



IAD File No./Dossier : WA3-00050

Reasons and Decision – Motifs et décision

Sponsorship

Appellant(s)

IGOR NICKEL

Appelant(s)

Respondent

The Minister of Citizenship and Immigration
Le Ministre de la Citoyenneté et de l'Immigration

Intimé

Date(s) and Place
of Hearing

April 15, 2004
Winnipeg, Manitoba

Date(s) et Lieu de
l'audience

Date of Decision

April 15, 2004

Date de la Décision

Panel

Sherry D. Wiebe

Tribunal

Appellant's Counsel

Reis Pagtakhan
Barrister and Solicitor

Conseil de l'appelant(s)

Minister's Counsel

Leonard Offrowich
Barrister and Solicitor

Conseil de l'intimé

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Oral Reasons for Decision

[1] These are my reasons and decision in the appeal made by Igor Nickel (the “Appellant”) from the refused application for a permanent resident visa application for his father Peter Nickel (the “Principal Applicant”), his mother Elisabeth Nickel, and their accompanying dependants Nikolai Nickel, Helene Nickel and Liane Nickel (the “Applicants”).

[2] This sponsorship was refused because Mrs. Elisabeth Nickel was found medically inadmissible. She was diagnosed with rheumatoid arthritis. The narrative contained in the refusal letter states that the Applicant has severe joint changes and will require ongoing treatment and orthopaedic surgery. It also specifies that she will require a knee joint replacement. She is, therefore, found to be reasonably expected to place an excessive demand on health and social services.¹

[3] The legality of the refusal is not challenged and this appeal is grounded in the discretionary jurisdiction of the Immigration Appeal Division (the “IAD”). The remedies available are outlined in s. 67² and s. 69³ of the *Immigration and Refugee Protection Act*⁴ (the “IRPA”). This appeal may be allowed if there are sufficient humanitarian and compassionate considerations, taking into account the best interests of a child directly affected by the decision, to warrant special relief in all the circumstances of the case.

¹ Record, pg. 26.

² 67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,
(a) the decision appealed is wrong in law or fact or mixed law and fact;
(b) a principle of natural justice has not been observed; or
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate consideration warrant special relief in light of all the circumstances of the case.

³ 69. (1) The Immigration Appeal Division shall dismiss an appeal if it does not allow the appeal or stay the removal order, if any,
(2) In the case of an appeal by the Minister respecting a permanent resident or a protected person, other than a person referred to in subsection 64(1), if the Immigration Appeal Division is satisfied that, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case, it may make and may stay the applicable removal order, or dismiss the appeal, despite being satisfied of a matter set out in paragraph 67(1)(a) or (b).
(3) If the Immigration Appeal Division dismisses an appeal made under subsection 63(4) and the permanent resident is in Canada, it shall make a removal order.

⁴ S.C. 2001, c. 27.

[4] In this appeal the Appellant testified as did Mrs. Anna Nickel and the Applicant Mrs. Elisabeth Nickel. The sponsorship was refused on the basis of medical inadmissibility. The exercise of special relief requires that the panel be satisfied that there are sufficient humanitarian and compassionate considerations which entails a balancing of the obstacles against the humanitarian and compassionate considerations as Minister's counsel has submitted.

[5] All the circumstances of the case fit the context in which this balancing occurs. The obstacle in this case is the medical inadmissibility of the Appellant's mother. Mrs. Elisabeth Nickel has had rheumatoid arthritis since 1966 after the birth of her first child. She went on to have four more children and provided all of the care and home support that a mother and wife could provide. She and her husband have five children who are adults with the exception of one of the Applicants who is under the age of majority. The youngest three are included in the sponsorship and are 16, 19 and 22 years of age.

[6] The Applicant Mrs. Nickel has managed all facets of her daily life despite the limits imposed by her arthritic fingers and elbow. She has been eligible for surgery in Germany since 1990 but has refused to have the surgery, in part because the consequences are not guaranteed. The joints which are a problem for her are her fingers and elbow. The evidence with regard to her ability to walk is that she is not limited other than in ways that age and fitness may limit one's ability.

[7] The Appellant testified that his mother has health insurance in Germany and there would, therefore, be no direct cost to his mother for the surgery for which she has been eligible.

[8] The medical report and statutory declaration of Dr. Waddell⁵ for the Minister notes that the Applicant Mrs. Nickel's daily activities are not restricted and it also notes that she has no cardiac or other complications. The primary cause, then, of the excessive demand cited in the narrative and in the statutory declaration relates to possible knee and hip replacement. There was no specific evidence with respect to the cost of hands and elbow surgeries which were not referenced in the medical narrative but which remained the primary concern for the Applicant.

⁵ Exhibit R-2.

[9] Even if there were evidence regarding the cost of orthopaedic surgery for the hand and elbow, there is, nonetheless, credible evidence that the Applicant flatly refuses to have the surgery which has been available to her for some 14 years.

[10] The Applicant Mrs. Nickel, who is now 56 years of age, continues to look after the household chores, including the cooking and cleaning for her family. While she has some assistance from family members, she, nonetheless, manages to provide all of the support at home, including washing clothes, shopping and the like which are necessary in day-to-day life.

[11] During the Appellant's visits to Germany there was credible evidence that the senior Mrs. Nickel went about all of her activities, including shopping of the discretionary type for clothes and shoes with her daughter-in-law. The senior Mrs. Nickel testified that the inflammation in her hands is manageable and the medication, cortisone, is also required. She walks without assistance and regularly uses the stairs in a three-story home. She admitted that some days she finds the stairs difficult but not always and she has never failed to use them because of her condition. She gardens her flowers daily in warm weather. I am satisfied that there is credible evidence that the Applicant's condition is manageable and has been managed over many years with a conservative approach.

[12] I am satisfied that this evidence is supported by the testimony of the Appellant, the Appellant's wife Mrs. Anna Nickel, and as well evidence in the reports of two doctors in Germany.⁶

[13] The humanitarian and compassionate factors to balance against the obstacle include the purpose of the sponsorship. The Appellant and his wife and two children, now 9 and 11 years of age, were landed in Canada in 1998. They came to Canada because it is a free country with open spaces where you can sit and enjoy the outdoors. Their youngest child, now two years of age, was born in Canada and they are expecting another child in the coming months.

⁶ Exhibit A-1.

[14] The family came to Canada as independent immigrants. They have established a life in Canada. Both Mr. and Mrs. Nickel have good paying jobs. They are living in a home they own and are integrated into a rural community in Manitoba. Their children attend school in Winkler. These are all positive factors. The Nickel family that is living in Germany wishes to join their family in Canada. They are a family who were all together before the Appellant moved to Canada. The family had moved from Siberia to Germany in 1988. Their move came about as a result of their becoming religious. They feared persecution in Russia.

[15] They believed their lives in Germany would be good and that they would be respected by the Germans. However, this was not to be and despite building a house to be integrated into their Germany community and hoping for acceptance among the Germans, they, nonetheless, remained isolated.

[16] The senior Mrs. Nickel testified that she is not happy with what has happened to the children in school and that their youngest daughter has recently been in a fight in school. Therefore, they want not only to join their family in Canada because of their love for each other but also because there is a life with the promise of integration into a community that has not been available to them as Russians living in Germany.

[17] The Appellant and his family have a close relationship with the family in Germany. While in Germany they lived geographically close and did many things together. The Appellant's youngest brother, Nikolai, one of the Applicants, lived with the Appellant for a year when he was younger. They have a close relationship. Nikolai has visited Canada twice, the latest in 2000-2001 when he obtained approval to remain in Canada to attend grade 11 at the high school in the town where Nikolai lived with the Appellant and his family. They continue to have regular contact. Nikolai continues to have contact with friends he made in Canada while living here.

[18] Mrs. Elisabeth Nickel has also visited Canada in 1999 and the Appellant and his wife traveled to Germany in 2001 and 2003. He maintains contact with frequent telephone calls. The Appellant's children, too, have spent time with their grandparents. The Applicants have financial

resources in Germany which they will bring with them. Their plan is to live with the Appellant and his family in their home for the immediate future.

[19] The senior Mr. and Mrs. Nickel are retired. The accompanying dependants in the sponsorship want to join their family in Canada as well.

[20] After hearing the evidence, the Minister's counsel is satisfied that the demand on health services presented by Mrs. Nickel will be less than that identified in the refusal letter. I find that the evidence is, on balance, that the demand will be minimized. The diagnosis is not disputed but there is credible evidence that the Applicant Mrs. Nickel is well able to manage on her own condition with only a minimum of medication to support her. This is agreed upon by two doctors in Germany.

[21] The conclusions of the officer are related to treatment that has been available to the senior Mrs. Nickel for 14 years and which she has refused. There is no risk to the Canadian public as the Minister's counsel has pointed out and I am satisfied that the evidence proves on balance that the demand on health services will be minimized.

[22] Therefore, I am satisfied that the obstacle to admission prevents a lesser standard than this diagnosis and narrative would at first blush appear to present. This obstacle, then, is balanced against the humanitarian and compassionate factors. The purpose of the sponsorship, as already noted, is one of those factors and includes the desire for the family to be reunited in Canada. Also noted is the closeness of the family, as well as the Applicants experience in and exposure to Canada, in addition to their current living situation in Germany.

Conclusion

[23] The Minister's counsel recommends that this appeal be allowed. I agree. I am satisfied that there exist humanitarian and compassionate factors and have taken into account the best interests of a child directly affected by this decision which includes the applicant dependants and find that there is sufficient humanitarian factors that warrant the exercise of special relief in light of all the circumstances of the case. This appeal is allowed.

Edited for syntax, clarity and grammar.

NOTICE OF DECISION

After reviewing the information in this appeal, and the consent of both parties, the appeal is allowed. The officer's decision to refuse a permanent resident visa is set aside and the officer must continue processing the application in accordance with the consent of the parties.

“Sherry D. Wiebe”

Sherry D. Wiebe

28 April 2004

Date (day/month/year)

Judicial review – Under section 72 of the *Immigration and Refugee Protection Act*, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.