

Date: 20080320

Docket: IMM-2086-07

Citation: 2008 FC 365

Ottawa, Ontario, March 20, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**MALKIAT SINGH GILL
KIRANPREET KAUR**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant, Ms. Kiranpreet Kaur, did indicate to the Visa Officer that she had taken leave from school on certain occasions, the period of her grandmother's illness and to assist in preparing for her sister's wedding.

[2] These leaves or absences from studies, however, 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institutions, specified, considered that she had either withdrawn or abandoned her studies for any given year.

[3] Contrary to *Vehniwal v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 279, [2007] F.C.J. No. 349 (QL), in the case at bar, Ms. Kiranpreet Kaur's academic performance has demonstrated a "genuine effort on the part of the student to acquire the knowledge that the course seeks to impart". Ms. Kiranpreet Kaur's personal circumstances were such that she failed one year of her studies; however, this was not due to her absence or withdrawal from her studies, they were the result of poor marks and, more particularly, to "difficult personal circumstances". (*Sandhu v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 79, [2002] F.C.J. No. 299 (QL), para. 15). No intention existed, on the part of the Applicant, to withdraw or abandon her studies. (*Dimonekene v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 675, [2007] F.C.J. No. 910 (QL).)

II. Judicial Procedure

[4] Ms. Kiranpreet Kaur, an M.A. student at Guru Nanak Mission Post-Graduate Girl's College, in India, seeks a judicial review of the High Commission of Canada refusal of her application for permanent residence as a dependent child of Mr. Malkiat Singh Gill.

III. Background

[5] The Principal Applicant, Mr. Malkiat Singh Gill, was sponsored for permanent residence by his daughter in Canada. His youngest daughter, Ms. Kiranpreet Kaur, was listed as an accompanying dependent on Mr. Malkiat Singh Gill's application for permanent residence.

[6] Following an interview by a Visa Officer at the High Commission of Canada, in New Delhi, India, in March 2007, Ms. Kiranpreet Kaur, was deleted from the application as she was found not to have been in continuous studies nor was she found to be actively pursuing post-secondary education prior to the age of 22.

[7] Ms. Kiranpreet Kaur confirms that she has attended eighteen years of formal education, six of which were at the college/university level. In particular, after high school, i.e. from July 1997 until April 2003, Ms. Kiranpreet Kaur had completed, in an uninterrupted manner, full-time B.A. studies at the Guru Nanak Mission Post-Graduate Girl's College, an institution associated with the Punjab University in Chandigarh.

[8] From August 2003 to July 2005, Ms. Kiranpreet Kaur, also, continuously and on a full-time basis, attended the Industrial Training Institute Moga, during which, after the first year, she obtained a Diploma in Cutting and Tailoring and, after the second year, she obtained a Diploma in Embroidery and Needle Work.

[9] From August 2005 to the present day, Ms. Kiranpreet Kaur is attending, also continuously and on a full-time basis, Guru Nanak Mission Post-Graduate Girl's College, where she is working towards her M.A. in History.

[10] Ms. Kiranpreet Kaur did indicate to the Visa Officer that she was absent from school at certain times for several months during her grandmother's illness and to assist in preparing for her sister's wedding.

[11] Ms. Kiranpreet Kaur further confirms that she failed one year of her studies; however, this was not due to her absence or withdrawal from her studies, but, rather, due to her low marks.

IV. Decision under Review

[12] In a decision, by letter, dated March 14, 2007, a Visa Officer held that she was not satisfied that Ms. Kiranpreet Kaur had been enrolled in continuous post-secondary schooling prior to the age of 22 due to her absences.

[13] The Visa Officer concluded that Ms. Kiranpreet Kaur was not a "dependent child" as defined in Section 2 of the *Immigration and Refugee Protection Regulations, S.O.R./2002-227* (Regulations). Also, as a direct result of this finding, the Visa Officer deleted Ms. Kiranpreet Kaur from her father's application for permanent residence in Canada.

V. Relevant Legislation

[14] Section 2 of the Regulations, defines the expression “dependent child”:

“dependent child”, in respect of a parent, means a child who	« enfant à charge » L’enfant qui :
(a) has one of the following relationships with the parent, namely,	a) d’une part, par rapport à l’un ou l’autre de ses parents :
(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or	(i) soit en est l’enfant biologique et n’a pas été adopté par une personne autre que son époux ou conjoint de fait,
(ii) is the adopted child of the parent; and	(ii) soit en est l’enfant adoptif;
(b) is in one of the following situations of dependency, namely,	b) d’autre part, remplit l’une des conditions suivantes :
(i) is less than 22 years of age and not a spouse or common-law partner,	(i) il est âgé de moins de vingt-deux ans et n’est pas un époux ou conjoint de fait,
(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 before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has	(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 :

been a student

(A) continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and

(B) actively pursuing a course of academic, professional or vocational training on a full-time basis, or

(iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition. (*enfant à charge*)

(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) y suit activement à temps plein des cours de formation générale, théorique ou professionnelle,

(iii) il est âgé de vingt-deux ans ou plus, 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 et ne peut subvenir à ses besoins du fait de son état physique ou mental. (*dependent child*)

VI. Main Issue

[15] Did the Visa Officer err in concluding that Ms. Kiranpreet Kaur had not been enrolled in continuous post-secondary schooling and, therefore, is not a “dependent child” as defined in Section 2 of the Regulations?

VII. Standard of Review

[16] The appropriate standard of review on the issue of whether Ms. Kiranpreet Kaur was continuously enrolled in and attending an educational institution must be determined by a pragmatic and functional analysis. (*Dehar v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 558, [2007] F.C.J. No. 751 (QL), para. 14.)

[17] In turn, the pragmatic and functional approach indicates the appropriate standard of review is the standard of reasonableness *simpliciter*. (*Shah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1131, [2006] F.C.J. No. 1425 (QL), para. 13.)

[18] Accordingly, the Visa Officer's decision should not be disturbed unless it "is not supported by any reasons that can stand up to a somewhat probing examination". (*Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, para. 56.)

VIII. Analysis

[19] Did the Visa Officer err by failing to consider the qualitative aspect of Ms. Kiranpreet Kaur's schooling as was submitted by the Applicant?

[20] In essence, must the Visa Officer "consider more than mere physical attendance in determining whether the person has been "in attendance as a full-time student"?" (*Sandhu*, above, para. 22.)

Continuously Enrolled

[21] In assessing whether Ms. Kiranpreet Kaur met the definition of “dependent child”, the Visa Officer considered the definition of “dependent child” in Section 2 of the Regulations, her academic records and her interview, on March 1, 2007. The Visa Officer found that, given the leave taken from school by Ms. Kiranpreet Kaur, “on more than one occasion in more than one school year” and her failed year (both of which are not denied by the Applicant); as a result, the Visa Officer was, therefore, not satisfied that she had been enrolled in continuous post-secondary schooling prior to the age of 22.

[22] The interpretation with respect to the Regulations as to what fulfills the requirement of a “dependent child” in attendance of post-secondary education as a full-time student, has been the subject of numerous decisions. Justice J. Edgar Sexton of the Federal Court of Appeal summarized the jurisprudence in his *Sandhu* decision, above. Justice Sexton concluded the key factor would be to examine if the student had made a bona fide effort in his or her studies:

[15] In *Chen v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1552 (T.D.), Sharlow J., as she then was, held:

In my view, a visa officer must consider the credibility of an applicant who claims to be enrolled and in attendance as a full-time student. A failure on the part of an applicant to learn the subject matter of a course of studies may be the result of an intellectual failing or difficult personal circumstances. Such factors would not, in my view, support the inference that the applicant is not in attendance as a full-time student. But a failure to learn may also be an indication that the applicant is not being truthful in claiming to be in attendance as a full-time student, and in this regard I accept the suggestion in *Khaira and Malkana* that “attendance” necessarily implies both physical and mental presence.

[16] In *Dhami v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1160 (T.D.), Madam Justice Dawson stated the meaning of “attendance” as follows:

From this jurisprudence I take two principles.

First, where an applicant's credibility is in issue, and the applicant cannot describe the courses taken or the program of study, or cannot demonstrate even a rudimentary knowledge of subjects which the applicant claims to have taken, it is open to a visa officer to conclude that the applicant has failed to establish to the visa officer's satisfaction that the applicant was truly in attendance at the program for which the applicant claims to have been enrolled in.

Second, poor academic performance is by and in itself an insufficient basis upon which to conclude that an applicant was not in attendance as a full-time student. On the plain and ordinary meaning of the words "continuously enrolled and in attendance" there is no requirement for the applicant to demonstrate academic prowess or mastery of the subject matter.

I conclude that because the regulatory definition speaks of both enrollment and attendance, a visa officer is obliged to look beyond the mere fact of registration in a program of study. The reference in the definition to "attendance" is, in my view, for the purpose of testing the reality of a claim to full-time student status. The visa officer must inquire whether an applicant is simply enrolled on paper or whether an applicant is actually engaged in a bona fide manner in a program of study.

When the case law of the Court is reviewed carefully, I find what was argued to be a conflict in the jurisprudence is more apparent than real. In no case has an applicant been required to be a good or a successful student. At the heart of the question certified by Gibson J. was whether a visa officer could look to an applicant's inability to describe what was said to have been taught in courses or evidence of poor physical attendance for the purpose of determining whether the applicant was "in attendance".

Meaning of the Words "is enrolled and in attendance as a full-time student".

[17] The requirement that a "dependent son" be enrolled in and in attendance as a full-time student in a program at an educational institution is public recognition of the value which our society attaches to higher education. For example, in many instances further education is a prerequisite to obtaining the sort of employment that a person seeks. Many employers seeking to fill certain positions will require evidence of university education before they will even interview applicants.

[18] Most full-time university students require financial assistance and in many instances this is provided by their parents. Subparagraph 2(1)(b)(i) of the Regulations, then, would appear to recognize this fact because it includes full-time students within the definition of dependents and, therefore, the Regulation promotes a policy of forwarding academic pursuits. This policy objective cannot be accomplished when a student merely physically attends school but makes no effort to study and understand the courses in which the student is enrolled.

[19] I therefore agree with the statement of Sharlow J., as she then was, in *Chen* that attendance "necessarily implies both physical and mental presence". I also agree with the statements quoted in *Dhami* by Dawson J. that a failure to demonstrate even a rudimentary knowledge of the subjects studied can lead to an inference that an applicant was not in attendance as a full-time student, but that poor academic performance is by and in itself an insufficient basis upon which to so conclude.

[20] In my view, the words "enrolled and in attendance as a full-time student" require that the student, on a continuous basis, make a bona fide attempt to assimilate the material of the subjects in which the student is enrolled.

[21] This does not suggest that a student must be either successful in the examinations or that the student have acquired a mastery of the subject. What is required is a genuine effort on the part of the student to acquire the knowledge that the course seeks to impart.

[22] Thus a visa officer is required to consider more than mere physical attendance in determining whether the person has been "in attendance as a full-time student" and must make sufficient inquiries in order to satisfy himself that the student meets the requirements of subparagraph 2(1)(b)(i). (Emphasis added.)

[23] Justice Sexton goes on to identify a non exhaustive list of factors that may assist Visa Officers in determining the nature of a student's enrolment in post-secondary studies:

[23] The factors which should be considered in making such a determination could include the following, although this list may well not be exhaustive. First is the record of the student's actual attendance. Second is the grades the student achieved. Third is whether the student can discuss the subjects studied in, at the very least, a rudimentary fashion. Fourth is whether the student is progressing satisfactorily in an academic program. Fifth is whether the student has made a genuine and meaningful effort to assimilate the knowledge in the courses being studied. The factors might perhaps be summed up by asking whether the person is

a bona fide student. While one could be a bona fide student and still have a poor academic performance, in such cases visa officers ought to satisfy themselves that, nevertheless, students have made a genuine effort in their studies. (Emphasis added.)

[24] Justice Max Teitelbaum of the Federal Court notes in his *Vehniwal*, above:

[11] Although *Sandhu* considered the *Immigration Regulations, 1978* [SOR/78-172], as enacted by SOR/92-101, and these have now been replaced by the IRPR, the Federal Court of Appeal's finding in *Sandhu* is still valid. In fact, in *Lee v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 F.C.R. 3, 2004 FC 1012, at paragraph 20, Justice Dawson found that the definition of "dependent child" at paragraph 2(b)(ii) of the IRPR:

... expresses the intent to codify the test articulated by the Court of Appeal in *Sandhu*. Clause (A) of the definition carries forward the requirement of full-time enrollment and attendance in an educational program, while clause (B) articulates the requirement for a mental presence in the educational program in the form of a genuine, *bona fide* effort on the part of the student.

[25] It is, therefore, clearly evident that the mere fact that a student was unsuccessful in his or her studies does not, in and of itself, suffice to exclude this individual from the Regulations application.

[26] The Operational Memoranda of Citizenship and Immigration Canada, OP 2 Processing Members of the Family Class, 2006, equally addressed the factors a Visa Officer may consider in the determination that which constitutes a full-time status of a student:

14.2. Full-time student

Officers may question applicants about their educational institution during an interview. If they are enrolled and attending school as full-time students, dependent children should be able to speak

14. b. Étudiant à temps plein

Lors de l'entrevue, les agents peuvent poser au demandeur des questions sur leur établissement d'enseignement. S'ils sont inscrits et qu'ils fréquentent l'école à titre d'étudiant à temps plein, les

knowledgeably about their course of studies, their activities at school, teachers, classmates, the physical description of the school, and so on.

enfants à charge devraient être à l'aise pour parler de leur programme d'études, de leurs activités à l'école, de leurs professeurs et de leurs camarades de classe, et pouvoir donner une description de l'école, etc.

The questions below may assist in a determination of whether a son or daughter is a full-time student:

Les questions ci-dessous peuvent aider à déterminer si un fils ou une fille est étudiant(e) à temps plein :

- Is the student enrolled in a program given at an educational institution such as a university, college or other educational institution?

- Est-ce que l'étudiant est inscrit à un programme offert dans un établissement d'enseignement comme une université, un collège ou un autre établissement d'enseignement?

- Is the student in attendance at the educational institution?

- Est-ce que l'étudiant suit des cours à l'établissement d'enseignement?

- Is attendance full-time? Is it the dominant activity in the life of the applicant?

- Est-ce qu'il suit des cours à temps plein? S'agit-il de l'activité dominante de la vie du demandeur?

- Is the program of studies followed at this educational institution academic, professional or vocational? (See below)

- Est-ce que le programme d'études suivi à cet établissement d'enseignement est une formation générale ou professionnelle? (voir ci-dessous)

- Is the institution accredited by a relevant government authority?

- Est-ce que l'établissement est reconnu par une autorité gouvernementale pertinente?

An officer must be satisfied that an applicant is in attendance at an educational institution with the intention of studying. If this is in doubt an officer may look at:

- The record of a student's actual attendance at school;
- The grades achieved by the student;
- Whether the student can discuss, with some knowledge, the subjects studied;
- Whether the student has made a genuine effort to assimilate the knowledge in the courses being studied.

If it is evident that an applicant is enrolled at an educational institution primarily to qualify as a dependent child for immigration purposes and not with the intention of studying, the applicant is not eligible as a dependent child.

Un agent doit être convaincu qu'un demandeur suit des cours dans un établissement d'enseignement avec l'intention d'étudier. Si l'agent a des doutes, il peut vérifier :

- le dossier de présence effective à l'école de l'étudiant;
- les notes obtenues par l'étudiant;
- le fait que l'étudiant puisse discuter, en faisant preuve de certaines connaissances, des sujets étudiés;
- le fait que l'étudiant a réellement fait un effort pour assimiler les connaissances communiquées dans les cours.

S'il est évident qu'un demandeur est inscrit à un établissement d'enseignement principalement pour être considéré comme enfant à charge aux fins de l'immigration et qu'il n'a pas l'intention d'étudier, il n'est pas admissible à titre d'enfant à charge.

Leave or Absence

[27] During the interview, the Visa Officer questioned Ms. Kiranpreet Kaur as to why she had failed her academic year; she explained that she missed ten days prior to her 2001 examination session in order to attend and assist in preparing for her sister's wedding in Canada. Ms. Kiranpreet Kaur went on to explain that the days she had missed were important ones as they were the class sessions that preceded the final examination. She also explained that she had actually failed three subjects, and, as a result, when a student failed more than two, the year is rated as a failure. (Interview Notes, Tribunal Record, p. 4.)

[28] Ms. Kiranpreet Kaur was equally questioned as to the leave she took to care for her grandmother (from November 2005 until her grandmother's death in February 2006). Mr. Malkiat Singh Gill, the Principal Applicant, confirmed his daughter's statement and noted that "there was no one else to care for my mother". (Interview Notes, Tribunal Record, p. 5.)

[29] Ms. Kiranpreet Kaur did indicate to the Visa Officer that she had taken leave from school on certain occasions, the period of her grandmother's illness and to assist in preparing for her sister's wedding.

[30] These leaves or absences from studies, however, 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, specified, considered that she had either withdrawn or abandoned her studies for any given year.

[31] Contrary to *Vehniwal*, above, in the case at bar, Ms. Kiranpreet Kaur's academic performance has demonstrated a "genuine effort on the part of the student to acquire the knowledge that the course seeks to impart". Ms. Kiranpreet Kaur's personal circumstances were such that she failed one year of her studies; however, this was not due to her absence or withdrawal from her studies, they were the result of poor marks and, more particularly, to "difficult personal circumstances". (*Sandhu*, above, para. 15). No intention existed, on the part of Ms. Kiranpreet Kaur, to withdraw or abandon her studies. (*Dimonekene*, above.)

VIX. Conclusion

[32] Based on the foregoing, the Visa Officer was unreasonable in determining that Ms. Kiranpreet Kaur was not "continuously enrolled in and attending a post-secondary institution" and that she was not a "dependent child" within the meaning of section 2 of the Regulations. Consequently, the application for judicial review is allowed and the matter is remitted for redetermination to a different Visa Officer.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be allowed and the matter be remitted for redetermination to a different Visa Officer.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2086-07

STYLE OF CAUSE: MALKIAT SINGH GILL
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AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 11, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: March 20, 2008

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