Federal Court  Cour fédérale

Date: 20130618

Docket: IMM-6964-12

Citation: 2013 FC 679

Ottawa, Ontario, June 18, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SIVAGOWRY SITHAMPARANATHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of a Visa Officer (Officer) of the Canadian High Commission, Colombo, Sri Lanka, dated 16 February 2012 and reconsidered 28 June 2012 (Decision), which found that the Applicant does not meet the definition of a dependant child as described in section 2(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-27 (Regulations).

BACKGROUND

[2] The Applicant is a citizen of Sri Lanka who was born on 21 February 1982. In 2011, the Applicant's mother submitted an application for permanent residence in Canada which included the Applicant as a dependent child. While the Applicant was over the age of 22 years at the time of the application, her mother stated in her application that the Applicant was enrolled as a full-time student at the Faculty of Medicine, University of Jaffna, since the age of 21.

[3] By letter dated 6 December 2011, the Officer notified the Applicant that she did not fall into the definition of a dependent child as stated in section 2 of the Regulations. By letter dated 24 December 2011, the Applicant's mother submitted a letter to the Officer stating that the Applicant had been enrolled as a full time student since 29 December 2003.

[4] On 16 February 2012, the Officer informed the Applicant by way of letter that she was found not to meet the definition of a dependent child. On 23 March 2012, the Applicant's counsel submitted further supporting documentation. This included the Applicant's student card and a letter confirming the Applicant's enrolment from 29 December 2003 until 9 December 2010 in the Faculty of Medicine, University of Jaffna. Another letter certified that the Applicant's final examination for her degree was held in December, 2010.

[5] The Officer considered the Applicant's submissions and communicated by way of email dated 28 June 2012 that she would remain excluded from her mother's application.

DECISION UNDER REVIEW

[6] According to the Applicant, the Decision under review in this application consists of the Exclusion Letter dated 16 February 2012 and the Officer's Global Case Management Systems (GCMS) Notes. There is also the Officer's email dated 28 June 2012, which informed the Applicant that her request for reconsideration had been refused.

[7] By entry into the Notes on 2 December 2011, the Officer stated that the Applicant had provided a letter from the University of Jaffna indicating that she was a final year medical student in 2010, but nothing to show that she was still enrolled. The Officer was not satisfied that the Applicant met the definition of "dependent" for continuous enrolment at a recognized educational institution and indicated that a letter should be drafted giving the Applicant 30 days to respond to these concerns. The Notes indicate that a letter was sent to the Applicant in this regard on 6 December 2011.

[8] The Notes indicated that further documentation was received on 10 January 2012. Again the Officer noted that there was nothing to indicate the Applicant was a student beyond December, 2010. In the Notes dated 7 February 2012, the Officer said that the Applicant has "submitted evidence of Clinical Clerkships but these have no dates past 2008 and appear to be internships." The Officer noted that the Applicant submitted a letter from the University of Jaffna indicating that "she was a final year medical student in 2010 but nothing to show that she is still enrolled." The Officer was not satisfied the Applicant met the definition of "dependent."

[9] The Exclusion Letter was sent on 16 February 2012. On 3 April 2012, the Notes indicated that a letter was received from the Applicant's consultant on 22 March 2012. The Officer reviewed

the Applicant's materials again, and found that the Applicant's student record ended in December, 2010. As such, the Applicant did not fall into the category of dependent child. The Officer further noted that there were not enough humanitarian and compassionate factors to overcome the Applicant' ineligibility. The Officer concluded that there was no requirement to respond to the Applicant's representative, and that the original exclusion stood.

[10] The Officer notified the Applicant that her reconsideration request was denied on 28 June 2012.

ISSUES

[11] The Applicant raises the following issue in this application:

a. Whether the Officer breached the rules of natural justice and procedural fairness by failing to consider and respond to the Applicant's submissions of 23 March 2012 regarding her status as a dependent child within her mother's permanent residence application.

STANDARD OF REVIEW

[12] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[13] The Applicant raises an issue of procedural fairness. As stated by the Supreme Court of Canada in *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, [2003] 1 SCR 539 at paragraph 100, "it is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Accordingly, the standard of review applicable is correctness.

[14] The Respondent submits that it is the reconsideration decision that is under review in this application, and that reconsideration is an exercise in discretion that is reviewable on a standard of reasonableness (*Rashed v Canada (Minister of Citizenship and Immigration)*, 2013 FC 175).

[15] In her arguments, the Applicant also takes issue with the adequacy of the Officer's reasons. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*], the Supreme Court of Canada held at paragraph 14 that the adequacy of reasons is not a stand-alone basis for quashing a decision. Rather, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." Thus, any issue that may arise as to the adequacy of reasons will be considered in a context of the reasonableness of the Decision.

[16] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that

it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISONS

[17] The following provisions of the Regulations are applicable in this proceeding:

Interpretation	**Définitions**
2. The definitions in this section apply in these Regulations.	**2.** Les définitions qui suivent s'appliquent au présent règlement.
[…]	[…]
"dependent child", in respect of a parent, means a child who	« enfant à charge » L'enfant qui :
(a) has one of the following relationships with the parent, namely,	a) d'une part, par rapport à l'un ou l'autre de ses parents :
(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	(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) is the adopted child of the parent; and	(ii) soit en est l'enfant adoptif;
(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 financial	(ii) il est un étudiant âgé qui n'a pas cessé de dépendre,

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.

(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.

[…]

[…]

Requirements

Exigences

121. The requirements with respect to a person who is a member of the family class or

121. Les exigences applicables à l'égard de la personne appartenant à la catégorie du

a family member of a member of the family class who makes an application under Division 6 of Part 5 are the following:	regroupement familial ou des membres de sa famille qui présentent une demande au titre de la section 6 de la partie 5 sont les suivantes :
(a) the person is a family member of the applicant or of the sponsor both at the time the application is made and, without taking into account whether the person has attained 22 years of age, at the time of the determination of the application;	a) l'intéressé doit être un membre de la famille du demandeur ou du répondant au moment où la demande est faite et, qu'il ait atteint l'âge de vingt-deux ans ou non, au moment où il est statué sur la demande.
[…]	[…]

ARGUMENTS

The Applicant

[18] The Applicant points out that her mother responded to the concerns of the Officer by sending in additional submissions on 24 December 2011. The Officer's entry in the Notes on 10 January 2012 indicates that the Applicant's mother did provide further documentation, but there is no indication that the Officer responded to these submissions. The entry from 7 February 2012 simply states that the Officer remains "unsatisfied" with the evidence.

[19] The Applicant says that the Officer raises many questions in the entry of 7 February 2012 to do with the Applicant's schooling and dates of study, but the Applicant was never confronted with these questions. Had she been, she would have been able to provide an explanation. The Applicant provided information that her Clinical Clerkships were part of her Faculty of Medicine curriculum, but the Officer simply states that they "appear to be internships." The Applicant submits that this

was sheer speculation, and the Officer did not confront her with these concerns as was required in *Liao v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1926.

[20] Further, on 23 March 2012 the Applicant's lawyer in Toronto prepared further supporting documentation to be sent to Colombo, receipt of which was confirmed. The Notes simply state that an email was received from the Applicant's consultant on 3 April 2012, which is incorrect as there was no email from the Applicant's solicitor sent in April, 2012. There was only the letter and submissions sent on 23 March 2012, and an email sent on 12 June 2012 requesting a response to the 23 March 2012 submissions.

[21] The Applicant submits that the Officer essentially failed to communicate with the Applicant's mother or her solicitor in regards to the December, 2011 and March, 2012 submissions. The duty of fairness requires officers to inform applicants of their concerns so that an applicant may have a chance to "disabuse" an officer of such concerns (*Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284; *Gedeon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1245). Where the issue of a foreign national's admissibility to Canada is at stake, as well as the separation of a family, the applicant ought to be given a full and fair opportunity to respond (*Ma v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1042 at paragraph 13; *Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49).

[22] CIC's Operational Manual ENF2/OP18, *Evaluating Inadmissibility*, deals with how visa officers should handle cases when admissibility issues arise. In regards to procedural fairness, this document says that applicants should be able to provide a response to concerns, have their evidence

fully and fairly considered, be able to receive and comment on any relevant documentation, and be advised of issues and allowed to respond. The Applicant submits that the Officer did not follow these guidelines.

[23] The Applicant also submits that there is no actual analysis or consideration of her submissions. For example, the Officer does not consider the letter from T. Thusyanthan stating that the Applicant was enrolled full-time at the University of Jaffna. The Officer simply remains "unsatisfied" as to the Applicant's status, but provides no insight into why this is the case. If the reasons for a decision are not sufficient to allow an applicant to understand the basis on which it was decided, the decision is unreasonable (*Nintawat v Canada (Minister of Citizenship and Immigration)*, 2012 FC 66 at paragraph 27). Although a visa officer is under a lesser duty to provide detailed reasons, there is still a duty to provide actual "reasons" and indicate the evidentiary basis for his or her ultimate determination and critical findings (*Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 at paragraph 16).

[24] The Applicant points out that the Officer did not even bother to record the Applicant's submissions of 23 March 2012, did not respond to them, and did not notify her counsel that a decision had been made months earlier. As in the case of *Wong v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1791, the Officer did not inform the Applicant of what factors were considered relevant and this constitutes a breach of natural justice.

The Respondent

[25] The Respondent points out that in her Notice of Application, the Applicant sought leave to review the decision of 28 June 2012, that is, the Officer's reconsideration decision. A

reconsideration decision is distinct from an Officer's original refusal (*Medina v Canada (Minister of Citizenship and Immigration)*, 2010 FC 504.

[26] The Federal Court of Appeal has made clear that when a reconsideration decision is being challenged it is not open to the Court to look behind that decision to judicially review the original decision (*Remstar Corp. v Syndicat des employé-es de TQS Inc.*, 2011 FCA 183 at paragraph 3). As was said by the Court of Appeal in paragraph 3 of *Williams v Teamsters, Local Union 938*, 2005 FCA 302:

> For whatever reason, Mr. Williams did not seek judicial review of the Initial decision and the time limit for judicial review of that decision expired in May, 2004. Accordingly, following earlier decisions, this Court is not, during judicial review of a reconsideration decision, to review an initial decision of the Board. (See *Lamoureux v. Canadian Air Line Pilots Association*, [1993] F.C.J. No. 1128 (C.A.); *Sim v. Canada*, [1997] F.C.J. No. 1382 (C.A.)).

[27] The Respondent submits that the Applicant only sought leave with respect to the reconsideration decision dated 28 June 2012, and so she should not now be allowed to challenge the original decision.

[28] The Respondent further submits that the Applicant's claim that the Officer failed to respond to her March, 2012 request is without merit. As evidenced by the email response of 28 June 2012 (Certified Tribunal Record, page 25), the Applicant was informed that the decision from February, 2012 would not be changed. The receipt of the response is also evidenced by the fact that the Applicant did not bring an application for *mandamus*, and her Notice of Application states the date the decision was rendered as being 28 June 2012.

[29] The reconsideration request was considered on 11 April 2012, and the Applicant was notified of the result on 28 June 2012. There was no prejudice to the Applicant in not being notified as soon as the decision was made. The Applicant's argument that the decision was lacking in analysis is without merit; it is established that the Officer's GCMS Notes form part of the Decision (*Pinto v Canada (Minister of Citizenship and Immigration)*, 2013 FC 349 at paragraph 3).

[30] The Respondent points out that unlike the age of a dependent child, educational status is not "locked in" as of the date of the application for permanent residence. The Applicant is required to show that she is an eligible member of the family class as of the date of the application and the time of determination of the application (*Hamid v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 217). There was no evidence before the Officer that the Applicant was enrolled in full-time academic training past December, 2010.

[31] In response to the letter sent to the Applicant's mother in December, 2011, she provided the Officer with a sworn letter stating that the Applicant was enrolled in the Faculty of Medicine on 20 December 2003 and that the Applicant is financially dependent on her mother. This letter does not say that the Applicant was enrolled in academic training on a full-time basis at the time the application was assessed. The letter from the University of Jaffna says that the Applicant was a student from January, 2004 until December, 2010. The Respondent submits that it is reasonable to expect that if the Applicant was still enrolled, the letter would have said so. The other documents provided by the Applicant also do not confirm that she was pursuing her studies after December, 2010.

[32] Based on the evidence presented, the Officer reasonably concluded that the Applicant had not been attending a post-secondary institution after December, 2010. For that reason she did not

meet the definition of a dependent child. The Respondent submits that there is no merit to the Applicant's allegations that the Officer breached procedural fairness.

[33] The onus was on the Applicant to put forward all the necessary information and supporting documentation. As the Court said at paragraph 6 of *Madan v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1198:

> It is well established that it is the responsibility of a visa applicant to put before the officer all the material necessary for a favourable decision to be made. Hence, visa officers are under no general legal duty to ask for clarification or for additional information before rejecting a visa application on the ground that the material submitted was insufficient to satisfy the officer that the applicant had met the relevant selection criteria.

See also *Prasad v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 453 at paragraph 7.

[34] There was no duty on the Officer to advise the Applicant that her documentation was unsatisfactory or provide her with an opportunity to address any concerns the Officer had (*Bharaj v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1462; *Asghar v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1091 at paragraph 21). The Applicant had the obligation to produce relevant documentation for the Officer. There is no obligation on a visa officer to seek additional evidence or conduct an interview when sufficient supporting material has not been included (*Silva v Canada (Minister of Citizenship and Immigration)*, 2007 FC 733 at paragraph 20). The onus does not shift to the Officer and there is no entitlement to a personal interview (*Pan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 838 at paragraphs 27-28).

[35] Furthermore, the Respondent submits that the issue of family reunification was reasonably assessed by the Officer. The Officer considered that the Applicant has family remaining in Sri Lanka, as well as in Canada, France and Australia.

ANALYSIS

[36] It is clear from the record that the Visa Post was concerned about the dependent child issue and prepared a procedural fairness letter on this issue dated 6 December 2011. The Applicant's mother responded to the fairness letter on 16 December 2011. The GCMS entry for 4 January 2012 indicates this letter was received for review by the Visa Post.

[37] The GCMS entry for 10 January 2012 reveals that the Applicant and her mother made further submissions. However, none of the documents and submissions from the Applicant and her mother established that the Applicant was enrolled in and attending a post-secondary institution. When the documents were reviewed on 7 February 2012, the GCMS entry shows that the visa post was still unsatisfied with the evidence submitted to establish that the Applicant was a dependent within the meaning of the Regulations. A review of that evidence clearly indicates why.

[38] The Applicant's mother was informed of the negative Decision in a letter dated 16 February 2012. In a letter dated 23 March 2012, counsel for the Applicant made further submissions. It is difficult to know how to categorize this letter. It says that the negative decision of 16 February 2011 was wrong, but no application was made to review the decision. Read as a whole, the letter of 23 March 2012 appears to be a request for reconsideration.

[39] The Decision under review is the refusal of the request for reconsideration dated 28 June 2012. This Decision was communicated by e-mail to the Applicant's counsel in response to his e-mail of 12 June 2012, requesting a response to counsel's submissions of 23 March 2012:

> Please be advised the decision communicated to the applicant with regard to her excluded daughter by letter in February 2012 stands.

[40] The accompanying GCMS notes indicate that the Officer considered the reconsideration request and conducted a transparent and intelligible analysis to determine whether the Applicant was a dependent at the material time. As the Respondent points out, education status is not "locked in" as of the date of the application and the Applicant has taken no issue with the Officer's decision to assess her educational status at the time of the determination itself. See *Hamid,* above, at paragraphs 55-60.

[41] It is clear from the record why the request for reconsideration was refused: none of the materials submitted by counsel on 23 March 2012 established that the Applicant was a dependent at the material time, or overcame the same difficulty found in the earlier submissions. As the GCMS notes reveal, the difficulty was that the evidence indicated that the Applicant was a student at the University of Jaffna from January 2004 until December 2010. Her university record ends in December 2010, and there was no evidence to indicate that the Applicant was continuing as a student, as per the Regulations, or that she was still enrolled in 2011. So the Officer was not satisfied that the Applicant met the definition of a "dependent" for continuous enrollment at a recognized educational institution so as to qualify as a dependent on her mother's application.

[42] The Applicant has raised various grounds for review, but none of them stand up to scrutiny. Given the evidence before the Officer, the decision not to change the initial decision is not

unreasonable. In addition, there was no procedural unfairness. The onus is upon the Applicant to provide the evidence required to establish dependency. See *Pan v Canada (Minister of citizenship and immigration)*, 2010 FC 838 at paragraphs 27-28.

[43] It is also clear from the GCMS Notes that the Officer considered the H&C factor of family reunification, but found that this factor did not overcome the Applicant's ineligibility because she had two siblings residing in Sri Lanka, as well as one in France and another in Australia. The Applicant complains that she had no opportunity to address these matters, but she could have done so in counsel's reconsideration request of 23 March 2012 and she has placed nothing before me to suggest that the Officer's assessment of the situation was inaccurate or inappropriate in any way. The Applicant submitted the same evidence for reconsideration that was submitted for the initial decision, so it is hardly likely that the request for reconsideration would succeed without providing any specifics for consideration on H&C grounds.

[44] Counsel agree there are no questions for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-6964-12
STYLE OF CAUSE:	**SIVAGOWRY SITHAMPARANATHAN**
	- and -
	MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 29, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	June 18, 2013

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