

Federal Court



Cour fédérale

Date: 20190109

Docket: IMM-1228-18

Citation: 2019 FC 28

Ottawa, Ontario, January 9, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

PAYAM SOHI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In September of 2011, Payam Sohi (the “Applicant”), applied to sponsor his family from Iran to Canada. The application included his brother, Daryoush Danesh Sohi, as a “dependent child” as it is defined in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (“IRPR”).

[2] When Immigration, Refugees and Citizenship Canada (“IRCC”) explained that Daryoush is not a dependent child, the Applicant did not dispute this finding. Instead, he asked for an exemption on humanitarian and compassionate (“H&C”) grounds under section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”). An IRCC Officer reviewed the H&C request and made negative credibility findings before dismissing it.

[3] The Applicant applied for judicial review of his rejected H&C application. For the reasons that follow, this application is granted.

II. **Facts**

[4] The Applicant is a Canadian citizen. He left Iran in 1999 and successfully claimed refugee status in Canada. In September of 2011, he submitted a sponsorship application for his parents. On the same application he included his brother, Daryoush, as a dependent child.

[5] The IRCC processed the sponsorship application six years later. Of note, when the Applicant submitted his forms, a different definition of “dependent child” existed than what is used today. The old definition included full-time adult students as long as they had started their studies before turning 22 years of age.

[6] The IRCC found that Daryoush (now 33 years old) did not meet the definition of “dependent child” at the lock-in date. For example, at the lock-in date he was 26 years old, had completed military service after graduating from high school, and had obtained a Bachelor’s degree in 2014.

[7] On April 5, 2017 the IRCC informed the Applicant's family that Daryoush was not a dependent child, but allowed them to submit more information to address these concerns.

[8] Instead of disputing the definition, on May 24, 2017, the Applicant asked for an exemption from the requirement under section 25(1) of the IRPA on H&C grounds. Counsel for the Applicant submitted that mandatory military service and the many years to process the application are outside of his control. Counsel also explained Daryoush had devoted his life to caring for his mother, ill father (now deceased), and ailing grandmother. Since Daryoush is unemployed, counsel also wrote that he relies on his mother for financial support.

[9] The Officer reviewed the H&C request, but found the Applicant's claims were not very credible. For example, although Daryoush said he had to serve in the military, the Officer knew other applicants had deferred service for school. The Officer also reviewed evidence that, although counsel said Daryoush was unemployed, he was actually working in a gym in exchange for a free membership. The Officer determined Daryoush was unemployed just so he could qualify as financially dependent for the sponsorship application.

[10] The Officer's handwritten notes also appear in the Certified Tribunal Record ("CTR") on page 154. Here, the Officer responds to the Applicant's submission that military service is mandatory. The Officer notes that, regardless what happened after, at the relevant time Daryoush had ceased to be a student:

If he were genuinely still [a dependent] that would not matter. He stopped studies and took an unpaid job to get a free gym membership he could not afford.

[11] On December 11, 2017 the Officer decided that no H&C grounds exist to exempt Daryoush from the “dependent child” requirement and removed Daryoush from the application.

[12] On March 15, 2018 the Applicant applied for judicial review. He argues that his right to procedural fairness was breached because he was not given an opportunity to respond to the Officer’s negative credibility findings.

III. **Issue**

[13] The sole issue arising in this application is whether the Officer violated the Applicant’s right to procedural fairness.

IV. **Standard of Review**

[14] Issues of procedural fairness are reviewed for correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

V. **Analysis**

[15] The Applicant argues that the Officer breached his right to procedural fairness by not providing him with an opportunity to respond to negative credibility findings (*Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at paras 25-26 [*Hamza*]). In particular, the Applicant says he should have had an opportunity to explain why he could not have deferred Military Service.

[16] The Respondent submits that any procedural fairness issues about credibility are not determinative of the decision because whether or not H&C factors are met, Daryoush did not satisfy or meet the definition of a “dependent child.”

[17] By all accounts, this is an H&C application. Accordingly, the earlier decision finding that Daryoush did not satisfy the definition of “dependent child” is not at issue in this matter, or rather, it should not have been. This is because the Applicant applied for H&C relief under section 25(1) of IRPA, and in doing so he requested an exemption from meeting the definition of “dependent child.” He also filed evidence in support of his H&C application including letters describing the death of their brother and the death of their father, as well as Daryoush’s strong connection to his family. Yet remarkably, the Officer does not find any H&C factors to weigh:

Information includes that there was another son, who died in Iran after SPR landed in Cnd. Submission links this death to the SPR’s [father’s] cancer and eventual death. Dep apparently took on responsibilities of looking after the family on his own and to dedicate himself to their wellbeing. Note that Dep was nearly 30 years of age at the death of his father, not young and he took on unpaid work only to get a free gym membership. I do not see evidence in this portion of the submission that indicates the application of H&C being justified.

[18] These reasons demonstrate the Officer failed to consider and weigh the H&C factors put forward, and they also reveal a negative credibility finding:

The submission has made some claims that are not very credible, such as Dep being UNABLE to continue studies before doing his military service. I find the statement that “if Daryoush has not met the definition of a dependent child, it is only due to circumstances totally out of his control” to be a disingenuous statement meant to support the H&C claim and not backed by fact.

[Emphasis in original.]

[19] Although the Officer made this negative credibility finding, the Respondent argues the Applicant just did not put his best foot forward when responding to the earlier procedural fairness letter. The Respondent also relies on *Toor v Canada (Minister of Citizenship and Immigration)*, 2006 FC 573 at paragraph 17 to say that the Officer had no obligation to disclose the adverse conclusion because it arose from material not unknown to the Applicant.

[20] This argument fails for two reasons. First, contrary to the Respondent's argument, the Officer does rely on evidence unknown to the Applicant. In particular, the Officer turns to previous cases involving other applicants:

I do not accept the claim that DEP was unable to continue his studies after HS and that he could not have deferred his military service. I have seen a very large number of cases where this had been done. There is no evidence to show that this dep's circumstances were different and that he was PREVENTED from continuing his studies vs this application was not yet in process so he did not see a need to continue his studies at that time. I feel that dep likely went to his military service as he was done with studies and he was later registered in studies, and kept in studies until 2016 in order to make him eligible for inclusion in this file.

[Emphasis in original.]

[21] Second, the duty of fairness in regards to the H&C application could not have been extinguished on the basis of an earlier and unrelated procedural fairness letter. At the judicial review hearing, the Respondent agreed that no H&C application had been filed prior to the procedural fairness letter being sent. In fact, the procedural fairness letter is what led the Applicant to file an H&C application. As explained by this Court in *Hamza* at paragraph 25, the duty of procedural fairness may entail giving an applicant the opportunity to respond to concerns arising from credibility, veracity, or authenticity of documentation provided. In this case, the duty arose when the Officer relied on material unknown to the Applicant and made negative

credibility findings. As no such opportunity was provided in this case, I find that the Officer breached the Applicant's right to procedural fairness.

VI. **Certification**

[22] Counsel for both parties were asked if there were questions requiring certification, they each stated that there were no questions arising for certification and I concur.

VII. **Conclusion**

[23] This application for judicial review is allowed.

JUDGMENT in IMM-1228-18

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter referred back for redetermination by a differently constituted panel.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1228-18

STYLE OF CAUSE: PAYAM SOHI v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: OCTOBER 10, 2018

JUDGMENT AND REASONS: AHMED J.

DATED: JANUARY 9, 2019

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