Federal Court  Cour fédérale

Date: 20170103

Docket: IMM-1761-16

Citation: 2017 FC 1

Ottawa, Ontario, January 3, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

SHAYAN SHOMALI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Shayan Shomali, is now a 27 year old citizen of Iran. In November 2011, the Applicant's father was issued a selection certificate under the Quebec Investor Program and, subsequently, his father applied for a permanent residence visa. The Applicant, along with his mother and sister, were included in the application as accompanying family members. The Applicant's family intended to emigrate to Montréal, Quebec.

[2] However, an immigration officer [the Officer] at the Embassy of Canada in Ankara, Turkey, removed and disassociated the Applicant from his father's application for a permanent resident visa because the Applicant was determined not to be a "dependent child" as defined in section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*]. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27, for judicial review of the Officer's decision.

I. Background

[3] The Applicant has been enrolled in post-secondary education programs since graduating from high school in June 2006. From September 2006 to June 2007, he completed a certificate in mathematics and, from September 2007 to March 2013, he completed a Bachelor of Science degree in mechanical engineering. Most recently, from September 2012 to the time of the filing of this application, the Applicant has been completing a Bachelor of Arts degree in French language translation. The Applicant took a six month leave of absence from his post-secondary education from July 9, 2011 to December 24, 2011 to complete his compulsory military service with the Armed Forces of the Islamic Republic of Iran. The Applicant did not have to complete the customary two year service requirement because his father is a veteran of the Iran-Iraq war.

[4] The Applicant's eligibility for a permanent resident visa hinged on whether he qualified as his father's "dependent child" under section 2 of the *Regulations*. The applicable definition at the time provided in relevant part as follows:

dependent child, in respect of a parent, means a child who	**enfant à charge** L'enfant qui :
(a) has one of the following	**a)** d'une part, par rapport à

relationships with the parent, namely,	l'un ou l'autre de ses parents :
(i) is the biological child of the parent…	**(i)** soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait,
…	…
(b) is in one of the following situations of dependency, namely	**b)** d'autre part, remplit l'une des conditions suivantes :
…	…
(ii) has depended substantially on the financial support of the parent since before the age of 22 …and, since before the age of 22 … 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,
…	…

[5] The Applicant did not automatically qualify as a dependent child because he had turned 22 years old prior to his father's permanent resident application. On October 13, 2015, an officer determined that the Applicant was not a full-time student since his transcript of marks indicated an educational leave of absence for the first semester of the 2011/2012 school year when he was completing his compulsory military service. The officer was not satisfied that the Applicant met the definition of a dependent child and, consequently, he was removed from his father's permanent residence application.

[6] On December 14, 2015, an officer informed the Applicant's representative that the Applicant did not meet the definition of a family member because his military service interrupted his studies. The Applicant's legal counsel requested in a letter dated December 17, 2015, that this determination be reconsidered and provided submissions outlining why the Applicant's absence from school for military service did not remove him from the definition of "dependent child." The Applicant's counsel conceded that the Applicant's studies would not have been continuous if he had been required to serve two years in the military; however, in the Applicant's case, the "brief interruption of studies" did not remove him from the definition. The Applicant's counsel also requested consideration of humanitarian and compassionate [H&C] relief, so that the Applicant could remain included in his father's application, and directed the officer's attention to the Supreme Court of Canada's discussion about the best interests of the child in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*].

[7] On December 30, 2015, a different officer reconsidered the decision but maintained that the Applicant did not meet the definition of dependent child. This officer also reviewed the

Applicant's request for H&C relief, noting that the Applicant is well-educated, has other relatives in Iran, and could be financially supported by his father from Canada. The officer found that the Applicant would not face unusual and undeserved or disproportionate hardship as a consequence of the determination that he did not meet the definition of a dependent child, and also that there were no compelling H&C grounds to overcome application of the definition. The day after the officer's decision, the Applicant filed an application for judicial review of the decision, but a month or so later the Applicant discontinued the application after the parties agreed that the matter would be re-determined by a different officer.

II. The Decision

[8] On February 11, 2016, an officer informed the Applicant that he could make additional submissions to support a finding that he met the definition of a dependent child, and he did so on March 2, 2016. The additional documentation included the Applicant's passport, driver's licence, banking information, police records, and some photographs of the Applicant with his family. The Applicant did not provide any further written submissions.

[9] In a letter dated April 25, 2016, the Applicant's father was informed that the Applicant was not a "dependent child" as defined in section 2 of the *Regulations*. The officer [the Officer] who sent this letter stated that:

> This is because there was a break in Shayan's studies when he performed his military service. From July 2011 to December 2011, Shayan did not attend a post-secondary institution that is accredited by the relevant government authority, and actively pursued a course of academic, professional or vocational training on a full-time basis.

The Officer further stated that:

> Following this decision regarding the eligibility of your son Shayan, humanitarian and compassionate considerations were reviewed.
>
> On April 4, 2016 I have exercised my discretion in reviewing humanitarian and compassionate considerations connected to Shayan's circumstances that you have presented on March 02, 2016. Having considered all of the evidence that you have presented, I am not satisfied that Shayan's circumstances involve humanitarian and compassionate considerations that are sufficiently compelling to overcome the ineligibility of your son.

[10] The Global Case Management System notes concerning the Applicant provide further detail as to why H&C considerations did not overcome the ineligibility finding:

> I have reviewed the H&C assessment guidance post-Kanthasamy v Canada….In summary the dependent in question, Shayan, is a 26 year old male, he has completed an undergraduate degree in Engineering and is currently enrolled in a second undergraduate degree in French Language. There was a break in his studies when he performed military service. PA has presented evidence that his son lives with him and that he provides economic support to his son, photos show the family together. This is not an unusual family arrangement and it does not demonstrate that Shayan is a dependant of the PA such that he would qualify for inclusion in this immigration file. I have examined information provided by the PA and do not find that this situation justifies the granting of H&C to overcome the fact that Shayan is not a dependent child as per The Act….insufficient grounds were demonstrated (onus is entirely on the applicant to be clear in the submission as to exactly what hardship they would face if they were not granted the requested exemption(s)) to warrant H&C to overcome his ineligibility.
>
> …
>
> Son had a break in his studies. He does not meet the definition of full-time/continuous. Son performed military service during his break in studies. Military services is not counted towards studies and therefore this factor does not qualify him as a dependent… At present he is studying for a Bachelor of French Lanaguage [*sic*] at the same university he obtianed [*sic*] his B Eng from. He started

> this second bachelor degree September 2012, prior to completing his first bachelor degree. In reviewing the documents on this file I see nthing [*sic*] to suggest that Shayan needs to be dependent on his parents. His father may well chose [*sic*] to continue to provide his son economic support but it appears to be a choice on the part of the family for Shayan to continue as a student, taking a second and unrelated Bachelor degree, rather than seeking employment based on his Bachelor Degree in Engineering….It is clear that the family would like Shayan to be able to immigrate to Canada with them, as part of this application. He however does not meet the definition of a dependent as there was a break in his studies….

III. Issues

[11] The parties' submissions raise the following issues:

1. What is the appropriate standard of review?
2. Was the Officer's determination that the Applicant did not meet the definition of a "dependent child" in section 2 of the *Regulations* reasonable?
3. Was the Officer's determination that there were no H&C considerations to overcome the ineligibility finding reasonable?

IV. Analysis

A. *Standard of Review*

[12] The Officer's determination that the Applicant did not meet the definition of a "dependent child" in section 2 of the *Regulations* is to be reviewed on the reasonableness standard (*Dono v Canada (Citizenship and Immigration)*, 2015 FC 400 at para 1, [2015] FCJ No 384; *Martinez v Canada (Citizenship and Immigration)*, 2014 FC 109 at para 14, 447 FTR 146; *Singh Gill v Canada (Citizenship and Immigration)*, 2008 FC 365 at para 17, 166 ACWS (3d)

359 [*Singh Gill*]). The same standard of review is also applicable to the Officer's decision that the Applicant's H&C considerations did not overcome the ineligibility finding (*Mursalim v Canada (Citizenship and Immigration)*, 2016 FC 264 at para 9, 264 ACWS (3d) 473).

[13] Accordingly, the Court should not intervene if the Officer's decision is justifiable, transparent, and intelligible, and it must determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; and it is also not "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339.

B. *Was the Officer's determination that the Applicant did not meet the definition of a "dependent child" in section 2 of the Regulations reasonable?*

[14] The Applicant argues that his leave of absence from school for military service did not constitute an interruption such that he was not continuously enrolled in a post-secondary institution. He relies upon *Dimonekene v Canada (Citizenship and Immigration)*, 2007 FC 675, 317 FTR 1 [*Dimonekene*], rev'd 2008 FCA 102, 387 NR 157, where Justice Harrington found

that the absence of an applicant's son from an educational institution during a raging civil war was not an interruption of his continuous enrollment and attendance under the definition of "dependent child." The Applicant says his absence for military service was not really six months long because two of those months were during the summer break. The Applicant further argues that the four month leave of absence to complete his military service was not an interruption because he was complying with Iranian law and he continued his studies following the compulsory military service. According to the Applicant, missing one term of school does not cause an interruption of studies under section 2 of the *Regulations* and, moreover, military service is a proper interruption because Parliament has not legislated otherwise.

[15] The Respondent says it was reasonable for the Officer to determine that the Applicant was not a dependent child because, as even the Applicant admits, his studies were interrupted by his military service from July 2011 to December 2011. The Respondent states that this Court should not follow Justice Harrington's approach in *Dimonekene* because it was overturned by the Federal Court of Appeal which stated that: "Even if we accept that the IAD had erred in considering the period during which the high school was closed as being a period of not attending school, the evidence on the record still showed that, after reaching the age of 22, the respondent's son did not attend an academic institution before and after that period of closure caused by the civil war" (para 10).

[16] In my view, it was reasonable for the Officer in this case to determine that the Applicant did not fall within the definition of dependent child because he had not been "continuously" enrolled in a post-secondary institution. The Applicant took a leave of absence from his post-

secondary education from July 9, 2011 to December 24, 2011 in order to complete his mandatory military service. His transcript of marks from the Islamic Azad University shows a break in his courses for an "educational leave of absence" during the first semester of the 2011/2012 school year.

[17] Furthermore, the word "continuously" (as noted by the court in *R v Schimanek,* 1987 CarswellNWT 28 at para 10, [1987] N.W.T.R. 332) is defined in *Black's Law Dictionary,* 5th edition (1979), to mean: "Uninterruptedly; in unbroken sequence; without intermission or cessation; without intervening time; with continuity or continuation." Similarly, the *Oxford English Dictionary*, 2nd edition (1989), defines the word "continuously" as being "in a continuous manner; uninterruptedly, without a break". The *Canadian Oxford Dictionary*, 2nd edition (2004) defines "continuous" as meaning "unbroken, uninterrupted." *Webster's Third New International Dictionary* (1986) defines "continuously" as being "in a continuous manner" and "continuous" as "characterized by uninterrupted extension in time or sequence."

[18] This case is unlike *Singh Gill,* where the Court determined that an applicant's two absences from school, one for four months to care for her ailing grandmother and another for ten days to attend and assist with her sister's wedding, did not constitute a sufficient period of time to abandon her studies and not meet the definition of "dependent child." The Court in *Singh Gill* found that the visa officer was unreasonable in determining that the applicant was not "continuously enrolled in and attending a post-secondary institution" because:

> [30] These leaves or absences from studies… did not, in and of themselves, constitute a sufficient period of time for her to abandon her studies. As Ms. Kiranpreet Kaur's school transcripts and certificates attest, she continued with her studies,

> uninterrupted; neither of the educational institutions… considered that she had either withdrawn or abandoned her studies for any given year.

In contrast, the Applicant's studies in this case were interrupted during the period of his military service and he was afforded an educational leave of absence as noted in his transcript of marks, unlike the applicant in *Singh Gill* who simply did not attend class.

[19] This case is, however, somewhat similar to *Hamid v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1632, [2006] 3 FCR 260 [*Hamid*], where the Court determined that the *Regulations* required that the status of a dependent child be assessed only at the time the application is made. In making this determination, the Court observed that:

> 18 The word "continuously"…denotes a time continuum. A person cannot be continuously engaged in an activity as of a date certain; one must examine the time surrounding the date to determine if an activity is continuous. This is some support for the interpretation…that the educational status of the child must be maintained throughout the application process. On the other hand, the provision could also mean that the student must have been enrolled continuously prior to the date of application. ...

[20] When the Federal Court of Appeal addressed the two questions certified in *Hamid*, it noted:

> 22 Counsel for the Minister argued that the requirement in subparagraph 2(b) (ii) (A) that the child be "continuously" enrolled as a student indicates that the visa officer is to assess eligibility by considering a period of time: a person cannot be determined to be "continuously" enrolled on the basis of facts at a given moment in time. I agree but, like the Applications Judge, I do not think that this assists the Minister. Continuity of enrolment may be determined equally well by looking back from the date of either the visa application or its determination. (2006 FCA 217, [2006] F.C.J. No. 896).

[21] Before leaving this issue, it should be noted that, although the definition of "dependent child" once allowed for interruptions of studies "for an aggregate period not exceeding one year," this exception was removed when the *Immigration Regulations, 1978* were repealed and replaced with the *Regulations*. It is also noteworthy that, effective August 1, 2014, the definition of "dependent child" was amended to reduce the age at which a child is considered a dependant from under 22 to under 19 and to remove the exception for older children continuously enrolled in post-secondary education.

C. *Was the Officer's determination that there were no H&C considerations to overcome the ineligibility finding reasonable?*

[22] The Applicant says that the Officer's determination on the H&C considerations is "irreparably flawed" because the Officer failed to recognize the importance of the Applicant's enrollment in the French language translation program. This failure is evidenced by his remarks that the degree is "unrelated." According to the Applicant, this program is important for him to work as an engineer in the French-speaking province of Quebec.

[23] The Respondent says that the Officer cannot be faulted for characterizing the Applicant's pursuit of a second degree as "unrelated" because the Applicant never made any submissions to the Officer about why this degree was being undertaken. The Respondent states that the Officer expressly referenced *Kanthasamy* and reasonably examined the Applicant's best interests. The Respondent notes that the Applicant has not taken issue with the Officer's assessment of *Kanthasamy* or the best interests of the child.

[24] The Officer reviewed the Applicant's submissions on the question of whether he was a dependent child before determining that the H&C considerations did not overcome the ineligibility finding. Although the Applicant's counsel made submissions concerning H&C grounds in light of *Kanthasamy* and the Applicant's best interests, the Applicant does not raise the Officer's H&C findings as an issue in this application for judicial review. The Applicant's only argument in this regard is that the Officer erred in characterizing his French studies as "unrelated" to his earlier degree in mechanical engineering. This finding, even if erroneous, is not germane to the Officer's determination on the H&C considerations. The Applicant has not made any other submissions on this issue.

[25] I find the Officer's assessment and determination in respect of the H&C factors as raised by the Applicant to be intelligible and transparent, and his decision in this regard is therefore a reasonable one within the range of acceptable outcomes.

V. Conclusion

[26] It was reasonable for the Officer in this case to determine that the Applicant did not fall within the definition of "dependent child" because he had not been "continuously" enrolled in a post-secondary institution. In addition, the Officer's assessment and determination in respect of the H&C factors as raised by the Applicant was reasonable as well. The Applicant's application for judicial review is dismissed.

[27] Neither party proposed a question for certification, so no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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