Date: 20090203

Docket: IMM-3675-08

Citation: 2009 FC 114

Vancouver, British Columbia, February 3, 2009

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

SHOU MIN YAO and JUN YAO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants, Shou Min Yao and his son Jun Yao, seek judicial review of the decision of a visa officer to exclude Jun Yao from his father's application for permanent residence on the basis that Jun Yao does not meet the definition of "dependent child," found at section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). The applicants allege that the visa officer misinterpreted the regulations and breached the duty of fairness owed to them.

[2] For the following reasons, the Court agrees that this decision should be set aside.

Background

[3] In January 2006, Shou Min Yao applied to the Government of Quebec for selection as a permanent resident under an investor program. On May 2, 2007, the Government of Quebec issued a Selection Certificate under the A9 investor category for three persons; Shou Min Yao, his wife Hiumin Liu and his son, Jun Yao. Shortly thereafter, they filed their application for permanent residence under the economic class with the Canadian Consulate General in Hong Kong.

[4] Jun Yao, following the completion of his senior high school and a certificate in computer information management in Qingdao, China, has been studying in Canada on a student visa since March 2002. In December 2003, he turned 22. At that time, he was enrolled and studying at the Language College of the Immigrant Services Society of British Columbia (ISS), an institution registered with, and accredited by, the Private Career Training Institutions Agency of British Columbia (PCTIA) in the "Learn English Now: Advanced Level 2" program and "Level 8" of the "TOEFL Preparation" program.

[5] These programs were completed on April 15, 2004. In the fall of 2004, Jun Yao started the Arts and Science Program at Langara College, where he studied until August 2007, obtaining a total of 67 credits in the process.

[6] In a letter dated June 13, 2008, the visa officer informed Shou Min Yao that Jun Yao was not eligible for inclusion in his application as a "dependent child" on the following grounds: i) ISS is not a post-secondary institution and the courses in which Jun Yao was enrolled for the period

from December 24, 2003 to April 15, 2004 do not constitute “a course of academic, professional or vocational training” within the meaning of s. 2 of the Regulations; ii) for the period from April 16, 2004 to at least August 31, 2004, Jun Yao was not enrolled and studying in any educational institution; and, iii) in the fall semester of 2006, Jun Yao completed only one four-credit course at Langara College and therefore was not pursuing a course on a full-time basis as defined in subsection 78(1) of the Regulations or by Langara College.

[7] The applicants challenged this decision on two main grounds: i) that the visa officer erred in her interpretation of the Regulations and their application to the particular circumstances of the case, particularly in respect of the meaning of “post-secondary institution,” “course of academic, professional or vocational training,” and “full-time basis”; and, ii) the visa officer breached her duty of fairness owed to the applicants by not providing them with a reasonable opportunity to address her concerns about Jun Yao’s eligibility as a dependent child and failing to provide adequate reasons.

Relevant legislation

Immigration and Refugee Protection Regulations, **SOR/2002-227**	***Règlement sur l’immigration et la protection des réfugiés,*** **DORS/2002-227**
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 :
…	…
(*b*) is in one of the following situations of	*b*) d’autre part, remplit l’une des conditions

dependency, namely,	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 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	(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) 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,

Analysis

[8] It is trite law that the Court must intervene where there has been a breach of procedural fairness, unless it is absolutely clear that the application for permanent residence in respect of Jun Yao is bound to fail regardless of the alleged breach (*Patel v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 55, (2002), 288 N.R. 48 at paragraphs 5-7).

[9] There is no need to discuss the standard of review applicable to the first issue raised by the applicants (see above, para. 7) given that the Court is satisfied that there was a breach of procedural fairness and that it is not clear that the decision would necessarily be the same once the applicants have had a chance to address the concerns raised in the June 13, 2008 letter.[1]

[10] The Regulations provide no definition of, nor any details in relation to, the exact meaning of expressions such as "post secondary institution," "a course of academic, professional or vocational training," or the notion of actively pursuing studies on a "full-time basis."

[11] As noted by the Federal Court of Appeal in *Sandhu v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 79, [2002] 3 F.C. 280 at para. 17, the requirements of dependency contained at s. 2 of the Regulations under the definition of "dependent child" are a public recognition of the value which our society and Parliament places on higher education. These requirements are susceptible of being applied to a number of different countries and educational systems. It is thus understandable that the definition of "dependent child" at s. 2 of the Regulations refers to concepts that include some flexibility in order to achieve its goals. In that sense, although an officer applies objective criteria, he or she has some discretion in their application.

[12] The Operational Manual (the Manual), particularly OP 2, - Processing Members of the Family Class – (OP 2) provides, at s. 14, some guidance as to what an officer may look at to

[1] The letter of July 17, 2008 (Exhibit "E", Affidavit of Jun Yao) does not appear to really address those concerns and in any event it was not considered by the Court for the determination of the merits of this application, given that, as argued by the respondent, it is evidence that was not before the decision maker when the decision under review was made.

determine whether a person applying as a dependent child is a full-time student. In particular, it lists potential questions that focus on the program in which the student is enrolled, the student's attendance record, and whether these studies are the dominant activity in the life of the applicant. It notes that obviously the officer must be satisfied that the applicant is in attendance at the educational institution with the intention of pursuing such studies and that, in this respect, the officer may look at grades obtained, actual knowledge of the subjects studied, etc.

[13] With respect to "post-secondary institution", s. 14.3 of OP 2 begins with the principle that:

> An institution must be accredited by a relevant authority. Officers should normally accept a state-recognised institution as an educational institution. In countries with licensed schools, officers may require evidence of licensing or state recognition.

[14] It is only when there is no such authority or accreditation that officers are advised to look through formal curriculum, examinations, granting of diplomas, primary purpose of the institution, etc.

[15] S. 14.4 of OP 2 is entitled: Institutions that are not "educational institutions". Although this particular expression is not used in the Regulations, it appears to be used in OP 2 for better understanding of what constitutes a post-secondary institution. The policy does not define what these institutions are, but rather it focuses on what should not be recognized, such as: i) centres providing on the job training; ii) institutions offering only correspondence courses; iii) institutions that enrol students to enable them to qualify as a dependent son or daughter under Canadian immigration regulations; and, iv) private training establishments offering specialized courses not

leading to a diploma or a vocational certificate, for example, those offering courses such as computer orientation, internet training, amateur painting, sculpting, sewing, etc.

[16] With respect to the procedure to be followed in assessing a claim that a dependent child is a student, s. 14.1 of OP 2 provides that:

> If the issuing institution is clearly not an educational institution, authenticity may be immaterial. Officers need not cite fraud as the reason an applicant is not a dependent son or daughter. Rely on proof of ineligibility of the institution. If there is proof of fraud, however, officers must cite it as well.
>
> Inform applicants about any doubts in order that they may have a chance to respond. If it appears that documents are false or that the schools they attend are not educational institutions, tell them why. This may be done during an interview or in writing.
>
> [emphasis added]

[17] Furthermore at s. 15 of OP 2, entitled "Procedure: Ineligible dependent children", one can read:

> If, after reviewing an application an officer believes that claimed dependent children are not members of the family class as described in [R2] they should:
>
> - give the applicants a deadline for providing additional information about the ineligible dependent children;
> - if by the deadline the officer still believes that the dependent child is ineligible, issue visas to the rest of the family and send a letter explaining why visas cannot be issued to the ineligible family members.
>
> [emphasis added]

[18] The content of the duty of fairness varies according to the context; in order to determine the content of a particular visa officer's duty in a given situation, the Court must normally apply the factors set out by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*).

[19] The parties did not provide the Court with any detailed submissions on the *Baker* analysis. Instead, they provided by consent four decisions where a *Baker* analysis was performed in respect of decisions by visa officers in various contexts. None are on all-fours with the present context, nor did they involve the determination of the status of a "dependent child" pursuant to the definition of this term contained at s. 2 of the Regulations.

[20] The nature of the decision and the process followed in making it both point to a more relaxed duty at the lower end of the spectrum. In effect, it is a purely administrative process that has no resemblance to the judicial process. Although the officer applies objective criteria, as mentioned he or she has a certain degree of residual discretion in their application. There is no privative clause and the decision is subject to judicial review without right of appeal**.** In that respect, the Court notes that in *Ha v. Canada (Minister of Citizenship and Immigration)* 2004 FCA 49, [2004] 3 F.C.R. 195, at para. 55, the Federal Court of Appeal held that the right to seek judicial review cannot be equated with an appeal right and that the absence of such a right suggests greater procedural protection.

[21] With respect to the importance of the decision, like many other decisions relating to the acquisition of a permanent residency status, it involves the granting of a privilege rather than a right.

The applicants had the burden of establishing the eligibility of Jun Yao. Still, the importance of the decision here is somewhat greater than for temporary student visas where the privilege at stake is simply the right to pursue studies in Canada for a limited period and one may reapply a number of times, as for a visitor's visa. It concerns the privilege to immigrate to Canada with one's family. That said, this factor also points toward a relatively low duty of fairness.

[22] Did the applicants have any legitimate expectations? As the Manual is made available through the Citizenship and Immigration Canada (CIC) website and particularly, given the lack of statutory definitions for many of the key expressions used in the relevant provisions of the Regulations, it is reasonable to infer that the applicants had a legitimate expectation that in accordance with ss. 14 and 15 of OP 2: i) if the officer had an issue with the eligibility of any institution Jun Yao attended in Canada, she would inform them of this in order that they may have an opportunity to respond to her concerns; and, ii) prior to issuing a final determination that Jun Yao was ineligible, the applicants would be given an opportunity to provide additional information within a set deadline.

[23] According to *Baker*, some consideration must also be given to the fact that CIC has chosen a particular procedure. The Court will look at the general policy described in the Manual as well as any explanation given by the visa officer as to why he or she did not follow the general policy as compliance with the Manual is not compulsory and the decision-maker always retains discretion not to follow it in a given case. Although the Court should guard against imposing a level of procedural formality that would unduly encumber the administration of the *Immigration and Refugee*

Protection Act, S.C. 2001, c. 27, the guidelines issued in the Manual by CIC are helpful to gauge what would or would not render the system inefficient.

[24] Having weighed all the factors, the Court is of the view that the content of the duty of fairness of the visa officer in this case was at the lower end of the spectrum. However, despite the relaxed content of her duty, the Court finds that, as held by Justice Andrew MacKay in *Mir-Hussaini v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 291, (2002), 219 F.T.R. 4 at para. 23, (in a very similar context to the one before the Court in the present matter), although there is no obligation on the visa officer to provide a running account to the applicants of concerns with any specific answers or impressions they have given, the visa officer should provide an opportunity to the applicants to comment when she comes to a conclusion based on her own specific standards or test for interpreting the documentary evidence before her with a view of applying the Regulations.

[25] In the present instance, this entails that, for example, before reaching any conclusion based on s. 78 of the Regulations which is expressly said to apply only to the part of the Regulations dealing with the "Federal Skilled Workers Class", the officer should have given an opportunity to the applicants to comment in respect of her concerns that Jun Yao was not studying on a full-time basis. The same reasoning would apply to the particular interpretation given by the officer to Langara College policy, as this institution offers its programs on a flexible three semester basis as opposed to a traditional two semester basis. The Court notes however that in this respect, it is not clear whether an ambiguity was created by the wording of the letter provided by the applicants

themselves for there is no explanation as to whether the definition of full-time studies adopted by Langara College (nine credits per semester) applies regardless of the number of semesters during which a student was enrolled in courses over a year and despite the fact that a given program may require him or her to take courses that were taught only during a particular semester. Such difficulties in applying the criteria set out in the definition of "dependent child" at s. 2 of the Regulations may well explain the process chosen by CIC in ss. 14 and 15 of OP 2.

[26] In the same manner, the officer should have raised her concerns in respect of the "Learn English Now" and "TOEFL Preparation" courses. Surprisingly, there is no specific mention in s. 14 of OP 2 of such courses (English as a second language or ESL) which are obviously of a different nature than sculpting, drawing or internet training (examples cited in OP 2). If there are any doubts as to whether or not they qualify as "courses of academic, professional or vocational training," the answer may well lie in whether or not these courses are part of a study plan or are prerequisites to the ability of a foreign student to enrol in a college or university in Canada. The application of the Regulations in such respects raises important policy issues which should be clarified for it appears to be dealt with differently depending on the officer. For example, it appears that in *Lee v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1012, [2005] 2 F.C.R. 3 at para. 36, question 26 cited therein, the visa officer viewed similar ESL courses in a very positive light, noting that after taking ESL courses, the applicant's grades in that case improved dramatically and that the decision to go back to language school was a very smart one.

[27] That said, there is another error that vitiates this decision and warrants putting it aside is the lack of adequate reasons.

[28] Although, as previously mentioned, the duty of fairness is at the low end of the spectrum in this case, there is no doubt that the officer must tell the applicants why she rejected Jun Yao as a dependent child, for otherwise they cannot properly exercise their right to seek judicial review. Obviously, in most cases these reasons will be brief and can be supplemented by the Computer Assisted Immigration Processing System (CAIPS) notes[2]. Nevertheless, as held in *Via Rail Canada Inc. v. Lemonde*, [2001] 2 F.C. 25 at para. 19 (C.A.), they must be sufficient to enable the parties to assess possible grounds for judicial review and to allow the Court to determine whether the decision-maker erred.

[29] When the parties argued before this Court the merits of the decision itself they were approaching it from a very different angle. For example, the applicants were focusing on the accreditation by the PCTIA (the successor of the Private Post-Secondary Education Commission of BC) of ISS while the respondent was defending the decision based on the lack of evidence provided with respect to the curriculum of ISS and other documentation required when there is no accreditation by a relevant authority and an officer is looking at an alternate method of determining eligibility.

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[2] In this case, the CAIPS notes do not add anything to the letter sent to the applicants. However, the respondent did refer in its further memorandum to a passage written on May 15, 2008 by a visa officer (it is not known if it was the decision-maker) who did the first screening of the application: "Studied ESL or TOFEL [*sic*] is not post secondary institute. Son may not meet R2(b) definition as his programs do not meet definition post-secondary education." If this ambiguous note is part of the reasoning of the decision-maker, it seems to mix apples and oranges, that is the type of courses required in

[30] It became very clear that the Court would have to speculate as to why the officer concluded that ISS was not a post-secondary institution. The same is true in respect of whether or not the "Learn English Now" and "TOEFL Preparation" courses fell within the meaning of the expression used in clause *(b)*(ii)(B) of the definition of "dependent child" at s. 2 of the Regulations.

[31] Based on the foregoing, the Court finds that the decision did not disclose adequate reasons.

[32] The parties did not submit any questions for certification and the Court is satisfied that this case turns on its own unique facts. No question will be certified.

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clause *(b)*(ii)(B) of the definition of "dependent child" in s. 2 of the Regulations with the definition of post-secondary institution in clause *(b)*(ii)(A) of the same.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application is granted. The decision dated June 13, 2008 is set aside. The matter shall be redetermined by a different officer who shall provide an opportunity to the applicants to submit additional material or attend an interview.

"Johanne Gauthier"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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