Federal Court  Cour fédérale

Date: 20100601

Docket: IMM-4499-09

Citation: 2010 FC 599

Toronto, Ontario, June 1, 2010

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

COMFORT AYERTEY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Since 2003, the Applicant has been trying to sponsor her son to come to Canada from Ghana. Because her son was over 22 years of age when she applied to sponsor him, he could only qualify if he could satisfy a visa officer that he was continuously in full-time studies. As reflected in the officer's notes from 2004, the visa officer (the first visa officer) was satisfied that the son was in

full-time study since attaining 22 years of age and, thus, would have met the statutory requirements for being a “dependent child”, as defined in s. 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*Regulations*). However, the sponsorship application was denied (the first visa officer’s decision) on the basis that the Applicant was in receipt of social assistance, contrary to s. 133(1)(k) of the *Regulations*.

[2] In a decision dated February 10, 2006 (the first IAD decision), the Immigration and Refugee Board, Immigration Appeal Division (IAD) allowed the appeal on the basis that there were “sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case”. The IAD returned the matter to the visa officer with the instructions that “the officer must continue to process the application in accordance with the reasons of the [IAD]”.

[3] In the subsequent processing, the son was interviewed by a second visa officer in 2008. At that time, according to the officer’s computer assisted immigration processing system (CAIPS) notes, the son admitted to not being a full-time student since 2000. In a decision communicated by letter dated July 29, 2008 (the second visa officer’s decision), the sponsorship application was again rejected. This time, the second visa officer was not satisfied that the son met the definition of a dependent child. The officer determined that the son was not a “student” as described in s. 2 of the *Regulations*. The Applicant appealed this second visa officer’s decision to the IAD. The IAD considered the appeal in writing and rejected the appeal in a decision dated August 11, 2009 (the second IAD decision). The Applicant seeks judicial review of the second IAD decision.

Issues

[4] This application raises the following issues:

1. Did the IAD err by failing to conclude that the second visa officer erred by making a new determination on the status of the son's studies as of July 29, 2008, rather than being bound by the 2004 decision of the first visa officer that the son was a full-time student (and, thus, a dependent child and member of the family class)?
2. If the second visa officer was not bound by the first IAD decision, did the IAD err by not concluding that the second visa officer reached a decision that was not substantiated by the evidence that the Applicant's son was not in full-time studies as of July 29, 2008?

Statutory Framework

[5] According to s. 11(1) of *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*), a foreign national must, before entering Canada, apply to an officer for a visa. The visa shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of *IRPA*.

[6] Under s. 12(1) of *IRPA*, a foreign national, such as the Applicant's son, may be selected as a member of a family class based on his parent-child relationship to the Applicant, who is a Canadian citizen. Section 117(1)(b) of the *Regulations* defines a member of the family class as, among others,

"a dependent child of the sponsor". The scope of who constitutes a dependent child is found under s. 2 of the *Regulations*. For purposes of the present judicial review application, a child, over 22 years of age, meets the requirements of a "dependent child" when he or she 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.

[7] Section 121(a) of the *Regulations* stipulates that "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".

[8] When a foreign national's family class application is rejected, the sponsor has a right of appeal to the IAD under s. 63(1) of *IRPA*. To allow an appeal, the IAD, pursuant to s. 67(1) of *IRPA*, must be satisfied that (a) the decision appealed is wrong in law or fact or mixed law and fact; (b) a principle of natural justice was not observed; or (c) that sufficient humanitarian and compassionate considerations exist to warrant a special relief in the circumstances of the case. Under s. 67(2), should the IAD allow the appeal, the Board can order one of two things: "set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order"; or "refer the matter to the appropriate decision-maker for reconsideration."

[9] Under s. 70(1) of *IRPA*, "an officer, in examining a permanent resident or a foreign national, is bound by the decision of the Immigration Appeal Division to allow an appeal in respect of the foreign national."

Analysis

Issue 1: Was the second visa officer bound to accept that the son was in full-time studies?

[10] Key to this judicial review is the meaning of the IAD's direction that "the officer must continue to process the application in accordance with the reasons of the [IAD]". Do these words in the first IAD decision mean that the application was to be processed as of the date of the first officer's decision in 2004, as asserted by the Applicant? In other words, does s. 70(1) of *IRPA* require the second visa officer to accept that the Applicant's son was a full-time student and, thus, a "dependent child"? Alternatively and as submitted by the Respondent, was the officer mandated to assess the entirety of the application, including whether the son was a full-time student, as of 2008 (subject to the caveat that the Applicant's receipt of social assistance was not to be taken into account)?

[11] In my opinion, the better legal view is that the second visa officer was required to consider whether the Applicant's son was a full-time student for the entire period up to the date of her determination in 2008.

[12] I begin by noting that the IAD, in its first decision, did not exercise its discretion under s. 67(2) of *IRPA* to substitute its own determination. Rather, the IAD returned the matter to the visa officer with the instructions that "the officer must continue to process the application in accordance with the reasons of the [IAD]". Had the IAD meant, in its 2006 decision, that the only matter for consideration in the subsequent visa officer review was "special relief", the IAD would have substituted a determination that, in its opinion, should have been made – as allowed for in s. 67(2) of *IRPA*.

[13] Secondly, it is important to understand the IAD's reasons in its first decision. The IAD based its decision on only one factor: the Applicant's dependence on social assistance (s. 133(1) of the *Regulations*). Specifically, the IAD found that there were "sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case". The IAD made no determination on whether the Applicant's son met the requirements for being a "dependent child" and, thus, a member of the "family class".

[14] Unlike the age of a dependent child, educational status is not "locked in" as of the date of application (see *Hamid v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 217, [2007] 2 F.C.R. 152). Accordingly, the Applicant's son was required to meet the requirements of s. 121(a) of the *Regulations* that he be a member of the family class both as of the date of application and the time of determination of the application. Had the IAD, in its first decision, substituted a determination that the sponsorship application was allowed (as it could do under s. 67(2) of *IRPA*), there would have been no need for a second visa officer to consider any aspect of the application.

The date of the IAD's first decision would have been the relevant time of determination. However, in this case, the time of determination is not the date of the IAD's first decision. Rather, the time of determination must be the date upon which the officer made the decision to deny the application – July 29, 2008. Simply put, the first visa officer's decision is irrelevant. For purposes of the second visa officer's decision, the officer was required to satisfy herself that the Applicant's son met the definition of "dependent child" as of the date of her decision and not as of some earlier date.

[15] In conclusion on this issue, the first IAD decision did not mandate that the second visa officer accept the earlier findings of the first officer. The IAD correctly stated in the second IAD decision that:

> [T]he eligibility for sponsorship is continuous up to the time of the "final determination of the application", when a permanent resident visa is issued. Thus, if the 2004 determination by the visa officer of continuous attendance was erroneous or the circumstances changed and the applicant ceases to be in full time attendance, he is no longer eligible for sponsorship. [Emphasis added.]

Issue #2: Was the second officer's decision reasonable?

[16] The Applicant submits that, even if the second visa officer was required to assess the status of her son's studies as of the later date, this determination was not done fairly or was not reasonable, based on the evidence.

[17] The Applicant's first argument appears to be that the second officer erred by calling the son in for an interview. I can see no error in the officer's decision to convoke an interview.

[18] I first observe that the second officer was required to conduct a fresh assessment of the status of the son's studies right up to the date of rendering her decision. As discussed above, she was not bound by any conclusions or findings of the first officer on this question. In fulfilling this obligation, it is evident from a review of the second officer's notes that she had problems with the educational status of the son. The note in 2008 from the Bursar at the son's school noted only that:

> He is a student in this school, started school in 2001, but could [not] complete on schedule as he did not write his final/external exam as stipulated hence . . . is to complete 2008 this academic year.

[19] Far from confirming that the son was a full-time student, the comment and other documentary evidence raises problems with the son's studies. In light of this, it was not unfair or unreasonable to convoke a hearing to allow the son to confirm his status in the school. As reflected in the second visa officer's notes (made at the time of the interview), the Applicant's son admitted that "he did not register with the school from 2003/2004, 2005/2006/2007". On the basis of this admission and other evidence, it was not unreasonable for the second visa officer to conclude as follows:

> I am not satisfied that app meets the definition of a dependent child. He has not been in full time studies since before he turned the age of 22. He has not registered with the school for a number of years, he states he is attending classes for a couple of hours a day. However, this seems highly unlikely as he hasn't paid fees, by his own admission he was spending most of his time in the house.

[20] Moreover, before the IAD, the officer's CAIPS notes version of the interview was not contradicted by the Applicant's son (for example, by way of an affidavit).

[21] Finally, the fact that the first visa officer was satisfied, in 2004, that the son was a full-time student is irrelevant to a determination by the second visa officer of whether he was still a full-time student in 2008/2009.

[22] In view of the uncontradicted evidence from the second visa officer and the documentary evidence, I am satisfied that the IAD reasonably came to its conclusion that:

> Based on the applicant's acknowledgement to the visa officer in 2008, he was not "continuously enrolled in and attending a post-secondary institution…" and thus does not meet the definition of a dependent child. As the applicant is not a dependent child as defined in the *Regulations*, he is not a member of the family class and may not be sponsored by the appellant.

[23] As part of this judicial review, the Applicant's son submitted an affidavit in which he denies that he admitted that he was not a full-time student. There are two problems with this affidavit. First, it was not before the IAD and hence should not form part of this judicial review. Secondly, even if it had been, it would have been open to the IAD to prefer the contemporaneous notes of the visa officer, who has no personal interest in the outcome of the application, to the self-serving denials of the Applicant's son.

Conclusion

[24] In spite of very capable submissions by the Applicant's counsel, I am not persuaded that there is a reviewable error in the decision under review. For these reasons, the application for judicial review will be dismissed. Neither party proposes a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. no question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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