Federal Court Cour fédérale

Date: 20131107

Docket: IMM-1690-13

Citation: 2013 FC 1135

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, November 7, 2013

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

LINA MALHA RAHAL
and
HANANE ANISSA RAHAL

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent.

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Lina Malha Rahal (Lina Rahal) and Hanane Anissa Rahal (Hanane Rahal) (collectively "the applicants") are submitting this application for judicial review of the decision by a visa officer at the Canadian Embassy in Paris, France, rendered on January 4, 2013, excluding them as dependent

children in their parents' permanent residence application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The court dismisses the application for judicial review submitted by the applicants for the following reasons:

II. The facts

[3] The applicants were included in their parents' permanent residence application as dependent children. They state that they were continuous full-time students since they turned 22. Applicant Lina turned 22 on June 2, 2000, and applicant Hanane turned 22 on October 17, 2003.

[4] The visa officer excluded the applicants from their parents' permanent resident application after finding that they did not meet the definition of "dependent child" under section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

III. Legislation

[5] Section 2 of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 [IRPR] states the following:

. . .	[…]
“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,

(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

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

that is accredited by the relevant government authority, and	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.
. . .	[…]

IV. Issues and standard of review

A. Issues

[6] This application for judicial review raises the following two questions:

- ***Did the visa officer err by finding that the applicants were not dependent children within the meaning of section 2 of the IRPR?***

- ***Did the visa officer breach procedural fairness by failing to give adequate reasons for his decision and failing to provide the applicants with the opportunity to respond to his concerns?***

B. Standard of Review

[7] The applicable standard of review for the first question is that of reasonableness (see *Nawfal v Canada (Minister of Citizenship and Immigration)*, 2011 FC 464 at paras 13-15 and *Miao v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1288 at para 12 [*Miao*]). The applicable standard of review for the question of the adequacy of reasons is reasonableness (see *Sithamparanathan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 679 at para 15). Lastly, the applicable standard of review for the issue of whether the visa officer should have given Lina and Hanane Rahal the opportunity to respond to his concerns is a question of procedural fairness and the is reviewable on the standard of correctness (*Miao, supra,* at para 13).

V. Analysis

- ***Did the visa officer err by finding that the applicants were not dependent children within the meaning of section 2 of the IRPR?***

[8] In light of the reasonableness review, the Court must determine whether the officer's decision to exclude the applicants from their parents' permanent residence application, finding that they were not dependent children, falls within the "range of possible, acceptable outcomes which

are defensible in respect of the facts and the law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[9] In a letter dated January 4, 2013, the officer notified Lina and Hanane Rahal's parents that their children would be excluded from their application for permanent residence since they did not meet the definition of "dependent child". According to the notes in the Computer Assisted Immigration Processing System [CAIPS], the officer found that the evidence submitted was insufficient to show that the applicants continuously pursued their studies after they turned 22.

[10] On January 22, 2013, through their counsel, the applicants wrote to the visa officer asking him to reconsider his January 4, 2013, decision. They also returned academic transcripts that they claim had been sent on November 30, 2012. According to the note in the CAIPS, the documents were the same ones the officer had analyzed before making his decision.

[11] On March 8, 2013, a CAIPS note indicates that new documents were received but the decision to exclude the applicants was maintained, because they had not been full-time students since they turned 22. This note certifies that the new documents did not change the officer's finding that the evidence submitted was insufficient to prove that the applicants had continued their studies on a continuous full-time basis after they turned 22.

[12] That same day, an email was sent to the applicants' parents to explain that their children did not meet the definition of dependent children and the evidence submitted in support of their application was insufficient. The email stated:

> [TRANSLATION]
> Dear Sir, Madam, you included Lina and Hanane as dependent children in your permanent residence application. In accordance with section 2 of the Immigration and Refugee Protection Regulations, a dependent child is a child who...
> The documents submitted on February 7, 2013, do not allow for the finding that Lina and Hanane were continuous full-time students after they turned 22.

[13] The applicants claim that the documents produced establish that they were continuous full-time students after they turned 22.

[14] The respondent objects to the production of Exhibits A-12 and A-17 on the ground that they were produced after the visa officer's decision, even though they could have been obtained before. The respondent relies on *Sidhu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 260 at para 22 in support of his claim that these documents are inadmissible and cannot be used to support their application for judicial review.

[15] The documents in question are emails the applicants sent to their university asking whether it is possible to be registered as part-time students in their respective faculties. These emails were sent after the application for judicial review was submitted on March 4, 2013. They were not before the decision maker and therefore are inadmissible under the *Federal Courts Rules*, SOR/98-106.

Applicant Lina Rahal

[16] Many certificates were produced by the applicant Lina Rahal in support of her claim that she was a continuous full-time student after she turned 22. A first certificate indicated that Lina was

registered in medicine and surgery classes during the 2000-2009 academic years (page 25 of the applicants' record). However, this certificate alone does not establish that Lina Rahal was "actively pursuing" courses during each of those years "on a full-time basis" pursuant to section 2 of the IRPR. Moreover, upon reading her academic transcripts for this period (pages 35 to 37 of the applicants' record), no grades appear to have been attributed to her in 2003, 2004 or 2007.

[17] Moreover, the Court finds that during certain years, Lina Rahal was registered in 9 courses (as in 2006) whereas in 2005 she was only taking 3 courses. Because of this, it is uncertain whether her studies were "active" and "full time".

[18] There also seem to be issues in 2012 because Lina Rahal was only registered for one course during this year.

[19] The applicants note that courses taken but failed do not appear in the certificates or academic transcripts. However, they have the burden of proving they met the criteria at section 2 of the IRPR (see *Pan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 838 at paras 27 and 28 [*Pan*] and *Dehar v Canada (Minister of Citizenship and Immigration)*, 2007 FC 558 at para 30). The evidence submitted by Lina Rahal does not clearly establish her status as a full-time student during each of the years, namely 2003, 2004, 2007 and more particularly 2012.

[20] The evidence produced by the applicant Lina are not sufficient to show that she indeed studied actively and full time from 2001 to 2012. It is therefore not unreasonable for the officer to

find that she did not submit sufficient evidence to establish that she met the definition of "dependent child" under the IRPR.

Applicant Hanane Rahal

[21] Many certificates were produced by the applicant Hanane Rahal in support of her claim that she was a full-time continuous student after she turned 22. A first certificate indicates she was registered from 2000 to 2004 (see page 70 of the applicants' file). This certificate also indicates that from 2004 to 2005, the registration could not be completed because the student did not present a copy of her residency permit.

[22] A second certificate was produced indicating that the applicant Hanane was registered from 2006 to 2010 (see page 72 of the applicants' file). According to her first academic transcript she passed one course in 2001 and 2 in 2002 (see page 84 of the applicants' file). Her second academic transcript indicates courses taken in 2007, 2008, 2010 and 2011, but does not indicate any courses in 2009 (page 86 of the applicants' file).

[23] The academic transcripts of applicant Hanane Rahal do not clearly establish her status as a full-time student during 2003, 2004, 2005, 2006 and 2009. There are no grades attributed to her for these years. Moreover, her registration for 2004 to 2005 was not completed because there was no residency permit.

[24] The totality of the evidence before the officer was therefore insufficient to find that the applicant Hanane was studying actively on a full-time continuous basis during the period of 2003 to 2012. It is therefore not unreasonable for the office to have found that she did not meet the definition of dependent child under the IRPR.

[25] The applicants did not submit any evidence to establish that the officer assessed their situation incorrectly or inappropriately. They claim that their certificates and academic transcripts confirm their full-time continuous studies, whereas the documents have no entries for certain years. Considering the gaps in the evidence submitted by the applicants, the Court must find that the officer did not err and his finding that they did not meet the definition of "dependent child" under the IRPR seems reasonable to us.

- ***Did the visa officer breach procedural fairness by failing to give adequate reasons for his decision and failing to provide the applicants with the opportunity to respond to his concerns?***

Adequacy of reasons

[26] The applicants allege that the officer did not provide adequate explanations to justify the refusal and he neglected or refused to answer their requests for explanations. They claim that [TRANSLATION]: "even after a joint reading of the refusal letter and the CAIPS notes, we are unable to determine which evidence the visa officer considered nor could we determine which burden of proof he applied."

[27] They also claim they sent a new document that was allegedly received on March 8, 2013, but they do not know whether the officer considered it because the CAIPS note only indicates that the officer maintains the decision to exclude them because the documents do not allow for them to be considered full-time students after they turned 22.

[28] The respondent claims that the visa officer's decision is adequately justified and the obligation for fairness is minimal in visa matters. He claims that the reasons in the January 4, 2013, letter, completed by CAIPS notes, explain why the applicants do not meet the definition of "dependent child". Indeed, these notes indicate that the evidence was insufficient to determine they were full-time students after they turned 22.

[29] The Court must restate that the burden of establishing full-time student status is on the applicants. They had to produce all the evidence required to do this. It was therefore their responsibility to bring probative evidence for each year of study. Their academic transcripts do not cover each of the years in question in order to meet the definition of "dependent child" under the IRPR.

[30] In his reasons, the officer claims that the evidence submitted does not establish their status as full-time continuous students. They essentially sent the same incomplete documents while noting that their university does not mention failed courses in the academic transcripts. In these circumstances, the officer's decision is within the range of possible outcomes. The Supreme Court of Canada teaches us, at paragraph 18 of *Newfoundland and Labrador Nurses' Union v*

Newfoundland and Labrador, 2011 SCC 62, that the reviewing court must ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision." This is true in the present case.

Opportunity to respond to officer's concerns

[31] The applicants claim that the officer did not give them the opportunity to respond to his concerns. They note that if he had doubts, he was obligated to provide them the opportunity to address his concerns and answer his questions. The applicants claim that in such circumstances, the officer should have met with them in an interview. The case law has clearly addressed the issue of whether a visa applicant may rely on the right to have an interview in similar circumstances:

> ... there is no entitlement to a personal interview if the application is ambiguous or supporting material is not included (*Silva v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 733, at paragraph 20) (see *Pan supra* at para 27).

[32] The applicants also claim that the officer did not tell them what documents to submit.

[33] The respondent refutes these claims, stating that procedural fairness does not create such an obligation (*Zeeshan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 248 at para 46 and *Kamchibekov v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1411 at para 26). The Court notes, however, that the officer wrote to express his reservations and specify that he was looking for original complete transcripts and not mere attestations of studies, and indicated the relevant years (see officer's November 2, 2012, letter).

[34] This Court agrees with the respondent's position. The CAIPS notes show that the applicants had the opportunity to submit additional evidence after the officer informed them of the deficiencies in the file.

[35] *Pan*, *supra*, reminds us that it is not the officer's responsibility to clarify a deficient application (see para 28). In this case, the applicants failed to meet their obligation and submit a complete, convincing application that is <u>unambiguous</u> (*Obeta v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1542 at paras 25-26).

[36] For these reasons, the applicants' application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and

2. There is no question of general interest to certify.

"André F.J. Scott"

Judge

Certified true translation
Elizabeth Tan, translator

FEDERAL COURT

SOLICITORS OF RECORD

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