Date: 20080313

Docket: A-359-07

Citation: 2008 FCA 102

CORAM: **DESJARDINS J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant
(Respondent in the Federal Court)

and

MARIE DIMONEKENE

Respondent
(Applicant in the Federal Court)

Hearing held at Montréal, Quebec, on March 12, 2008.

Judgment delivered at Montréal, Québec, on March 13, 2008.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: DESJARDINS J.A.
NOËL J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.:

[1] This is an appeal from a decision of Mr. Justice Harrington (*Dimonekene v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 675), sitting in judicial review, to set aside the decision of the Immigration and Refugee Board's Immigration Appeal Division (IAD) ([2006] I.A.D.D. No. 398 (QL), Docket No. MA4-03946) respecting one of the respondent's children.

[2] Harrington J. certified the following question:

> [TRANSLATION]
> For the purpose of interpreting the conditions stated in the definition of "**dependent child**" set out in clause 2(*b*)(ii)(A) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 as amended, with regard to the words "continuously enrolled in and attending", can the Immigration Appeal Division take into consideration a period of interruption of studies, and if so, can it take into consideration the reasons for the interruption?

The facts

[3] After obtaining permanent residence in Canada, the respondent sponsored the permanent residence application of four of her children and of one grandchild. The IAD decision before Harrington J. allowed the respondent's appeal in part. The adverse decision concerning her son Carloscenhe Canthe Carlite (her son or Canthe), born on April 29, 1976, was judicially reviewed by the Federal Court.

[4] Before the IAD, the respondent alleged that her son was a "dependent child" as defined by section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) and that the only reason he did not continuously attend a post-secondary institution after the age of 22 was the conflict in the Democratic Republic of the Congo. That conflict resulted in the closure of schools and other academic institutions.

The IAD decision

[5] After noting the "inconsistencies regarding [Canthe's] periods of study" and the "difficulties in the evidence [that] have not been explained to the satisfaction of the panel", the IAD dismissed the respondent's allegation that Canthe is a dependent child. Among other things, the respondent's son himself stated that he had discontinued his studies between 1997 and 1999.

Federal Court decision and analysis

[6] Harrington J. did not conduct a judicial review of the IAD decision: he stopped at the meaning of the definition of "dependent child" instead of assessing the facts of Canthe's narrative. That is the reason for his certified question. He allowed the application for judicial review and returned the matter to the IAD for redetermination.

[7] Before proceeding in that way, Harrington J. should have first ensured that the facts in evidence before the IAD, analyzed according to the standard of review of reasonableness (in accordance with *Dunsmuir v. New Brunswick*, 2008 SCC 9), would allow him to intervene.

[8] Had he done so, he would have found that, by dismissing the application concerning Canthe, the IAD rendered the only decision that the evidence before it reasonably allowed it to render.

[9] At the same time, Harrington J. would have taken note of the parties' admission concerning the period of school closures caused by the civil war, which period was accepted by the IAD, but

did not coincide with the period that he indicated at paragraph 8 of his reasons (paragraph 36 of the respondent's memorandum, paragraph 17 of the IAD reasons for decision). He used this period of closures to explain the interruption in Canthe's studies.

[10] Had Harrington J. considered the evidence, he would have inevitably noticed that the outcome of the judicial review before him did not depend on the answer to the certified question. Even if we accept that the IAD had erred in considering the period during which the high school was closed as being a period of not attending school, the evidence on the record still showed that, after reaching the age of 22, the respondent's son did not attend an academic institution before and after that period of closure caused by the civil war (paragraph 17 of the IAD reasons).

[11] For these reasons, I would allow the appeal without costs, since there are no special reasons as set out in rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, set aside the Federal Court order dated July 24, 2007, and dismiss the application for judicial review.

"Johanne Trudel"
Judge

"I concur.
Alice Desjardins, J.A."

"I concur.
Marc Noël, J.A."

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-359-07
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE HARRINGTON DATED JULY 24, 2007, DOCKET NO. IMM-6139-06	
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. MARIE DIMONEKENE
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 12, 2008
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	DESJARDINS J.A. NOËL J.A.
DATED:	March 13, 2008

APPEARANCES:

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