Date: 19971223

Docket: IMM-4180-96

Between :

KARMJIT SINGH NIJJAR, AMANDIP SINGH NIJJAR and SUKHJINDER KAUR NIJJAR

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

PINARD, J. :

[1] This is an application for judicial review of the decision of Immigration Program Officer Preeti Ahluwalia Grover (the officer), included in a letter dated October 14, 1996, refusing to continue processing the applicants' Application for Permanent Residence as a result of her conclusion that the applicants did not come within the definition of "dependent" pursuant to subsection 2(1) of the *Immigration Regulations, 1978* (the Regulations). The October 14, 1996 letter reads:

October 14, 1996

Mrs. Daljit Kaur Nijjar

W/o Amarjit Singh Nijjar
625 Dhalia Street
Lynden, Washington
U.S.A.

Dear Mrs. Nijjar,

I refer to your application for permanent residence in Canada, in which you included Sukhjinder Kaur Nijjar as a dependent daughter and Karmjit Singh Nijjar and Amandip Singh Nijjar as a dependent sons.

"Dependent daughter" is defined in section 2(1) of the **Immigration Regulations, 1978** as follows:

"Dependent daughter" means a daughter who

(a) is less than 19 years of age and unmarried

(b) is enrolled and in attendance as a full-time student in an academic, professional or vocational program at a university, college or other educational institution and

(i) has been continuously enrolled and in attendance in such a program since attaining 19 years of age or, if married before 19 years of age, the time of her marriage, and

(ii) is determined by an immigration officer, on the basis of information received by the immigration officer, to be wholly or substantially financially supported by her parents since attaining 19 years of age or, if married before 19 years of age, the time of her marriage, or

(c) is wholly or substantially financially supported by her parents and

(i) is determined by a medical officer to be suffering from a physical or mental disability, and

(ii) is determined by an immigration officer, on the basis of information received by the immigration officer, including information from the medical officer referred to in subparagraph (i), to be incapable of supporting herself by reason of such disability.

The term "dependent son" is also defined in section 2(1) of the ***Immigration Regulations, 1978***, and has identical meaning as "dependent daughter" stated above with the appropriate gender changes.

According to section 2(7) of the ***Immigration Regulations, 1978***, "for the purposes of subparagraph (b)(i) of the definitions of "dependent son" and "dependent

daughter", where a person has interrupted a program of studies for an aggregate period not exceeding one year, the person shall not be considered thereby to have failed to have continuously pursued a program of studies."

A careful review of your file indicates that Sukhjinder Kaur Nijjar is not a "dependent daughter" as defined in section 2(1) of the ***Immigration Regulations, 1978***, and within the meaning of section 2(7) of the ***Immigration Regulations, 1978***, in that since attaining 19 years of age, she has not been continuously enrolled and in attendance as a full-time student in an academic, professional or vocational program at a university, college or other educational institution.

Sukhjinder Kaur Nijjar was born on January 20, 1975. She was not under 19 years of age when an undertaking of assistance submitted on your behalf was received at the Case Processing Centre, Mississauga on June 14, 1994. The information available on her application for permanent residence indicates that she discontinued her education after completing her matriculation in April 1991.

A careful review of your file indicates that Karmjit Singh Nijjar is not a "dependent son" as defined in section 2(1) of the ***Immigration Regulations, 1978***, and within the meaning of section 2(7) of the ***Immigration Regulations, 1978***, in that since attaining 19 years of age, he has not been continuously enrolled and in attendance as a full-time student in an academic, professional or vocational program at a university, college or other educational institution.

Karmjit Singh Nijjar was born on February 15, 1970. He was not under 19 years of age when an undertaking of assistance submitted on your behalf was received at the Case Processing Centre, Mississauga on June 14, 1994. The information available on his application for permanent residence indicates that he discontinued his education in April 1984 and since then he has been employed.

A careful review of your file indicates that Amandip Singh Nijjar is not a "dependent son" as defined in section 2(1) of the ***Immigration Regulations, 1978***, and within the meaning of section 2(7) of the ***Immigration Regulations, 1978***, in that since attaining 19 years of age, he has not been continuously enrolled and in attendance as a full-time student in an academic, professional or vocational program at a university, college or other educational institution.

Amandip Singh Nijjar was born on April 25, 1972. He was not under 19 years of age when an undertaking of assistance submitted on your behalf was received at the Case Processing Centre, Mississauga on June 14, 1994. The information provided in support of his application for permanent residence indicates that he discontinued studies between 1990 and 1993. In March 1994 he claims to have written the class 12 exams as a private student and did not attend any regular school. Persons pursuing their course of study as private students/candidates are not deemed to be in full-time attendance.

Since Sukhjinder Kaur Nijjar is not your "dependent daughter" and Karmjit Singh Nijjar and Amandip Singh Nijjar are not your 'dependent sons' according to the ***Immigration Regulations, 1978***, we cannot continue processing your application in its current form. Insofar as Sukhjinder Kaur Nijjar, Karmjit Singh

> Nijjar and Amandip Singh Nijjar are not your dependent daughter and dependent sons respectively, please advise this office **in writing and within 60 days** that you agree to delete Sukhjinder Kaur Nijjar, Karmjit Singh Nijjar and Amandip Singh Nijjar from your application for permanent residence in Canada. In this connection, we have enclosed self-explanatory declarations for completion and return to our office.

Yours truly,

Counsellor (Immigration)

cc: Sponsor (Mr. Amarjit Singh Nijjar, 8415 - 184th Street, Surrey, B.C. V3S 5X7)

[2] Given the facts in this case, I find that the officer's conclusion that the applicants did not come within the definition of "dependent daughter" or "dependent son" was correct in fact and in law. It is clear that at the time the Undertaking to Sponsor was filed, each of the applicants was over 19 years of age, and had not been enrolled and in attendance as a full-time student. The officer had no discretion to exercise, and could only look at the application before her in light of the established criteria.

[3] The only relevant question then becomes whether the officer had a positive duty to submit the applicants' application for permanent residence in Canada made through their mother to a visa officer in order that it be considered on the basis of humanitarian and compassionate grounds.

[4] Section 2.1 of the Regulations reads as follows:

> **2.1** The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

(Emphasis is mine.)

[5] In the present case, it is questionable whether the applicants specifically requested that their application be considered on the basis of humanitarian and compassionate grounds. The Federal Court of Appeal discussed whether an applicant needed to specifically request consideration on humanitarian and compassionate grounds in *Jiminez-Perez v. Canada (M.E.I.)*, [1983] 1 F.C. 163,[1] and found, at page 170, that:

> The Act does not indicate how the request for exemption from the requirement of section 9 is to be applied for, nor is there anything in the record that throws light on the department practice in this regard, but in my opinion the request is properly made, as a practical matter, to the local immigration officials who may be expected to refer it to the Minister with their recommendation. Such a request falls within the general administration of the Act and, in the absence of special provision, administrative fairness requires that it be capable of being made at the local departmental level. The letters dated June 24 and 30, 1980 addressed to the appellant Boisvert, from which I have quoted above, expressed a sufficiently clear request for exemption on compassionate or humanitarian grounds from the requirement of section 9.

(Emphasis is mine.)

[6] In this case, I am of the opinion that the correspondence from the sponsor's counsel can be considered as a request for consideration based on humanitarian and compassionate grounds. The letter, dated June 8, 1994, contains the following statement:

> To furnish you with Mr. Nijjar's background and the special circumstances that make the basis for our request we are submitting the following information.

And later:

> . . . Due to the long delay that occurred we take the view that Mr. Nijjar has been placed in a prejudicial position through no fault of his own. We are therefore requesting, pursuant to the Minister's statement concerning family reunification, that Mr. Nijjar's siblings, who are all single and financially dependent upon him, be permitted to enter Canada as part of his Undertaking of Assistance.

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[1] Appeal allowed on other grounds: [1984] 2 S.C.R. 565. The correspondence accompanying the application in this case contained such expressions as "If you are of the view that an exception . . ." and "I believe that you will find significant humanitarian reasons for making an exception . . .", but there was no separate request expressly made for humanitarian and compassionate grounds consideration.

[7] Although this letter does not coin the language as accurately as the correspondence in *Jiminez-Perez*, *supra*, I consider, in light of paragraphs 27 and 28 of the Affidavit of Preeti Ahluwalia Grover, filed on behalf of the respondent, that it is sufficient to constitute a request to have the application considered on the basis of humanitarian and compassionate grounds.

[8] With respect to the visa officer's duty to consider humanitarian and compassionate grounds, the Federal Court of Appeal, in *Jiminez-Perez*, *supra*, concluded that "Since the Act contemplates that admission may be granted on this basis in particular cases, a prospective applicant is entitled to an administrative decision upon the basis of an application . . .". The Supreme Court noted in this respect that:

> In this Court, counsel for appellants conceded that appellants Jean Boisvert and Susan Lawson are under a duty to consider and deal with respondents' application for an exemption, on compassionate or humanitarian grounds, of the requirement of s. 9 of the *Immigration Act, 1976*, 1976-1977 (Can.), c. 52, under s. 115(2) [now 114(2)] of the Act. Counsel for appellants took the position that such a duty could not be enforced by way of mandamus but he did not really dispute that it could be enforced by way of declaration.
>
> (Emphasis is mine.)

[9] My colleague, Justice Cullen, concluded in *Nueda v. Canada (M.E.I.)* (1993), 65 F.T.R. 24, at page 31, that:

> A decision made pursuant to s. 114(2) is an administrative decision. Since the decision of the Supreme Court in **M.E.I. v. Jiminez-Perez and Reid v. Minister of Employment and Immigration et al.**, [1984] 2 S.C.R. 565, it is clear that immigration officers are under a duty to consider the application of a person for exemption, for humanitarian or compassionate reasons, from the requirement of s. 9 of the **Immigration Act**, that the officers must also make a decision on behalf of the Minister of Employment and Immigration, and advise the individual of the decision. . . .

[10] I am therefore of the opinion that the officer had a duty to refer the applicants' application for permanent residence in Canada, made through their mother, to a visa officer for consideration on humanitarian and compassionate grounds.

[11] I disagree with the respondent's submission that the applicants cannot have their application considered on this basis simply because they applied as "dependents" of a principal applicant in the "family class". I cannot conceive why section 2.1 of the Regulations, which includes the general terms "any person" and "any regulation", could not apply to the applicants' situation. The parties were unable to refer to any specific Court decisions on this point. I am prepared, therefore, to certify the following question, which was proposed by counsel for the respondent, pursuant to subsection 18(1) of the *Immigration Federal Court Rules, 1993*:

> Can a visa officer only consider an humanitarian and compassionate application by persons found not to come within the definition of "dependent son" or "dependent daughter" in a Family Class Application if those persons have submitted an independent request for humanitarian and compassionate consideration in an Application for Permanent Residence in Canada submitted in his or her own right as the Principal Applicant (either as an Independent Application or as a Family Class Application where he or she has applied as a "member of the family class", not as an accompanying dependant of the member of the family class)?

No further question deserves to be certified in this matter.

[12] The application for judicial review is allowed accordingly and the matter is remitted back to the Immigration Program Officer who shall refer the Application for Permanent Residence in Canada made under the family class submitted by Daljit Kaur Nijjar (the principal applicant) to a visa officer for consideration of the applicants' application for permanent residence in Canada included therein on humanitarian and compassionate grounds.

JUDGE

OTTAWA, ONTARIO
December 23, 1997