Federal Court  Cour fédérale

Date: 20180201

Docket: IMM-1147-17

Citation: 2018 FC 109

Ottawa, Ontario, February 01, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

HAJAR AHANI
JAWAD AHANI

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] On January 26, 2017 the Visa Officer [Officer] removed the adult Applicants' names from their father's application for permanent residence as they were not "dependent children" within the definition of the *Immigration and Refugee Protection Act* [IRPA] and *Immigration and Refugee Protection Regulations* [IRPR].

[2] For the reasons that follow the judicial review of that decision is dismissed. The Officer's decision is reasonable and no procedural fairness issues arise on the facts.

I. Background

[3] The two Applicants who were 33 and 28 years of age in January 2017 are the adult children of an Iranian citizen, Mr. Ahani, who is seeking permanent residence status in Canada. Mr. Ahani listed them as dependents on his application on the basis that they are students.

[4] The Male Applicant [MA] provided education records from the 1st semester of the academic year 2002-2003 to the 1st semester of 2011-2012, when he was studying part-time for a Bachelor's Degree in Civil Engineering. In 2012-2013, he enrolled in a Master's Degree in Civil Engineering. He took a leave of absence in 2014-2015 and another leave of absence in the second semester of 2015-2016.

[5] The Female Applicant [FA] was enrolled in evening classes from 2007-2013. She was a full time student in the 2013-2014 academic year. In the second semester of the 2014-2015 year, she took a leave of absence, which lasted through the first semester of the 2015-2016 year. The FA returned to her studies after her leaves of absence.

II. Decision Under Review

[6] The reasons for decision consist of the email sent to the Applicants on January 26, 2017 and the Global Case Management System [GCMS] notes communicated to the Applicants on May 29, 2017.

[7] The email advised the Applicants that their names had been withdrawn from their father's application. The GCMS notes indicate that the MA did not provide any proof of education beyond the second semester of 2011, and that the MA no longer appeared to be a student. Therefore, according to the Officer, the MA could not be a dependent under the IRPR.

[8] The Officer further notes that the FA provided proof of education through records for late 2014 and early 2015. The Officer notes that the FA was registered for courses in this period, but did not attend them.

[9] The Officer concluded that the MA and the FA did not meet the definition of dependent children.

III. Issues

[10] The Applicants raise two issues:

A. Is the decision reasonable?

B. Is there a breach of procedural fairness with respect to the FA?

IV. Standard of Review

[11] An Officer's determination of whether an applicant meets the definition of "dependent child" in the IRPR is reviewed on the reasonableness standard (*Shomali v Canada (Citizenship and Immigration)*, 2017 FC 1 at para 12 [*Shomali*].

[12] Whether the FA was owed an opportunity to respond is an issue of procedural fairness which is typically reviewed on a correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. However recent jurisprudence from the Federal Court of Appeal notes that the standard of review is in flux on issues of procedural fairness: *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at para 11. Here, as I have concluded that there are no breaches of procedural fairness, the applicable standard of review would not change the result.

V. Statutory Provisions

[13] The application under review in this case was received in 2013. As a result, a previous version of s.2 of the IRPR, defining the term "dependent child" was in force. The relevant provision provides as follows:

(b) is in one of the following situations of dependency, namely,	**b)** d'autre part, remplit l'une des conditions suivantes :
(i) is less than 22 years of age and not a spouse or common-law partner,	**(i)** il est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait,
(ii) has depended substantially on the	**(ii)** il est un étudiant âgé qui n'a pas cessé de dépendre,

financial support of the parent since before the age of 22 — or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner — and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student

pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents à compter du moment où il a atteint l'âge de vingt-deux ans ou est devenu, avant cet âge, un époux ou conjoint de fait et qui, à la fois :

(A) continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and

(A) n'a pas cessé d'être inscrit à un établissement d'enseignement postsecondaire accrédité par les autorités gouvernementales compétentes et de fréquenter celui-ci,

(B) actively pursuing a course of academic, professional or vocational training on a full-time basis, or

(B) y suit activement à temps plein des cours de formation générale, théorique ou professionnelle,

(iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition. (enfant à charge)

(iii) il est âgé de vingt-deux ans ou plus, n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents à compter du moment où il a atteint l'âge de vingt-deux ans et ne peut subvenir à ses besoins du fait de son état physique ou mental. (dependant child)

VI. Analysis

A. *Is the decision reasonable?*

[14] The Applicants argue that the Officer ignored evidence which established that the MA was a full-time student after 2012, thereby rendering the decision unreasonable.

[15] As the above provisions demonstrate, to be considered a "dependent child" after the age of 22, an applicant must have been continuously enrolled as a full time student since before the age of 22.

[16] In *Shomali*, at para 17 the Court considered the definition of "continuously" in the IRPR and determined that it meant: "uninterruptedly; in unbroken sequence; without intermission or cessation…" In *Shomali*, although the applicant was on a leave of absence for six months for military reasons, the Court found that the applicant was not continuously engaged in a course of studies, and so was not a dependent child.

[17] Here, the MA was a part-time student for a decade, which clearly does not meet the definition of a "dependent child" for that period of time. While he began "daily" studies in 2012, and appears to have been enrolled in a program of study for the 2012-2013 and 2013-2014 years, he took a year-long absence in 2014-2015 and another leave of absence in the first semester of 2015-2016. These leaves of absence were recorded on his official school records.

[18] It does appear that the Officer did not consider the fact that the MA was enrolled in studies post-2012. However, even if that evidence had been factored into the analysis it would not have changed the result, as the MA could still not establish he was enrolled "continuously" as a full-time student as required by the IRPR because of his subsequent leaves of absence throughout the 2014-2015 and 2015-2016 years. Therefore, the Officer was justified, based on *Shomali*, in concluding that the MA was not engaged in continuous full-time studies.

[19] In any event, to be a reviewable error, the error must go "to the heart of the decision" (*Castillo Mendoza v Canada (Citizenship and Immigration)*, 2010 FC 648 at para 24; *Zhu v Canada (Citizenship and Immigration)*, 2017 FC 615 at para 23). Here, although the Officer's decision does not indicate that the post-2011 evidence was considered, nothing turns on this omission.

[20] The same considerations apply in assessing the FA's status as a student. For a number of years (2007-2013), the FA attended night school, and was not a full-time student. Further, she took an official leave of absence from the second semester of the 2014-2015 year which lasted through the first semester of the 2015-2016 year. The Officer reasonably concluded that these circumstances did not constitute continuous full-time study, as set out in *Shomali*.

[21] Overall, this case is different from *Singh Gill v Canada (Citizenship and Immigration)*, 2008 FC 365 [*Singh Gill*]. In that case, the Court concluded that the applicant was a dependent child even though the applicant, as here, took absences from study. However, in *Singh Gill*, the

absences were short and there were no withdrawals from study. That is unlike the case here for the FA and the MA.

[22] Therefore, based upon the definition of "continuously" from *Shomali*, it was reasonable for the Officer to conclude that the MA and the FA do not meet the definition of continuous enrolment to allow them to be considered dependent children within the meaning of the IRPR.

[23] In my view, notwithstanding the error of the Officer to consider the MA's post 2011 evidence, the Officer's decision is nonetheless reasonable.

B. *Is there a breach of procedural fairness with respect to the FA?*

[24] The FA argues that the Officer should have provided her an opportunity to explain the leaves of absence in her academic record. The FA relies upon the Officer's operational manual which refers to an interview process. The FA further argues that a fairness letter stating the specific concerns and the Officer's assumptions should have been sent to the Applicants.

[25] However, there was no such duty on the Officer here. In *Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283 at para 24, the Court noted that where a concern with an application arises from the legislation itself, there is no duty to provide an applicant with a chance to respond to an officer's concerns.

[26] Where, however, the concerns relate to the "credibility, accuracy or genuine nature" of information, an opportunity to respond may be afforded: *Hamza v Canada (Citizenship and*

Immigration), 2013 FC 264 at para 25; *Ansari v Canada (Citizenship and Immigration)*, 2013 FC 849 at paras 17-19.

[27] However, here the Officer made no findings with regard to the credibility of the FA or the reliability of the education records he was provided. The Officer was simply assessing the evidence before him.

[28] The Applicants rely on *Azizian v Canada (Citizenship and Immigration)*, 2017 FC 379 at paras 20-24 [*Azizian*] for the proposition that the Officer should have afforded an opportunity for the FA to explain the leaves of absence on her academic records. In *Azizian*, the Court found that the procedural fairness letter sent to the applicant had left out relevant medical details which the Applicant should have had an opportunity to address.

[29] Here as there was no procedural fairness letter sent to the FA, this case does not apply. The *Azizian* case does not stand for the proposition that a procedural fairness letter must be provided. Rather, it confirms that when such a letter is provided it must highlight the Officer's concerns so that the applicant can respond accordingly.

[30] However, this case is different from *Azizian*, in that the FA was not owed an opportunity to respond in the first place. Here, the Officer did not doubt the veracity of any of the evidence offered by the Applicants. The Officer merely applied the requirements of the IRPR to the Applicant's evidence, and made an assessment as to the eligibility of the Applicants as

"dependent children." Under these circumstances, there was no requirement to offer the FA a chance to further explain this evidence.

JUDGMENT in IMM-1147-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review of the Visa Officer's decision is dismissed.

2. No serious questions of general importance are certified.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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