicated earlier, turns on the reasonableness of the conclusion that Conor was "severely" learning disabled and thus could reasonably be expected to place excessive demands on health or social services in Canada.

B. *Reasonableness of Conclusion*

[26] There are several problems with the Respondent's conclusion as to the nature and severity of Conor's disability quite independent of the shabby treatment the Applicant has experienced at the London Visa Office.

[27] The classification of Conor's learning disabilities as "severe" or "mild" under Alberta education policy determines whether Conor could reasonably be expected to place an excessive demand on the social services. Social services are defined in s. 1 IRPA Regulations as those services where government pays the majority of the costs. The costs for a severely disabled child are approximately $16,000 which was greater than the amount that the Applicant would be paying in tuition.

[28] The only evidence before either the 2nd Medical Officer or the 2nd Visa Officer on the issue of where Conor would fall within the Alberta Board of Education - the determinative educational

authority in this case - was that of Sellwood who concluded that on the province's criterion for categorizing levels of learning disability, Conor was mildly disabled.

[29] Despite the importance of the Sellwood Report, the 2nd Medical Officer never articulated the reasons why the report was not accepted.

[30] It is accepted legal principle that the more important the evidence the greater the obligation to explain the reasons for its rejection. That obligation forms part of the requirement for transparency and intelligibility mandated by *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[31] In *Poste v. Canada (Minister of Citizenship and Immigration)* (1997), 140 F.T.R. 126, this Court held:

> At para. 24
>
> …
>
> > The governing principle arising from this body of jurisprudence is that 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. The reasonableness of a medical opinion is to be assessed not only as of the time it was given, but also as of the time it was relied upon by the Immigration Officer, since it is that decision which is being reviewed or appealed. The grounds of unreasonableness include incoherence or inconsistency, absence of supporting evidence, failure to consider cogent evidence, or failure to consider the factors stipulated in section 22 of the Regulations.
>
> At para. 61
>
> When a government body such as Immigration requests information of an individual, it is duty-bound to consider that information when

> received. This is especially so in the case where the information requested is in the form of expert opinion, which is time-consuming as well as costly to acquire. If a decision is rendered that runs contrary to the information requested, the decision maker must at least make reference to the contrary information, and account for its rejection. To be put bluntly, if Immigration requests certain medical reports, receives two positive medical reports and one negative report, and a medical assessment is rendered apparently solely on the negative medical report, reasons must be given as to why the positive reports are absent from the analysis. Even if the decision makers had considered the requested information, and had placed it in the context of all the circumstances of the case, there is nothing on the face of the record communicated to the applicant to indicate that consideration of the favourable material was seriously made. There is no appearance of justice. The decision makers thus failed the applicant in these basic duties of procedural fairness and natural justice in this case.

[32] The only basis advanced for the conclusion that Conor had severe learning disabilities was the 2nd Medical Officer's conclusion that in a report by Routledge on cognitive abilities, Conor's disabilities are described as "significant". There is no explanation of how or why Routledge would use that word to mean "severe" in the context of the Alberta system. (Routledge did not assess Conor as against the Alberta system of classification of learning disabilities.) There is no explanation of the basis upon which the 2nd Medical Officer made that interpretation of Routledge.

[33] In what appears to be an attempt to corroborate his overall conclusion, the 2nd Medical Officer makes comments on Conor's costs being greater than the national average and on his current schooling situation. Both comments are conceded to be in error but irrelevant because the Visa Officer had the correct facts.

[34] The importance of these factual errors is that they underline the fragile basis of the 2nd Medical Officer's opinion. They are not simply "throw away lines" but are used to bolster an opinion which is at variance with the 2nd Medical Officer's initial opinion.

[35] The Applicants were entitled to an explanation of the Respondent's conclusions. This case fails on both the adequacy of reasons principle and on the transparency and intelligibility criteria.

[36] The Court is mindful that the assessment of a child's learning disabilities can be a difficult task, particularly where the child is growing and their conditions change or manifest themselves differently. However, this decision does not stand up to the legal criteria above cited and must be quashed.

IV. CONCLUSION

[37] As the decision to deny the Applicant's permanent residence application will be quashed, the Court will defer issuing a formal order to allow the parties time to make submissions on a certified question. The Respondent shall have 21 days from the date of issuance of these Reasons to serve and file its submissions; the Applicant shall have 14 days to respond.

[38] The matter of the admission of this family has gone on far too long. They are entitled to a fair and proper assessment of their child's situation, whatever the final conclusion of a proper process may be. Further and unnecessary delay serves no one any good.

[39] As a result, the Court is considering retaining jurisdiction over this matter to ensure that the reconsideration is completed as expeditiously and as fairly as possible. The parties may, within the time limits for submissions on a certified question, make submissions on the terms under which a reconsideration should be completed.

[40] Lastly, the Court suggests that it may be possible to have one person, acceptable to the parties, conduct the necessary assessment and whose report would bind both parties. The Court's mediation role could be utilized to assist if the parties so request.

"Michael L. Phelan"
Judge

Ottawa, Ontario
January 11, 2011

FEDERAL COURT

SOLICITORS OF RECORD

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