

Federal Court



Cour fédérale

Date: 20161124

Docket: IMM-1957-16

Citation: 2016 FC 1302

Toronto, Ontario, November 24, 2016

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

**ROSE SALLY GABRIEL
MICHAEL BEN GABRIEL**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicants, Rose Sally Gabriel [Rose] and her son Michael Ben Gabriel [Michael], have applied for judicial review of a decision of an Immigration Officer [the Officer] dated April 28, 2016 [the Decision] in which following a reconsideration, she decided that Michael was not a dependent child and therefore did not qualify for permanent resident status under section

2(b)(ii)(a) of the *Immigration and Refugee Protection Regulations*, SOR /2002-227 [the Regulations].

II. Background

[2] Michael and Rose are both citizens of the Philippines. Rose applied for permanent residence in Canada under the live-in caregiver program in June 2010. Her husband and three dependent sons were listed in her application. Michael was 24 years-old at that time. There is no issue that Michael was a full time student until October 2013. However he was diagnosed with a severe lung infection at that time and was required to withdraw from his studies in order to undergo treatment.

[3] The treatment for Michael's lung infection was administered between October 27, 2013 and May 4, 2014. After his treatment, Michael underwent further testing and monitoring from June 2014 to October 2014. Michael's doctor recommended a one year rest period for recuperation between October 2014 and October 2015. During this time Michael was cared for by his father and two brothers. This period of approximately two years will be referred to as the "Absence".

[4] In October 2015 Michael was ready to resume his studies but was too late to apply for the course he had chosen. He enrolled instead in another program in November 2015. He expects to complete it in October 2017.

III. The Decision under Review

[5] In reaching the Decision the Officer stated “[u]nfortunately, the regulations are silent regarding medical conditions of dependent children and determining their eligibility as dependents. Since there is no mention of [] medical condition exceptions Michael is not considered a dependent. While I empathize with Michael and his mother I am not satisfied that an exception should be made in this case. The decision to remove Michael from the application stands.”

[6] The parties agreed that Michael’s absence from school for health reasons was entirely legitimate and that the Officer in fact had discretion to find that Michael was continuously enrolled and attending school notwithstanding the Absence.

IV. Issues

[7] The sole issue is whether the Officer recognized that she had the discretion just described.

V. Discussion and Conclusion

[8] In my view the Decision shows that the Officer believed that, because the Regulations did not mention the possibility of an exception from the requirement for continuous study for students who became ill, she could not give Michael the benefit of such an exception and include him in Rose’s application for permanent residence as a dependent child notwithstanding the Absence.

[9] In other words, she did not appreciate that she had any discretion. Accordingly the application for judicial review will be allowed.

[10] No question was posed for certification.

JUDGMENT

The application for judicial review is allowed. The matter of Michael's inclusion in Rose's application for permanent residence is to be reconsidered by a different officer who is to treat the issue as a discretionary matter.

"Sandra J. Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1957-16

STYLE OF CAUSE: ROSE SALLY GABRIEL AND MICHAEL BEN
GABRIEL V THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 23, 2016

JUDGMENT AND REASONS: SIMPSON J.

DATED: NOVEMBER 24, 2016

APPEARANCES:

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