Federal Court  Cour fédérale

Date: 20160426

Docket: IMM-4567-15

Citation: 2016 FC 470

Ottawa, Ontario, April 26, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

NANA OHEMAA PINAMANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is a judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of a decision by the Immigration Appeal Division [the IAD] confirming a decision by a visa officer [the Officer] to refuse a permanent residence visa to the Applicant's daughter, Priscilla Abigail Kotey. The Officer found that Ms. Kotey was not a member of the family class for failure to meet the definition of a "dependent child" under

Section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations].

[2] The Applicant is a permanent resident of Canada. In 2000, she applied to sponsor her three children for permanent residence. Two of those applications were successful, but on May 11, 2005, the application for Ms. Kotey was refused.

[3] An appeal of that decision was allowed on June 21, 2006. On January 13, 2009, however, the application to sponsor Ms. Kotey was rejected again, for reasons that are not material to this judicial review. What is material is that the Applicant alleges that she was not informed of this rejection and only learned of it in 2011.

[4] The Applicant then re-applied to sponsor Ms. Kotey on November 18, 2011. At this point, Ms. Kotey, who was born on February 16, 1986, was 25 years old. She had attended school from 1992-1994, from 1995-2001, and then began secretarial school in 2012 during the processing of the application. When asked for more information, Ms. Kotey stated that, from 2001-2012, she was not in school as she was caring for her child. A birth certificate was provided disclosing that her daughter, Princess Emmanuela Pinamang, was born on February 14, 2003.

[5] On February 6, 2014, the Officer rejected the application because Ms. Kotey did not meet the definition of a "dependent child" as she had not been continuously enrolled in a post-secondary education since turning 22. The Applicant appealed the decision to the IAD shortly thereafter.

[6] The IAD agreed that the Applicant's daughter did not meet the definition of a "dependent child" under the Regulations. The IAD first noted that Ms. Kotey was not a full-time student between the 2001/2002 and 2010/2011 school years. The IAD then turned to the definition of "dependent child" in the Regulations that was in force the time of the 2014 rejection:

> 2. The definitions in this section apply in these regulations.
>
> …
>
> "dependent child", in respect of a parent, means a child who
>
> …
>
> > (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
> > >
> > > (B) actively pursuing a course of academic, professional or vocational training on a full-time basis, or

[7] The IAD observed that the Applicant's daughter was born on February 16, 1986 and so turned 22 on February 16, 2008. As a result, she had to demonstrate that she had been continuously enrolled in school since 2008. Since the Applicant's counsel had admitted that Ms. Kotey was not a full-time student between 2001 and 2011, and the Applicant's daughter's submissions confirmed this fact, there was no way to conclude that she was continuously enrolled from 2008 to 2011 in full-time studies. As a result, the IAD dismissed the appeal.

II. Analysis

[8] The standard of review applicable to the IAD's determination of whether an individual belongs to the family class is reasonableness (*Fang v Canada (Citizenship and Immigration)*, 2014 FC 733 at para 18). In a reasonableness review, this Court must take a deferential approach and resist imposing its own analysis. So long as the decision is an acceptable and rational solution that is justifiable, transparent and intelligible, it should not be disturbed (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[9] The Applicant argues Ms. Kotey was on maternity leave from 2001-2011 and that the IAD erred in concluding that she was not a full-time student throughout that period. The Applicant submits that in reaching this conclusion, the IAD unreasonably failed to apply a "flexible approach" to the concept of continuous enrollment. The Applicant relied on various IAD cases to reach this conclusion, which are not binding on this Court, but did also reference two Federal Court authorities, namely *Dimonekene v Canada (Citizenship and Immigration)*, 2007 FC 675, rev'd *Canada (Citizenship and Immigration) v Dimonekene*, 2008 FCA 102 and *Singh Gill v Canada (Citizenship and Immigration)*, 2008 FC 365.

[10] In short, the Applicant argues that it was unreasonable to conclude she fell outside of the Regulations' definition when the record shows she had attended school, left for maternity leave, and returned to school: clearly, she had intended to continue her education.

[11] Furthermore, the Applicant argues that she could not have remained continuously enrolled under the strict definition of the IAD since, under Ghanaian law, a parent that deprives

their child of welfare is punishable on summary conviction. In other words, she had no choice but to go on leave. To approach "continuous enrollment" otherwise would be to adopt an inflexible approach, inconsistent with the jurisprudence.

[12] I cannot agree with the Applicant's submissions on these points. On the contrary, I find the IAD's interpretation of the law and jurisprudence both sensible and entirely reasonable. First, the Applicant could not point to any jurisprudence in which an individual was found to be continuously enrolled over a period time anywhere near as lengthy as the gap present in this case.

[13] Second, the "maternity leave" argument does not explain the fact that she left school in 2001, but her child was only born in 2003. No sufficient or credible explanation for this gap was provided. In other words, even if one were to view the period from 2003 to 2011 as maternity leave, for which I see no basis in law, this still leaves the time before the birth of her child unaccounted for.

[14] Finally, the decade-long gap in academic enrollment cannot place the Applicant within the exception created by the definition of "dependent child" because it cannot be said that since before the age of 22 she has been a student "actively pursuing a course of academic, professional or vocational training on a full-time basis".

[15] The Applicant submitted that her daughter's poverty-stricken circumstances should serve as an explanation for the lengthy interruption in schooling. However, compelling these and similar humanitarian and compassionate [H&C] submissions are, the IAD nonetheless

reasonably held that, as per Section 65 of the Act, it had no jurisdiction to consider H&C factors given that the Applicant did not meet the definition of a member of the family class:

> 65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

[16] Finally, the Applicant also argued that she never received notice of the 2009 rejection (of the first sponsorship application), resulting in a breach of natural justice, and that the failure of the IAD to address this breach was an error, reviewable on a correctness standard.

[17] The Respondent rightly notes, however, that the IAD decision at issue here was an appeal of the 2014 decision and *not* the 2009 decision. As such, the IAD can only properly consider objections to the later decision.

III. Conclusion

[18] While Applicant's counsel provided able representation and did his utmost to put his client's best foot forward at this late stage, there is no basis upon which to find fault with the IAD's decision. It was a reasonable interpretation and application of the law on dependency to the facts at hand.

IV. Judgment

[19] The application for judicial review is dismissed. There are no questions for certification or costs awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. There are no questions for certification or costs awarded.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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