Federal Court  Cour fédérale

Date: 20091231

Docket: IMM-2616-09

Citation: 2009 FC 1315

Ottawa, Ontario, December 31, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

RICARDO COMPANIONI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

HIV & AIDS LEGAL CLINIC (ONTARIO)

Intervener

REASONS FOR ORDER AND ORDER

[1] Were it not for the cost of out-patient prescription drugs to control their HIV, Ricardo Companioni, together with his common-law partner, Andrew Grover, would be admissible to

Canada as members of the skilled worker class. The cost of their prescriptions totals some $33,500 per year.

[2] The Officer charged with the matter refused to issue permanent resident visas on the grounds that they are inadmissible as their condition, within the meaning of section 38 of the *Immigration and Refugee Protection Act*, (IRPA) "…might reasonably be expected to cause excessive demand on health…services." This is a judicial review of that decision.

Overview

[3] An "excessive demand" is defined in section 1 of the *Immigration and Refugee Protection Regulations* as a demand for which the anticipated cost would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is extended to 10 years. An "excessive demand" is also one which would add to existing waiting lists and increase the rate of mortality and morbidity in Canada.

[4] A health service is defined as any health service for which the majority of the funds are contributed by governments. Health services include the services of family physicians, medical specialists, nurses, chiropractors, physiotherapists, library services and the supply of pharmaceutical or hospital care.

[5] Messrs. Companioni and Grover have both tested HIV positive. It is common ground that their medical condition at present and as reasonably projected over the next five or 10 years should not create an excessive demand on medical services, or increase delays in servicing the Canadian population at large. However it is also common ground that the projected cost of their prescription drugs over the next 10 years is $33,500 per year while the average per capita cost at the relevant time was $5,170.

[6] As Canadians we tend to assume that we enjoy universal, government funded, health care. While in large measure that assumption is true in that hospital care and the services of doctors, nurses and so on are government funded, there are exceptions. Messrs. Companioni and Grover intend to reside in Ontario. The general rule in that province is that the cost of out-patient drugs is not government funded. It follows that the cost of such drugs is not a demand on health services. There are, however, exceptions to that exception and this is where the difficulty in this case lies.

[7] In *Hilewitz v. Canada (Minister of Citizenship and Immigration)*; *DeJong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706, the appellants applied for permanent resident status for themselves and their families under the “Investor” and “Self-Employed” classes. Both qualified but were denied admission on the ground that the intellectual disability of a dependent child might reasonably be expected to cause excessive demands on social services under the former *Immigration Act*. The Court held that assessments must be individualized and take into account not merely eligibility for services, but also likely demand, and in that context consideration of an applicant’s ability and intention to pay is relevant.

At paragraph 69, it was held that, even if the applicants' stated intention for providing for their children did not materialize, both applicants would likely be required under Ontario law to contribute substantially, if not entirely, to any cost for social services provided to their children by the province. Both the majority, and those in dissent, made it abundantly clear that they were only addressing demands on social services, not health services.

[8] Therefore, the first issue is whether the reasoning in *Hilewitz* is equally applicable to assessments concerning out-patient prescription drugs. The applicant, and the intervener, the HIV & AIDS Legal Clinic (Ontario), submit that the principles enunciated in *Hilewitz* are equally applicable in any determination as to whether the cost of such drugs would create an excessive demand on Canadian health services. In fact, the visa officer applied the *Hilewitz* principles to the situation of Messrs. Companioni and Grover. They submit, however, that her analysis was flawed by unreasonable assumptions.

[9] The Minister's prime position is that ability to pay should not be considered at all when assessing potential medical inadmissibility due to excessive demands on health services. His secondary submission is that if they were to reside in Ontario, they would be entitled to recover most of the cost of their prescription drugs from the Ontario Government, and that any undertaking not to assert such a claim is unenforceable. Thus, in any event, there would be an excessive demand.

Is *Hilewitz* applicable?

[10] In my opinion, the principles enunciated in *Hilewitz* are equally applicable in any consideration as to whether the cost of out-patient drugs would constitute an excessive demand on health services. The fundamental distinction, however, is that when it comes to social services, at least in Ontario, as a matter of law the province is entitled to recover most, if not all, of those costs from those who can afford it (*Hilewitz,* para. 69). But when it comes to the supply of out-patient drugs in Ontario, by virtue of the provincial Trillium Drug Program, most of the cost of the drugs in question would be paid by the province. Promises not to access this program are simply not enforceable.

[11] Framed in this way, the Minister's reliance on the decision of the Federal Court of Appeal in *Deol v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 271, [2003] 1 F.C. 301 and *Lee v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1461, as supporting a general principle that ability to pay for health services should never be considered, is misplaced.

[12] In *Deol*, the medical condition in question could have been corrected by surgery at a cost of some $40,000. In speaking for the Court, Mr. Justice Evans held that the failure of the visa officer to have regard to the financial ability of the applicant or members of her family to pay for the cost of surgery was not an error in law. He said at paragraph 46:

> […] As has been held in several previous cases, it is not possible to enforce a personal undertaking to pay for health services that may be required after a person has been admitted to Canada as a permanent resident, if the services are available without payment. The Minister has no power to admit a person as a permanent resident on the condition that the person either does not make a claim on the health

> insurance plans in the provinces, or promises to reimburse the costs of any services required. See, for example, *Choi v. Canada (Minister of Citizenship and Immigration)* (1995), 98 F.T.R. 308 at para. 30; *Cabaldon v. Canada (Minister of Citizenship and Immigration)* (1998), 140 F.T.R. 296 at para. 8; *Poon, supra*, at paras. 18-19.

[13] *Deol* is distinguishable because the issue in that case was prospective surgery, not the cost of out-patient drugs. Surgery, of the type in question, is government-funded.

[14] The decision of Mr. Justice Campbell in *Lee* is consistent with *Deol*. The applicants' health conditions included polycystic kidney disease, hypertension, moderate mitral regurgitation and chronic renal failure. He referred to the *Canada Health Act* and noted that the health services that might have been required by the applicant were services covered by provincial and territorial public funded healthcare plans, as "insured health services" which include medically necessary hospital and physician services. No mention was made of out-patient drugs.

The fairness letter

[15] As prospective permanent residents, Messrs. Companioni and Grover were required to provide details of their medical condition. In light thereof, a "medical notification" or "fairness letter" was sent by which they were asked for information as to the likely evolution of their medical condition over the years ahead and the anticipated cost of treatment.

[16] They made a number of points in reply. Both are American citizens residing in the state of New York. Their doctor gave particulars of their current state of health and predicted that their current good health ought to remain stable over the next several years. He was backed up by Dr.

Bayoumy of St. Michael's Hospital, Toronto, a specialist in the delivery of health services to people living with HIV. The Health Canada Medical Officer involved in this matter has not contested those opinions. Occasional monitoring by a doctor was not considered to be an excessive cost.

[17] Dr. Bayoumy calculated that the current costs in Canada of Mr. Companioni's required out-patient drugs would be $12,700 and Mr. Grover's $20,800. He did a flatline projection over the next 10 years and similarly projected the average Canadian cost of $5,170. Had the cost of the drugs been anywhere close to the Canadian average a more nuanced approach might have been appropriate. Will the average cost go up, particularly as our population ages? On the other hand, are some of the drugs in question on patent? When will they come off patent? Will a generic enter the market and drive the cost down? In the circumstances of this case, what the applicant did was reasonable.

[18] Mr. Companioni and Mr. Grover revealed combined assets of about $500,000.

[19] Significantly, they both signed declarations of ability and intent in which each undertook

> …to ensure enrolment in a private (including employer-based) health care insurance plan which will cover a minimum of 85% of my prescription costs.
>
> […]
>
> During any gap of coverage by the above insurance plan(s), including the period of time after obtaining Canadian permanent residence, and prior to enrolment in a private insurance plan, I intend to fund any prescription medication costs through my personal savings/assets.

> […]
>
> I hereby declare that I will not hold the federal or provincial/territorial authority responsible for costs associated with the provision of the services, which I or my family member would require in Canada and which would otherwise create excessive demand on services in Canada.

[20] At the time of the application, Mr. Companioni had a personal insurance policy which covered prescription drugs, and Mr. Grover had an employer-based group policy which did the same. However there is no evidence that these policies would apply should they take up residence in Canada, and this point was not pressed at the hearing.

[21] The Health Canada medical officer signed off on the medical information, except as to the costs of the outpatient prescription drugs. She said to the visa officer: "Admissibility is dependent on the visa officer determining if the clients will have access to private or employer-based insurance thus not require and/or be eligible to the Trillium Drug Program, and on his/her assessment of financial aspects submitted." It is a given that family coverage in a group plan may extend to a same-sex partner.

The visa officer's decision

[22] The reasons why the visa officer turned down the application for permanent resident visas are to be found in her computer assisted immigration processing system (CAIPS) notes. A number of points were made, not all of which may have been determinative. She took into account Citizenship and Immigration Canada's Operational Bulletin 063 which was originally designed to assess the applications of business investors who had medical or social services issues. However,

since the Federal Court of Appeal has held in *Colaco v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 282, 64 Imm. L.R. (3d) 161, that individual assessments would also be required for skilled workers hers was a perfectly sensible approach.

[23] She asked herself if the applicants had advanced a credible plan. If not, she noted she could follow-up by way of a letter or personal interview. She also asked herself if the applicants had the financial ability to cover the projected expenses over the full period. However, she was ambivalent as to whether that period was five or ten years. It seems to me the only possible answer was ten years, and that she was attempting to give the applicants the benefit of the doubt.

[24] She concluded that they had not shown a credible plan. Again there is some ambiguity in that she noted there was no guarantee Mr. Companioni would find employment in his current occupation which is as an internet music programmer. She was concerned that their current assets might not cover the entire period, be it five or ten years. However, as skilled workers Mr. Companioni and Mr. Grover should be assumed capable of meeting the normal costs of living. Section 76 of IRPA assumes that a skilled worker will be able to become economically established in Canada.

[25] The crux of her decision quite rightly lay in the undertakings by Mr. Companioni and Mr. Grover to obtain medical insurance coverage for their prescription drugs. The plan was inchoate in that there was no indication that either Mr. Companioni or Mr. Grover had sought or secured

employment in Canada and there was no evidence substantiating their claim they would be eligible for employer-based insurance. She added, and this is crucial:

> "Subject and partner have not shown they would be able to pass the requirements for any type of employer based medical coverage – since these coverages are based upon passing medical examinations. Pre-existing conditions may exclude subject and partner from an employer-based medical coverage plan."

[26] Although the evidence on file was far from perfect, Dr. Bayoumy had specifically mentioned employer-based insurance. There is nothing in the record to substantiate the visa officer's belief that employer-based prescription drug coverage would be contingent on a medical examination of Mr. Companioni and Mr. Grover, who would presumably be found uninsurable due to their pre-existing conditions.

Discussion

[27] The HIV & AIDS Legal Clinic (Ontario) took the position that group benefit plans provided through an employer, union or an association would provide some basic level of insurance without proof of insurability, and without having to disclose one's condition. In my view, what the officer should have done was follow her own dictates and go back to Mr. Companioni to call upon him to provide a viable plan. One cannot conclude, on the balance of probabilities, that, just because there may be some plans which might cover prescription drugs without proof of insurability, Mr. Companioni or Mr. Grover would be in a position to obtain such an employer-based group policy. It was conceded that they would not be insurable under an individual policy. Even if they could, what would the premiums be, and what caps, if any, would there be on an annual or policy basis?

[28] As the material before the visa officer shows, there are exceptions in Ontario to the general rule that out-patient prescription drugs are not government funded. Some are based on status, such as age or residency in a long term care facility. In addition, some drugs, under certain circumstances, fall within an exceptional access program. Neither of these two programs would be available to Mr. Companioni and Mr. Grover.

[29] What is available, however, is the Trillium Drug Program. In essence the holder of an Ontario health insurance card may enrol so that the costs of drugs in excess of four percent of household income are recoverable. Based on their past earnings, even if one were to assume an income of $200,000 per year, the deductible would be $8,000, which would give rise to a claim under the Trillium Drug Program of $25,500, far in excess of the average per capita per annum cost of $5,170.

[30] It was conceded that the promises made by Messrs. Companioni and Grover not to draw on public funds are not enforceable. In *Hilewitz*, as I understand it, the determining factor was that the wealthy were required by Ontario law to contribute to the cost of the social services in question. In the present case, the cost of the drugs in excess of the deductible is borne by the province, without recourse. Thus, *Deol* applies.

[31] Absent a viable insurance plan, most of the costs of the drugs in question would be borne by the province of Ontario, would constitute an “excessive demand” and would render Messrs. Companioni and Grover inadmissible.

Certified Question

[32] Counsel for Mr. Companioni submitted a question for certification at the hearing. Counsel for the Minister was given an opportunity to reply, which led to a final comment from Mr. Companioni's counsel. The question must be one which would support an appeal by the Minister. I certify the following:

> "Is the ability and willingness of applicants to defray the cost of their out-patient prescription drug medication (in keeping with the provincial/territorial regulations regulating the government payment of prescription drugs) a relevant consideration in assessing whether the demands presented by an applicant's health condition constitute an excessive demand?"

ORDER

FOR REASONS GIVEN, judicial review is granted.

THIS COURT ORDERS that:

1. The matter is returned to a different visa officer for a fresh determination limited to medical admissibility.

2. The following serious question of general importance is involved and is stated in accordance with section 74(d) of the *Immigration and Refugee Protection Act*:

> "Is the ability and willingness of applicants to defray the cost of their out-patient prescription drug medication (in keeping with the provincial/territorial regulations regulating the government payment of prescription drugs) a relevant consideration in assessing whether the demands presented by an applicant's health condition constitute an excessive demand?"

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2616-09
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