Date: 20070625

Docket: IMM-6139-06

Citation: 2007 FC 675

BETWEEN:

MARIE DIMONEKENE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] The issue raised in this application for judicial review comes down to whether Marie Dimonekene's son, Canthe Carlosenhe Carlite, is a student who, in the words of the definition of "dependent child" in section 2 of the *Immigration and Refugee Protection Regulations*:

(*b*) (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	b) (ii) […] 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

before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student	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,	(B) y suit activement à temps plein des cours de formation générale, théorique ou professionnelle,
[Emphasis added]	[nos soulignés]

If the answer is in the affirmative, this application for judicial review must be allowed. Otherwise, it must be dismissed.

THE FACTS

[2] Marie Dimonekene is a refugee originally from the Democratic Republic of Congo. After obtaining her permanent residence in the country from Canadian authorities, she attempted to sponsor her children. To do so, she began administrative procedures that met with some delays

because these procedures imposed requirements on both the applicant and the authorities in charge of the file. In this case, the delays are not important.

[3] Although the sponsorship application involving Ms. Dimonekene's children was initially dismissed, it was subsequently allowed in part by the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, which dismissed the application of just one of the claimants—Canthe, the oldest son.

[4] In fact, according to the Regulations set out above in these reasons and considering that Canthe is now 31 years old, it is impossible for him to fall within the category of "dependent child" unless he demonstrates that he has depended substantially on the financial support of his parents since before the age of 22 and has been continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority and actively pursuing a course of academic, professional or vocational training on a full-time basis.

[5] When the IAD exercises its jurisdiction and decides to allow an appeal as it did here, it must act in accordance with section 67 of the *Immigration and Refugee Protection Act*, which states:

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67.** (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé:
(*a*) the decision appealed is wrong in law or fact or mixed law and fact;	*a*) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

(*b*) a principle of natural justice has not been observed; or	*b*) il y a eu manquement à un principe de justice naturelle;
(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	*c*) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[6] It is important to note that, although Canthe was directly affected by the first decision that his mother was unable to sponsor him, when the IAD reviewed that decision, it could not consider humanitarian and compassionate grounds under section 65 of the IRPA because it had determined that Canthe was not a member of the family class since he was not actually a "dependent child" within the meaning of the Regulations.

[7] In short, in accordance with the legal requirements of the law in force in the country, Canthe can only be considered a member of the family class if he meets the conditions regarding post-secondary studies set out in the definition of "dependant child" in subparagraph 2(*b*)(ii) of the Regulations.

[8] In this case, one fact remains. From April 1998 to February 1999, when he was 22 years old, Canthe did not go to school. It is important to note that during this time, all schools in the Congo were closed because of the raging civil war and the resultant instability. Since that was one

of the grounds for initially denying the sponsorship application, i.e. Canthe's absence from school during those months, which resulted in an interruption of his post-secondary studies and thus disqualified him from being a "dependent child," Ms. Dimonekene appealed that decision to the IAD. Once again, reiterating this ground, the IAD determined that the oldest child was not a "dependent child" and, consequently, was excluded from the family class. The IAD added that membership in that class was an essential prerequisite for considering humanitarian and compassionate grounds.

[9] This is an application for judicial review of that decision.

[10] The grounds for that decision are based essentially on the fact that the wording of the IRPA at issue here does not provide explicitly, as the previous Regulations did, that the claimant can benefit from a grace period following an interruption of studies caused by an act of God, such as the war. The IAD made that decision despite the fact that the claimant satisfactorily demonstrated that, following his return to school, he completely made up for the lost time. The IAD relied on the case law in arriving at its decision.

ANALYSIS

[11] It would be much too simple to find that that the question here is a mixed question of fact and law. First, the question dealing with the meaning to be given to the definition of "dependent child" is purely a question of law, while the second question involving the assessment of the facts particular to Canthe's story is a question of fact. Applying the pragmatic and functional approach to

determine the appropriate standard of review in this case, I conclude that the first question should be reviewed against the standard of correctness. In light of the findings that I have made on this question, it is not necessary for me to determine the appropriate standard of review for the second question, i.e. reasonableness *simpliciter* or patent unreasonableness.

[12] As mentioned earlier, the IAD referred to the case law to support its reasons, including previous decisions of the IAD itself. For example, following *Casinathan v. Canada (Minister of Citizenship and Immigration)*, [1994] I.A.D.D. No. 938 (QL), it was decided that [TRANSLATION] "the applicant was unable to continue his studies in Sri Lanka after the schools were closed during the civil war. The panel determined that he was not a 'dependent son'." It must be noted that this Court is in no way bound by such a decision.

[13] The IAD also based its opinion on a decision of Mr. Justice Wetston in *Canada (Minister of Citizenship and Immigration) v. Nikolova*, [1995] F.C.J. No. 1337 (QL). In that case, the Court found that the child in question was no longer a dependant child although he had been [TRANSLATION] " prevented from continuing his studies because he was called up to do his compulsory military service." However, it is important to clarify that the main reason in that decision for not recognizing the claimant as a "dependent child" was the fact that he was too old when the sponsorship application was made.

[14] Mr. Justice Pinard's decision in *Avci v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No.1412 (QL), also cited by the IAD in the decision at issue here, is very similar to

the *Nikolova* case above although the relevant Regulations differ. In short, once again in this case decided by Mr. Justice Pinard, the claimant could not be recognized as a "dependent child" because he was too old when the sponsorship application was made.

[15] On a number of occasions, the Supreme Court of Canada has reiterated the principles of statutory interpretation that should guide the meaning to be given to provisions when an ambiguity arises. *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 is a good example of this:

> [26] In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."
>
> [Emphasis added.]

[16] Accordingly, it is essential to consider the objectives of the IRPA. As stated in the Act, it is very clear that one of the primary objectives is as follows:

3. (1) The objectives of this Act with respect to immigration are	**3.** (1) En matière d'immigration, la présente loi a pour objet:
…	(…)
(*d*) to see that families are reunited in Canada;	*d*) de veiller à la réunification des familles au Canada[,]

From this, it appears to me that the IAD's interpretation of the wording of the Regulations at issue here is quite simply incorrect, if not unreasonable.

[17] By way of comparison, the *Citizenship Act* in force in Canada requires a permanent resident to reside in the country for a period of three years during the four years immediately preceding his or her application for citizenship. This prerequisite for granting Canadian citizenship has resulted and continues to result in the exclusion of a large number of applications. It is nonetheless true that in some cases, including *Koo (Re)*, [1992] F.C.J. No. 1107 (QL), this Court established that all the particular circumstances surrounding such an application must be considered, including the reasons why the applicant was absent from the country during the prescribed reference period.

[18] Can it be inferred that a student is not continuously attending an educational institution from the fact that he or she is sick for a day, from the fact that he or she stays away for a day because of a teachers' strike, from the fact that the school is closed for several days following an exchange of

gunfire by crazed students or from the fact that, for example, all the schools in a region are closed because of a raging civil war?

[19] If missing a day of school does not really constitute an interruption of studies, how many school days must be missed to arrive at that conclusion? It seems to me that in order to do that, all the circumstances particular to a given case must be considered such as, for example, the reasons for the absences from class, the opportunities to make up the lost time and whether these opportunities were taken or not, etc.

[20] In this case, the IAD's analysis should not have stopped as it did, i.e. by making a narrow finding that Canthe's physical absence from his educational institution during the months of civil war in the Congo had resulted in itself in an interruption of his post-secondary studies. The IAD should also have considered why and what had been done subsequently to remedy the consequences of such an absence. It failed to do so.

[21] Although this application for judicial review is allowed, the Minister will have until July 9, 2007, to submit a serious question of general importance for purposes of a possible appeal and, under the circumstances, the applicant will have until July 19, 2007, to respond.

"Sean Harrington"

Judge

Ottawa, Ontario
June 25, 2007

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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