Court File No. IMM-2320-17

FEDERAL COURT

BETWEEN:

A.B.

APPLICANT

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT

FACTUM OF THE INTERVENERS

PART I – OVERVIEW

1. This is an application for judicial review of the decision of the Immigration Appeal Division ("IAD") to refuse the Applicant A.B.'s appeal to sponsor her parents due to her father's medical inadmissibility for excessive demand on health services.

2. The Interveners submit that the IAD decision perpetuates HIV-related stigma by relying on discriminatory stereotypes of people living with HIV, particularly associations of HIV infection with moral culpability and promiscuity, and ignorance about methods and risks of HIV transmission.

3. The Interveners further submit that in assessing whether the IAD erred in finding that the Applicant's father is medically inadmissible, this Court must follow the principles established by the Supreme Court of Canada in *Hilewitz v. Canada (MCI); De Jong v. Canada* ("*Hilewitz*"), which requires officers to analyze the likelihood that an applicant

or their family members will present an excessive demand given their particular circumstances, applies to both health services and to social services. Applicants living with HIV therefore have the right to an individualized assessment of their particular circumstances and the likelihood that their treatment will entail a cost borne by the public health care system. Failure to conduct these individualized assessments manifests as an effective ban on immigration applicants living with HIV to whom excessive demand inadmissibility applies.

4. The Interveners are not challenging the IAD Panel's finding and the Respondent's position that the Applicant's father cannot raise a *Charter of Rights and Freedoms* ("*Charter*") claim in his own right because the *Charter* does not apply to him. Since this threshold issue is determinative, the Interveners submit that it is unnecessary for this Court to proceed to assess the constitutionality of section 38(c) of the *Immigration and Refugee Protection Act*.

Baker v. Canada (MCI), [1999] 2 SCR 817, para. 11

PART II – CONCISE STATEMENT OF FACTS

5. In the decision under judicial review, the Applicant A.B. is challenging the IAD decision dismissing her appeal of a visa officer's decision refusing her application to sponsor her parents due to her father's medical inadmissibility for excessive demand on health services. The IAD held that the visa officer's refusal of the sponsorship was correct in law, as the Applicant's father was medically inadmissible due to excessive demand.

6. The IAD further held that there were insufficient humanitarian and compassionate ("H&C") grounds to warrant relief from the inadmissibility. In finding that there were insufficient H&C grounds to warrant relief, the Panel made specific reference to the manner in which the Applicant's father believed he had contracted HIV, namely by having an affair. The Panel then dismissed the allegations that the Applicant's father would suffer hardship due to HIV-related stigma and discrimination in China.

7. While the Applicant and her father argued that the excessive demand medical inadmissibility

regime infringed their equality rights under section 15 of the *Charter,* the IAD held that the Applicant's father could not assert a section 15 right because he was not a permanent resident of Canada. The IAD then held that the excessive demand provisions did not infringe the Applicant's section 15 rights.

8. The Interveners are organizations who represent people living with HIV and who seek to advance and promote the human rights and dignity of people living with HIV. As such, the Interveners have expertise with respect to HIV-related stigma and discrimination.

PART III – SUBMISSIONS

(i) The Panel's decision is unreasonable because it perpetuates HIV-related stigma

9. The Panel's decision perpetuates HIV-related stigma and is thereby unreasonable, warranting the intervention of this Court. This discrimination in the decision constitutes a breach of natural justice. In the alternative, it renders the decision unreasonable, as a discriminatory decision falls outside of the range of acceptable outcomes.

Dunsmuir v. New Brunswick, 2008 SCC 9, para. 47

10. People living with HIV continue to face pervasive stigma and discrimination in Canada, including beliefs that people living with HIV are morally culpable for their HIV infection. These beliefs are often the result of associations of HIV and promiscuity. Beliefs about the moral culpability of people living with HIV can extend to beliefs that people living with HIV deserve any hardship they suffer due to their HIV status. HIV-related stigma is also the result of incorrect beliefs about the way HIV is transmitted and the risk of transmission. HIV-related stigma, and the discrimination that often accompanies it, significantly erodes the dignity and human rights of people living with HIV. HIV-related stigma can also prevent people from seeking appropriate medical care.

11. In the underlying decision, the Panel assessed whether humanitarian relief was warranted to

grant the sponsorship appeal. The Applicant had raised the HIV-related stigma her father would face in China as a factor warranting relief. In assessing and ultimately concluding that there were insufficient humanitarian and compassionate factors to warrant granting the appeal, the Panel raised the manner in which the Applicant's father believes he contracted HIV, namely by having an extramarital affair, as a negative factor weighing against granting the appeal.

12. The Panel's comments with respect to the Applicant's father's moral culpability for contracting HIV are as follows:

> [32] Much discussion at the hearing centered on the risk to the father of being shunned and ostracized if his family found out he is HIV positive…
> …
> [47] The reason why it is claimed the family will shun them is a perception that [people living with HIV] have loose morals, in that a key way the virus is transmitted is by having sex. In fact, it turns out that the father did get the virus from having an affair. It is noteworthy, perhaps, that this did not come out until the Panel directly asked the appellant why her father had the virus.
> …
> [59] It is unfortunate that the father had an affair which led him to become HIV positive. However, this was, again, a risk he took, which was unlikely but reasonably foreseeable, and it has unfortunately presented him with very significant problems.

IAD Decision and Reasons, Applicant's Record, pp. 18-19, 21 (emphasis added)

13. The Panel here improperly uses the Applicant's father's HIV status as an opportunity to conclude that he does not deserve H&C relief because he is morally culpable for his HIV infection. The way in which the Applicant's father contracted HIV is not relevant to this sponsorship appeal. This is an appeal of the Applicant's request to sponsor her parents, not a spousal sponsorship appeal, where sexual exclusivity could be a relevant factor. By referring to the way that the Applicant's father contracted HIV, the Panel is inferring that he can be blamed for his HIV status. As noted above, blaming individuals for their HIV status is one of the hallmarks of HIV-related stigma.

14. The Panel further perpetuates HIV-related stigma by concluding that because the Applicant's father was at fault for having contracting HIV in the first place, he deserved whatever hardship that he suffered due to his HIV status, including the refusal of the sponsorship

application. As noted above, the Panel found that while it was "unfortunate" that the Applicant's father contracted HIV, this was "a risk he took" which "has unfortunately presented him with very significant problems." By dismissing the Applicant's HIV status as the result of "a risk he took," which has "presented him with very significant problems" the Panel is suggesting that he deserves whatever hardship that he must now suffer.

IAD Decision and Reasons, Applicant's Record, p. 21

15. The Panel also appears to legitimize HIV-related stigma and negative stereotyping. As noted above, the Panel acknowledged that people living with HIV could be stigmatized due to perceptions of their loose morals. The Panel then, however, stated that "in fact, it turns out that the father did get the virus from having an affair." The Panel's logic is that since the Applicant's father does, "in fact" have "loose morals," then any negative treatment that he is subjected to is justified. This further demonstrates the Panel's discriminatory treatment of the Applicant.

IAD Decision and Reasons, Applicant's Record, p. 18

16. Finally, the Panel also minimized the impact of any HIV-related stigma that the Applicant's father would suffer in his country of origin, further contributing to the unreasonableness of the decision. While acknowledging that the Applicant's family in China might refuse to share drinks or food with him because of his HIV-positive status, the Panel concluded that this was mere "caution and prudence about the risk of HIV transmission, rather than "outright shunning." Specifically, the Panel stated:

> [48]…The Panel speculates that even if [the Applicant's family members] knew that the father is HIV positive, even with a potential bias against HIV positive persons in China, the applicants' family's response would more likely be a caution and prudence against, say sharing drinks and food from the same kitchen utensils, for fear of transmission of the virus, rather than an outright shunning.

IAD Decision and Reasons, Applicant's Record, p. 19

17. Given that HIV cannot be transmitted through food or drink, it is difficult to reconcile the Panel's finding that this behaviour would not amount to HIV-related stigma, discrimination, and shunning. The Panel failed to consider the potential hardship that the Applicant's father would suffer should his family members refuse to use the same kitchen utensils as him.

> Indeed, the Panel's reasons demonstrate that the Panel itself may have a very limited understanding of how HIV is transmitted. In addition to the above comments, the Panel also posited that "there was no evidence submitted that the father is staying away from (his family) in China, thus it does not appear as if the father is concerned about infecting them with the virus)." Despite the fact that it is now common knowledge that HIV cannot be transmitted through casual contact, the Panel appears not to understand that the Applicant's father does not need to "stay away" from his family members in order to prevent them from contracting HIV. The Panel's ignorance with respect to basic facts about HIV transmission further demonstrates the HIV-related stigma running through the decision as a whole.
>
> IAD Decision and Reasons, Applicant's Record, p. 19

18. The Panel's comments perpetuate negative stereotypes of people living with HIV and undermine the effort made toward the eradication of HIV-related stigma and discrimination. By relying on HIV-related stigma in rendering his decision, the Panel discriminated against the Applicant. The Panel failed to exercise its duties without discrimination, thereby contravening the Immigration and Refugee Board's Code of Conduct for Members in addition to the equality rights set out in the *Canadian Human Rights Act* and the *Charter.*

> *Code of Conduct for Members of the Immigration and Refugee Board, Point 25*
> *Canadian Human Rights Act,* RSC 1985, c. H-6, s. 2, 3(1), 5(b)
> *Canadian Charter of Rights and Freedoms*, 1982, c.11, s. 15(1)

(ii) The Correct Interpretation of the Law with respect to Medical Inadmissibility due to Excessive Demand

19. In assessing the Panel's findings with respect to whether the Applicant's father is medically inadmissible, this Court must correctly interpret the law with respect to medical inadmissibility due to excessive demand. In particular, this Court must ensure that its findings on this point align with the jurisprudence with respect to the scope and content of the individualized assessment of an individual's excessive demand on health services.

20. The Supreme Court of Canada held in *Hilewitz* that assessments of excessive demand on health

or social services must be individualized and must take into account an individual's particular circumstances.

> *Hilewitz v. Canada (Minister of Citizenship and Immigration)*; *De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57 (*Hilewitz)*

21. The Supreme Court further stated that the threshold for medical inadmissibility determinations requires that there is a *reasonable probability* that the excessive demand will take place. The Court stated the following with respect to the threshold to be applied in medical inadmissibility cases:

> The clear legislative threshold provides that to be denied admission, the individual's medical condition "would" or "might reasonably be expected" to result in an excessive public burden. The threshold is reasonable probability, not remote possibility. It should be more likely than not, based on a family's circumstances, that the contingencies will materialize.
>
> *Hilewitz,* para. 58

22. In *Companioni v. Canada (MCI)* ("*Companioni*"), the Federal Court ruled that the individualized assessment requirement set out by the Court in *Hilewitz* applied to health care services in addition to social services. In that case, the health care service in question was prescription drug medication for people living with HIV. The Court held that the officer erred by failing to consider the impact of a private insurance plan on whether the applicant's prescription drug medications would reasonably be expected to result in an excessive public burden.

> *Companioni v. Canada (MCI),* 2009 FC 1315

23. Since *Companioni,* the Federal Court has confirmed on several occasions that the *Hilewitz* requirement to conduct an individualized assessment of the reasonable probability that an individual's medical condition will result in an excessive demand applies equally to prescription drugs and other health services.

> *Jafarian v. Canada (CI),* 2010 FC 40, para. 23
>
> *Rashid v. Canada (MCI),* 2010 FC 157, para. 20
>
> *Hassan Chauhdry v. Canada (CI),* 2011 FC 22, para. 50

24. This Court has overturned decisions on the grounds that officers failed to conduct a proper analysis of the likelihood that an applicant's prescription drug medications would result in an

excessive demand. As noted above, in *Companioni,* this Court found that the officer erred by failing to consider the impact of the availability of private insurance on the likelihood that the applicant would cause excessive demand. In *Diaz Ovalle,* the Court held that the officer erred by failing to analyze an applicant's detailed plan for covering the cost of his HIV medications.

Companioni

Diaz Ovalle v. Canada (CI), 2012 FC 507, para. 9

25. The application of the *Hilewitz* principles to health services is particularly important to people living with HIV. As noted above, the vast majority of people living with HIV require anti-retroviral treatment, or will require it within the five or ten year time frames considered in the medical admissibility assessment. For many people living with HIV, the cost of their anti-retroviral medications is the sole reason that they may be found inadmissible due to excessive demand. While many individuals are eligible for publicly-funded anti-retroviral treatment, a significant proportion are not eligible for a number of reasons, including that their medications may be paid for in whole or in part by private health insurance.

26. In the case at bar, the Panel conducted only a cursory assessment with respect to the Applicant's father's medical inadmissibility, stating only that a permanent resident has a right to health care services and may not opt out of them. This assessment does not account for the nuances developed in the jurisprudence outlined above.

IAD Decision and Reasons, Applicant's Record, p. 14, para. 20

27. The Respondent's position in its leave memorandum that the *Hilewitz* principles do not necessarily apply to health care services is incorrect. Indeed, the Federal Court specifically rejected this submission in *Companioni,* stating:

> [12] …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.

Companioni, para. 12

Respondent's Leave Memorandum, paras. 10-12

28. With respect to the Applicant's position, the Interveners first wish to clarify the options for out-patient prescription drug coverage in the province of Ontario. Out-patient prescription drugs are not covered by Ontario's *Health Insurance Act*. The options for out-patient prescription drug coverage in Ontario are as follows:

    - Ontario Drug Benefit (ODB) program (100% of cost paid by government);
    - Trillium Drug Program (TDP) (100% of cost paid by government minus a deductible equivalent to approximately 4% of household income);
    - private group health insurance (varying coverage depending on policy);
    - private individual health insurance (varying coverage depending on policy); or
    - out-of-pocket (100% cost paid by individual).

    Health Insurance Act, R.S.O. 1990, Chapter H.6, and R.R.O. 1990, Regulation 552, section 8(1)

29. The ODB is available to seniors, people on social assistance (Ontario Works and Ontario Disability Support Program), people residing in homes for special care and long-term care homes, and people receiving professional home care services. It covers 100 per cent of the cost of prescription drugs, minus a negligible dispensing fee or co-payment.

    Ontario Drug Benefit Act, Ont. Regulation 201/96, s. 2(1)

30. The Trillium Drug Program was established under the *Ontario Drug Benefit Act* to assist other Ontarians with high prescription drug costs who do not qualify for the ODB and who do not have any other means of paying for their drugs. TDP entails the payment of a deductible which amounts on an annual basis to approximately 4% of household income. Once the deductible is paid, TDP covers the remaining cost of the household's prescription drug coverage. In the case where a TDP enrolee has private health insurance coverage that does not cover 100% of the cost of prescription drugs, TDP will pay for the uncovered balance and a portion of the cost of the insurance premiums which are paid out-of-pocket.

    Ontario Drug Benefit Act, Ont. Regulation 201/96, ss. 3-10

31. While the private insurance option was not advanced in the case at bar, as a general rule people living with HIV may have drug coverage through group health insurance plans, frequently provided by employers, unions, or other associations with varying levels of prescription drug coverage. Group health insurance plans do not require members to demonstrate that they are "insurable," so an individual's HIV status will not be a barrier to coverage. Individual insurance plans are generally not an option for people with HIV because virtually all individual insurance plans require that the applicant demonstrate insurability.

32. Finally, prescription drugs can be purchased in Ontario at cost from licensed pharmacies. There is no requirement in law to be covered under public or private health insurance.

33. In the case at bar, the Applicant had advanced evidence that she and her sister could pay for their father's medications out of pocket. The Panel, however, held only that since a permanent resident has a right to medical services and may not opt out of them, it could assume that the Applicant's father will use public funding for his HIV medications. This, however, is incorrect, as there is no requirement that an individual be covered under a public or private health insurance scheme for out-patient prescription medications. An individual could, therefore, "opt out" of Ontario's public health insurance schemes for the coverage of out-patient prescription medication. The Panel should have assessed whether there was a *reasonable probability* that the Applicant's father would cause an excessive demand.

PART IV – ORDER SOUGHT

34. The Interveners request an order granting this application for judicial review and remitting the matter to a differently-constituted panel of the Immigration Appeal Division.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of November, in Toronto.

Meagan Johnston
Adrienne Smith

Solicitors for the Interveners

Court File No. IMM-2320-17

FEDERAL COURT

B E T W E E N:

A.B.

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

FACTUM OF THE INTERVENERS

HALCO
55 University Avenue, Suite 1400
Toronto, Ontario M5J 2H7
Tel: 416-340-7790

Meagan Johnston

JORDAN BATTISTA LLP
Barristers & Solicitors
160 Bloor Street East, Suite 1000
Toronto, Ontario M4W 1B9
Tel: 416-203-2899

Adrienne Smith

Solicitors for the Proposed Interveners