Date: 20080227

Docket: IMM-1665-07

Citation: 2008 FC 260

Vancouver, British Columbia, February 27, 2008

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

Sandeep Kaur SIDHU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of a decision rendered on March 12, 2007 by Mr. Larry Carroll, a visa officer (the Officer) in New Delhi, India. In his decision, the Officer found Sandeep Kaur Sidhu, the Applicant, not to be a dependent child of Sarbit Singh Sidhu, pursuant to s. 2(b)(*ii*) of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 (the Regulations). Consequently, she had been deleted from his application for permanent residence in Canada. The Applicant seeks an order setting aside the Officer's decision and to

have the application for permanent residence be remitted for reconsideration by a different visa officer.

A. *Preliminary Motion*

[2] At the outset of the hearing I dealt with a motion, on behalf of the Applicant, which had initially been scheduled for hearing at general sittings in Vancouver the day before the hearing of this application. In her motion, the Applicant seeks the following relief:

> THIS MOTION IS FOR an order
>
> 1. striking out the affidavit made 20 December 2007 by officer Larry Carroll; or,
> 2. amending the order for leave pronounced by
>   a. extending the time for the applicant to file further affidavit material to the date of the determination of the present motion
>   b. accepting the affidavits within the present motion record as filed as evidence of the applicant in support of her application for judicial review
>   c. amending the times for service and filing further materials and the date for the hearing upon such terms as the Court considers just
>
>   or
> 3. such other order as the Court considers just.

[3] The Applicant essentially seeks to have two new affidavits filed in support of her application and to have the affidavit of the Officer struck. I will deal first with the Officer's affidavit.

[4] The Respondent elected not to file a memorandum of argument or affidavit evidence with respect to the Applicant's application for leave, but reserved the right to file submissions and affidavits if leave were granted. The Applicant alleges that the Respondent's officials have "sought to avoid disclosing the full reasons for the decision of the Officer… until it was too late for the Applicant to adduce evidence to the contrary." It is argued that the Officer's affidavit should be struck out as not relevant to the reasons for the refusal as revealed in the tribunal record.

[5] I find the Applicant's allegation to be without merit. The Applicant provides no evidence to support such a serious allegation. I am satisfied that the Officer's affidavit is properly before the Court. The affidavit explains the provenance of the CAIPS notes, affirms their accuracy, and explains why the Officer proceeded to conduct a qualitative assessment of the Applicant's English language abilities during the March 8, 2007 interview. In my view, the affidavit does not add to/or modify the reasons for the Officer's decision. The Officer's affidavit will not be struck.

[6] The Applicant also seeks leave to file two new affidavits. The affidavit of Narinder Singh Ghag and the affidavit of Aisha Battool Jilani both sworn on February 13, 2008.

[7] The Ghag affidavit deals with the issue of the accuracy and authenticity of the university transcripts submitted by the Applicant. The Applicant's main argument is that she was unaware that the authenticity of the documents would be an issue until the Respondent's record was filed since the Respondent did not file affidavit evidence on the leave application. The Applicant

contends, as a consequence, that she did not have sufficient time to prepare and file the necessary affidavit evidence to address the issue. To accept the Applicant's argument would be to ignore that the Notice of Application states expressly, as one of the grounds in support of the application, that "the tribunal erred in law by deciding the applicant had produced forged academic documents…." The Applicant was therefore aware of the issue of the authenticity of the documents since April 23, 2007. In my view, she had ample time to prepare her evidence. To allow the affidavit at this late stage would unjustifiably deprive the Respondent of his right to cross-examination on the affidavit. In my view, this would be prejudicial to the Respondent.

[8] The Jilani affidavit exhibits two letters exchanged between counsels after leave was granted in this proceeding. The letters essentially state the respective positions of the parties regarding the authenticity of the educational documents. The Applicant argues that a passage in the letter from Respondent's counsel is material evidence to the application. In the letter, counsel for the Respondent indicated that evidence on judicial review is restricted to the evidence that was before the Officer at the time of the decision. In my view, this is no more than a statement of the accepted state of the law. I see nothing in this affidavit that is relevant to the reasonableness of the Officer's decision, the issue to be decided in the underlying application. The affidavit does not assist the Court.

[9] I also note that both affidavits sought to be introduced contain information that was not before the Officer and are out of time. For the above reasons, the affidavits of Narinder Singh Ghag and Aisha Battool Jilani will not be received.

[10] It follows that the Applicant's motion is dismissed. I will now turn to the application under review.

II. Background

[11] On November 16, 2006, Sarbjit Singh Sidhu filed an application for permanent residence in Canada under the family class. The application was filed with the High Commission of Canada in New Delhi, India. Mr. Sidhu included in his application his wife, Malkit Kaur Sidhu and his dependent children, Jaskaran Singh Sidhu and Sandeep Kaur Sidhu, the Applicant in the within application.

[12] The Applicant was born on February 5, 1982, in Burj Harika, India. At the time of the application for permanent residence, the Applicant was twenty four years of age, single and enrolled as a student in a bachelor degree program at Punjabi University.

[13] On March 8, 2007, with the assistance of a Punjabi interpreter, the Officer interviewed the Applicant, her brother and her parents. The Applicant was interviewed separately from her parents and brother.

[14] In his decision letter dated March 12, 2007, the Officer informed Sarbjit Singh Sidhu that his children are not dependent children for the purposes of section 2(b)(*ii*) of the Regulations under the *Immigration and Refugee Protection Act* (the Act). The Applicant and her brother were consequently deleted from the application.

[15] On April 23, 2007, the Applicant brought the within application seeking judicial review of the Officer's decision.

III. The Impugned Decision

[16] At page two of his decision letter the Officer wrote:

> I am not satisfied that your son Jaskaran Singh has been actively pursuing post secondary schooling nor that your daughter Sandeep Kaur has been in continuous schooling since before the age of 22. Neither Jaskaran nor Sandeep meets the definition of a Dependent under R2(b)(ii). At his interview with me, Jaskaran informed me that his repeated failed years of schooling at the BA level were due to the fact he was preoccupied with kabbadi and not concentrating on his studies. Your daughter Sandeep, on the other hand, provided me with documentation that indicated that she passed English with very high marks (a course she failed badly on a number of previous occasions). A very brief verification of her English skills revealed it would have been impossible for her to score as well as claimed on her examination. In speaking with you at the interview I asked to what you would attribute your daughter's remarkable improvement in her marks over previous exam results. You were speechless and never provided me with a single response.
>
> Given the foregoing, I conclude that Jaskaran Singh and Sandeep Kaur are each not a "dependent child" as defined in section 2 of the ***Immigration and Refugee Protection Regulations***.
>
> Since Jaskaran Singh and Sandeep Kaur are not dependent children according to the ***Immigration and Refugee Protection Regulations***, I have deleted them from your application.
>
> [Emphasis in original]

IV. Issue

[17] Did the Officer err by basing his decision on an erroneous finding of fact that he made in a perverse or capricious manner or without regard for the material before him?

V. Standard of Review

[18] In *Liu v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 525, 2003 FCT 375, Justice Snider wrote at paragraph 14:

> An application to be admitted to Canada as an immigrant involves a discretionary decision on the part of the visa officer, who is required to make that decision on the basis of specified statutory criteria. The standard of review to be applied to a visa officer's decision with respect to a finding of fact is patent unreasonableness.

[19] In *Dhindsa v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1700, 2006 FC 1362, Justice Gibson cited Justice Snider's decision in *Liu*, and concluded that the standard of review of patent unreasonableness applies to a finding that an individual was not a "dependent child" under the Regulations. The same finding was made by Justice de Montigny in *Mazumber v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 552, 2005 FC 444 at para. 6. I agree with the reasoning of my colleagues.

[20] Since the decision under review in this application also concerns a finding that an individual was not a "dependent child" under the Regulations, I will adopt the standard of patent unreasonableness in reviewing the Officer’s decision.

VI. Analysis

A. *Preliminary Objection by the Respondent*

[21] In written submissions, the Respondent submits that the Applicant has improperly included the following documents in her application for judicial review:

a. Affidavit by her sister in Canada, Veerpal Kaur Brar, which contains in paragraphs 5 to 9 statements based on information and belief, and to which are attached affidavits of a headmaster and two un-translated Punjabi documents purporting to be affidavits of the Applicant and her father.

b. Affidavit by the Applicant's lawyer's secretary which contains in paragraphs 3 and 4 statements based on information and belief, and to which are attached documents purporting to be English translations of two of the exhibits to "the" (no date provided) affidavit of Veerpal Kaur Brar.

[22] There are a number of problems with these affidavits. The Punjabi documents exhibited to Ms. Brar's affidavit are not properly accompanied by a translation and an affidavit attesting to the accuracy of the translation. Additionally, the documents are declarations, and not in affidavit form as required by the Rules. More importantly, the affidavits contain information about receiving English tutoring that was not before the Officer. It is a well-established principle that a judicial review of a decision must be based only on the evidence before the decision-maker (*Gallardo v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 45 at para.7; *Samsonov v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1158 at para. 7; and *Asafov v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 713 (F.C.T.D.). I note that these same affidavits were before the Court on the leave application. Since no submissions were made by the Respondents at that stage, the affidavits were not objected to. Fulsome arguments were not made at

the hearing of the application as to whether this could have a bearing on the admissibility of the affidavits on the main application. In the absence of any argument that the well-established principle should not be followed, I find the affidavits, which were not before the Officer at the time he rendered his decision, to be new evidence and consequently not receivable.

B. *The Applicant's Position*

[23] The Applicant makes a general claim that the Officer based his decision on an erroneous finding of fact that he made in a perverse or capricious manner or without regard for the material before him. It is specifically argued that the CAIPS notes suggest that the Officer based his decision to sever the Applicant from her father's application in large part due to her parents' inability to explain why her birth had not been registered in the usual way. She qualifies this decision as perverse because she was only an infant at the time she should have been registered. Although the Officer's decision was not based on the lack of ordinary birth registration, the Applicant contends that it contributed to the decision questioning the authenticity of the university transcripts. Finally, the Applicant claims that the Officer made a perverse finding of fact when he described the Applicant's passing mark of 45 out of 100 as a very high grade.

C. *The Respondent's Position*

[24] The Respondent submits that it was the Applicant's burden to establish that she met the definition of a "dependent child" and thus be qualified to be included in her father's application for permanent residence in Canada as a member of the family class. The Respondent contends that when assessing if an individual falls within the definition of "dependent child", as defined at

section 2(b)(*ii*) of the Regulations, an Officer is required to determine whether the claimant has made a *bona fide* attempt to assimilate the material in the subjects in which the student is enrolled. Accordingly, it is argued that the Officer was required to assess whether the Applicant made a genuine effort, on a continuing basis, to acquire knowledge.

[25] The Respondent rejects the Applicant's claim that the Officer found the Applicant's documents to be forgeries. The Respondent maintains that it is on the basis of all of the evidence that the Officer rendered his negative decision. The Applicant's inconsistent documents, along with her demonstrated inability to read and explain a short sentence, did not satisfy the Officer that the Applicant had been continuously enrolled, in attendance and pursuing an academic training from the time she turned 22 to the date of the application. Finally, the Respondent maintains that the CAIPS notes do not indicate that the Officer made a general finding of lack of credibility against the Applicant.

D. *The Court*

[26] It is settled law that the burden rests with an applicant to satisfy an officer of all of the positive elements of his or her application. This principle has been confirmed in *Philippe v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 317 at para. 9; *Bhandal v. Canada (Minister of Citizenship and Immigration);* 2006 FC 427 at para. 11 and *Mann v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 775 at para. 20.

[27] Section 2 of the Regulations define "dependent child" as follows:

"dependent child" , in respect of a parent, means a child who

(*a*) has one of the following relationships with the parent, namely,

(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or

(ii) is the adopted child of the parent; and

(*b*) is in one of the following situations of dependency, namely,

(i) is less than 22 years of age and not a spouse or common-law partner,

(ii) has depended substantially on the 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

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

«enfant à charge» L'enfant qui :

a) d'une part, par rapport à l'un ou l'autre de ses parents :

(i) soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait,

(ii) soit en est l'enfant adoptif;

b) d'autre part, remplit l'une des conditions suivantes :

(i) il est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait,

(ii) il est un étudiant âgé qui 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 ou est devenu, avant cet âge, un époux ou conjoint de fait et qui, à la fois :

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

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

[28] Paragraph 2(b)(*ii*) of the Regulations requires not only that the person be continuously enrolled and attending a post-secondary institution, but also be actively pursuing a course of training on a full-time basis. The Courts have had occasion to interpret the meaning of this section of the Regulations.

[29] In *Bajwa v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 474 at para.11, Justice O'Reilly wrote:

> The law has now been made clear by virtue of the decision of the Federal Court of Appeal in *Sandhu v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 299, 2002 FCA 79. The Court confirmed that the definition of "dependent son" in the Regulations is drafted so as to further the social value of learning. Accordingly, persons seeking permanent residence may include in their applications those adult children whose commitment to their studies renders them dependent on their parents' support. Therefore, the Regulations require more than proof that the student is registered in the program and is occupying a chair in the lecture hall. He or she must also be making a real effort to learn. As the Court stated, the student must be making a "bona fide attempt to assimilate the material of the subjects in which the student is enrolled" (at para. 19). It is not academic results that count - a student may make a real effort and not succeed. [My emphasis]

[30] The Applicant claims to have been pursuing a course of academic training in English, namely a B.A. The Applicant had produced her university transcripts. The following documents relating to the Applicant's education were before the Officer:

a. High school transcripts provided by the Punjab School Education Board for the years 1997, 1999, 2000, 2001 and 2002; and

b. Punjab University Detailed Marks Cards for:

    i. B.A. Part I, April 2002, September 2002, April 2003 & September 2003;

    ii. B.A. Part II, April 2003; and

    iii. B.A. Part III, April 2006;

c. The Punjab State Board of Technical Education and Industrial Training Detailed Marks Cards for the trade of "Cutting & Tailoring" dated December 2, 2004; and for the trade of "Embroidery and Needle Work" dated December 20, 2005;

d. Statement from the Sant Baba Bhag Singh Memorial Girls College certifying that Ms. Sidhu was a regular student in the M.A.I. (Punjabi) program from December 7, 2006 until November 7, 2006.

[31] In assessing the Applicant, the Officer focused on her claimed English language abilities. The documents submitted did not explain her sudden improvement in her English grade and contained certain inconsistencies. Specifically, the Officer noted that:

a. The Applicant could not have passed B.A. Part II in April 2003, as she had not yet passed First Year English;

b. In April 2003, she passed Second Year English with a score of 45 out of 100 while in the same month, she failed First Year English with a score of 16 out of 100; and

c. The Applicant was required to repeat B.A. Part I in the 2003-2004 academic years and would not have been able to sit for all of her exams until April 2004.

[32] In addition, at the interview, the Officer assessed the Applicant's English skills by asking her to read and explain a sentence in English. The following excerpt from the Officer's CAIPS notes indicate that she was unable to do so:

> Asked her to say anything in English (No response)
> Asked her if "English" subject exam was in English? Yes
> In what form: verbal or written?
> Written. We had to read and give answers
> Asked her to read out loud the following (from her own school certificate)
> "TO WHOM IT MAY CONCERN"
> Subject read: "TO HOW IT MY CONCLEAR"
> Informed her that her reading ability is extremely poor
> Further asked her to tell me the meaning of what she had just read
> Response: (after much hesitation) I can't tell you
> Informed Sandeep that not satisfied she meets the definition of dependent of PI as documentation (especially marks) submitted in support of her claims to be actively pursuing studies does not match with her demonstrated ability to have successfully PASSED in English subject
> Provided Sundeep Kaur with opportunity to comment
> Response: (TOTAL SILENCE)

Based on the result of the oral examination conducted by the Officer and the questionable documents submitted, the Officer was not satisfied that the Applicant has been in continuous schooling since before the age of 22 and found that she did not meet the definition of a dependent child under s. 2(b)(*ii*) of the Regulations.

[33] In determining the *bona fides* of an applicant's claim to status as a dependent, the Federal Court of Appeal in *Sandhu v. Canada*, [2002] 3 F.C. 280 at para. 23 set out a non-exhaustive list of factors that may be considered by a visa officer. These include the student's attendance record, grades obtained, whether the student could discuss what was studied in at least a rudimentary

fashion, whether the student is progressing satisfactorily and whether the student has made a genuine and meaningful attempt to assimilate knowledge. In short, the essential question is whether it can be said the person is a *bone fide* student.

[34] Poor academic performance may be attributable to a lack of *bona fides*, but may also be attributable to a number of factors including intellectual failing, difficult personal circumstances and cultural or language difficulties (*Lee v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1012 at para. 33). The particular circumstances of a case may require the visa officer to conduct a more probing inquiry.

[35] In the instant case, it was open to the Officer to question the authenticity of the Applicant's university transcripts. Although it may be debatable whether the Officer's finding that a score of 45 out of 100 is a high mark, such a finding must be considered in context. The record shows that a passing mark in the circumstances is 35. Further, the record also establishes that the Applicant's mark of 45 was a significant improvement over her previous grades. In any event, this finding by the Officer is not determinative. Based on the documentary evidence before him, the Officer was entitled to ask questions and seek clarification regarding the Applicant's English grades. The Applicant's failure to provide satisfactory answers led to a rudimentary English assessment which revealed poor English skills. The Officer's findings were reasonably open to him on the record he had before him.

[36] A review of the CAIPS notes of the Officer also establishes that the Officer expressed his concerns to the Applicant and to her parents and afforded them the opportunity to address these concerns. They failed to do so. In my view, the Officer did not breach the principles of procedural fairness or fundamental justice in the conduct of the interview or in his assessment of the Applicant as a dependent child.

[37] For the above reasons the Application for judicial review will be dismissed.

[38] The parties have had the opportunity to raise a serious question of general importance as contemplated by paragraph 74(*d*) of the Act and have not done so. I am satisfied that no serious question of general importance arises on this record. I do not propose to certify a question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The judicial review of the decision of the Officer is dismissed.

2. No question is certified.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1665-07
STYLE OF CAUSE:	SANDEEP KAUR SIDHU V. MCI
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	February 19, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	BLANCHARD J.
DATED:	February 27, 2008

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