Date: 20080526

Docket: IMM-3568-07

Citation: 2008 FC 655

Ottawa, Ontario, May 26, 2008

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

VERNITA NIMBLETT WILLIAMS

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, dated August 21, 2007, wherein the applicant was denied her sponsorship appeal.

[2] The IAD rejected the applicant's appeal primarily on the basis that one of her sponsored family members, her eldest daughter, Khadine Nimblett (the Daughter), is not a member of the "family class" as described in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as

amended (the Act) and the *Immigration and Refugee Protection Regulations*, SOR/2002-227, as amended (the Regulations).

[3] The following facts are relevant in this case.

[4] The applicant, Vernita Nimblett Williams, was born in St. Vincent and the Grenadines. She became a permanent resident of Canada on April 4, 2005, based on humanitarian and compassionate grounds. At the time the applicant filed her application for permanent residency, she declared the Daughter and her two younger children, Kendell Nimblett and Onesha Nimblett, as dependent children.

[5] On June 8, 2005, the applicant filed a sponsorship application for the Daughter (the Visa Application) and her two other children. At the time the Visa Application was filed, the Daughter was more than twenty-two years of age. Unlike her two younger siblings, the Daughter does not live in Canada.

[6] On October 17, 2005, according to the Computer Assisted Immigration Processing System (CAIPS) notes, a visa officer requested that the applicant submit the Daughter's background declaration form (Schedule 1), and provide proof of all educational studies undertaken by the Daughter since her 22nd birthday.

[7] The requisite documentation was not submitted by the applicant.

[8] On November 7, 2005, a visa officer again asked for the Daughter's Schedule 1 and for letters from all the educational institutions she had attended from secondary school to present. The letters from the schools were to specify the course of study; the commencement and completion dates; the dates and times the Daughter attended classes; and, whether or not she was enrolled as a part-time or full-time student.

[9] On February 21, 2006, the CAIPS notes indicate receipt of the following documents filed in support of the Visa Application: a) the Daughter's Schedule 1; b) a letter from Troumaca Ontario Secondary School in St. Vincent, dated December 5, 2005, confirming the Daughter's attendance on a full-time basis from August 31, 1998 to June, 2003; and, c) a letter from the Mustique Community Computer Education Programme (the MCCEP), dated December 12, 2005, indicating that the Daughter had enrolled in the MCCEP's full-time course in Information Technology on October 20, 2004 and was "currently continuing her studies at an intermediate level."

[10] In the spring of 2006, a visa officer communicated with the applicant on two occasions seeking additional information about the Daughter's commencement and completion dates of the intermediate level at the MCCEP, as well as the days and times she attends classes.

[11] Subsequently, between July and November, 2006, the applicant submitted two letters from the MCCEP which indicated the Daughter studied Information Technology at the basic level between October, 2004 and November, 2005; commenced her studies at the intermediate level on

November 7, 2005; and, was expected to complete the intermediate course by August 2006. During her studies at the MCCEP, the Daughter attended classes every weekday (except for holidays) from 9 a.m. to 12 p.m.

[12] On September 22, 2006, the CAIPS notes state that the Daughter's attendance at the MCCEP for 15 hours *per* week meets the requirement of "full-time" studies pursuant to subsection 78(1) of the Regulations. However, the officer also noted that the intermediate course was scheduled to finish in August, 2006. The applicant was therefore requested to advise whether or not the Daughter was still enrolled as a full-time student and if so, to submit a letter from the educational institution indicating the course of study; the commencement and completion dates; the dates and times the Daughter attended classes; and, whether the Daughter was enrolled on a part-time or full-time basis.

[13] On November 1, 2006, the MCCEP provided another letter to confirm that the Daughter had completed her full-time basic and intermediate course in Information Technology and that she had attended at the MCCEP from October 20, 2004 to August 4, 2006.

[14] On December 12, 2006, the Canadian High Commission in Port-of-Spain, Trinidad & Tobago refused the applicant's Visa Application on the grounds that the Daughter does not meet the requirements of "dependent child" under the Act and Regulations since, following the completion of her studies in August 2006, she was no longer enrolled in and attending a post-secondary institution.

[15] On January 8, 2007, B. Hamel-Smith, a Designated Immigration Officer working at the Canadian High Commission in Port-of-Spain, informed the applicant and the Daughter, in writing, that the Visa Application had been refused on the basis that the Daughter was "22 years of age on the date the sponsorship application was received at the Case Processing Centre [of the Canadian High Commission] and [has] not been a full-time student since [she] completed the Information Technology Course at [MCCEP] in August 2006." As a result, the Daughter did not meet the definition of a "dependent child" as defined in section 2 of the Regulations and was therefore not a member of the "family class" pursuant to subsection 117(1) of the Regulations.

[16] The applicant filed a Notice of Appeal with the IAD Registry Office in Montreal in February 2007. The IAD, by letter dated March 21, 2007, acknowledged receipt of the applicant's Notice of Appeal. The IAD also stated that if the applicant wanted to continue with her appeal, she must provide a copy of any written information or arguments in support of her position to the IAD Registry and to the respondent within certain prescribed timelines. In particular, the letter reads: "[t]he Minister's counsel will have fourteen days after receiving your documents to respond in writing. You will have ten days after receiving the Minister's response to reply to it in writing." The letter then indicates in bold: "[t]he IAD may make a decision on the basis of the documents provided by the parties within the time limits set out above. […] If the member of the IAD decides that the the [*sic*] sponsored foreign national is not a member of the family class, the member may dismiss the appeal because the decision to refuse a permanent resident visa would be correct."

[17] Applicant's counsel presented written submissions arguing the refusal of the Visa Application was "said to be due to a lack of proof that [the Daughter] was in school at the time of her application, when in fact, a letter attesting to [her] schooling was sent to [the Canadian High Commission] November 24, 2006 by Fedex." Appended to the applicant's written representations were the following documents: 1) a copy of a letter from the MCCEP, dated November 22, 2006, stating the Daughter commenced her studies in Information Technology at an advanced level on November 6, 2006 and attends classes weekdays from 9 a.m. to 12 p.m.; and, 2) a copy of a FedEx International Air Waybill dated November 24, 2006.

[18] Having requested and been granted an extension of time to file the respondent's materials, N. Bélanger, Hearing advisor for the Minister of Citizenship and Immigration Canada (CIC) filed the respondent's written response on May 10, 2007 (Tribunal Record, at pages 31 and following). According to these representations and the documents filed, the respondent had contacted F. Mark, a visa officer at the Canadian High Commission in Port-of-Spain, in regards to the Daughter's school attendance. The respondent received the reply (the Reply) from the visa officer in early May and it was produced as an exhibit to the respondent's written submissions.

[19] According to the Reply, the visa officer had been advised by the St. Vincent Ministry of Education that the MCCEP is "a recognized Primary school" on Mustique. Indeed, it is "the only school" on that island. Students must "go off island (St. Vincent) for secondary school." Nevertheless, the MCCEP also runs "adult literacy courses and what may be described as self interest courses or personal enhancement courses." Attached to the Reply is a document provided

by the MCCEP describing these types of courses (Tribunal Record, at pages 35-36). According the to Reply, such courses "do not in our opinion meet the legislative requirement of being post secondary and they are generally part time courses. The course followed by the applicant appears to be described on the last page [of the MCCEP document] and clearly does not support her claim to be a dependent of her mother and she is not a member of the family class."

[20] The respondent agreed with the position taken in the Reply and argued that the MCCEP is not a post-secondary institution as described in section 2 of the Regulations. Accordingly, the Daughter is not a "dependent child" under the legislative scheme. The respondent also provided an excerpt from the Policy Manual – OP 2 on "Processing members of the Family Class" and emphasized that subsection 14.3 further supports the visa officer's decision to refuse the applicant's Visa Application (Tribunal Record, at pages 37-40).

[21] The IAD dismissed the applicant's appeal on August 21, 2007. The decision reads as follows:

> The appeal is dismissed because the appellant has not shown that the visa officer's refusal was wrong in law. On the basis of the information provided, the person who was sponsored by the appellant is not a member of the family class. Therefore, under s. 65 of the [Act], the IAD has no discretionary jurisdiction to consider humanitarian and compassionate considerations. In addition, there is insufficient independent reliable evidence to conclude that [MCCEP] is on [*sic*] approved post-secondary institution

[22] Having carefully considered both parties' submissions and oral arguments, I find that it was not unreasonable for the IAD to conclude that the Daughter was not a "dependent child".

Accordingly, I am also of the view that it was not unreasonable to refuse the applicant's request to sponsor the Daughter as a member of the “family class”. The IAD’s decision was based on the evidence before it and was made in accordance with the express provisions of the Act and Regulations. There was no breach of procedural fairness in this case.

[23] The relevant statutory provisions are as follows.

[24] Section 13 of the Act provides that a Canadian citizen or permanent resident may, subject to the Regulations, sponsor a foreign national who is a member of the family class. Subsection 117(1) of the Regulations defines who is a member of the “family class”:

117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	117. (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu’ils ont avec le répondant les étrangers suivants :
[…]	[…]
(b) a dependent child of the sponsor;	b) ses enfants à charge;
[…]	[…]

[25] Pursuant to section 2 of the Regulations, “dependent child” (« enfant à charge » in French), in respect of a parent, means a child who:

(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	(i) soit en est l’enfant biologique et n’a pas été adopté par une personne autre que son

the spouse or common-law partner of the parent, or	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 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,
(iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of	(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

22 and is unable to be financially self-supporting due to a physical or mental condition.	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.

[26] The applicant's right to appeal before the IAD is governed by subsection 63(1) of the Act which states:

63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.	63. (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

[27] Section 67 prescribes the manner an appeal is disposed of

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	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

compassionate considerations warrant special relief in light of all the circumstances of the case.	circonstances de l'affaire, la prise de mesures spéciales.

[28] In this case, there is no dispute that the Daughter had attained the age of 22 on November 6, 2004. She was thus, over the age of 22 at all material times in the Visa Application process. Given the Daughter's age, according to the legislation described above, to be considered a member of the family class, she had to be "continuously enrolled in a post-secondary institution accredited by the relevant government authority", namely, the St. Vincent Ministry of Education.

[29] The evidence before the IAD clearly demonstrates that the applicant was unable to establish that the Daughter met this statutory requirement.

[30] The evidence before the IAD shows that the Daughter finished her intermediate course at the MCCEP on August 4, 2006 and was not enrolled in the advanced course until November 6, 2006. The applicant was therefore unable to demonstrate that the Daughter had been "continuously enrolled in and attending" a post-secondary institution. Indeed, there was no evidence provided to the IAD to explain the Daughter's three month absence from schooling.

[31] The applicant argues the failure to consider, in the original rejection decision dated December 12, 2005, the letter sent by the MCCEP (which indicated the Daughter was enrolled in the advanced course), is a fatal flaw warranting this Court's intervention. I disagree. The

jurisprudence in this area is settled: an appeal before the IAD is *de novo*: *Mendoza v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 934, [2007] F.C.J. No. 1204(QL) (*Mendoza*); *Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1673, [2005] F.C.J. No. 2071 (QL); and, *Kahlon v. Canada (Minister of Employment and Immigration)*, (1989) 97 N.R. 349 (F.C.A.). As such, the IAD had the jurisdiction to consider all the evidence before it, including but not limited to the letter from the MCCEP dated November 22, 2006. There is no evidence before me to suggest the IAD failed to consider this letter. Indeed, the applicant has not advanced this argument. As a result, I am unable to find support for the applicant's suggestion that the failure to deal with the letter from the MCCEP in the original decision, a decision, it bears re-iterating, that was the subject of a *de novo* appeal, is a reviewable error.

[32] I am also of the view that the evidence before the IAD, in particular the Reply produced by the visa officer in Port-of-Spain, provides a reasonable basis for the IAD's conclusion that the MCCEP is not a post-secondary institution that is accredited by the relevant government authority. Instead, the evidence suggests that the MCCEP is a primary school that offers self interest or personal enhancement courses, typically on a part time basis. (To that effect, see the Reply and the information contained in the Tribunal Record at page 34-36). While the MCCEP may also be a "government approved post-secondary certified center for the International Computer's Drivers Licence (ICDL)" (e-mail dated July 17, 2007 from MCCEP Coordinator, Tribunal Record, page 69), there is no evidence on record that the Daughter followed ICDL classes. There is nothing to suggest the Daughter was enrolled in the ICDL classes. To the contrary, the intermediate and advanced classes are described separately from the ICDL classes.

[33] Given that the appeal was *de novo*, both parties could adduce any fresh evidence they wished the IAD to consider: *Mendoza*, above. This possibility was clearly explained to the applicant. In short, there is no conclusive evidence on the record to contest the reasonableness of the findings of the IAD that "there is insufficient independent reliable evidence to conclude that [MCCEP] is on [*sic*] approved post-secondary institution."

[34] Finally, the applicant alleges in her written memorandum that she was denied procedural fairness by the IAD since she was not provided the opportunity to proceed orally. This allegation is without merit. Section 25 of the *Immigration Appeal Division Rules*, SOR/2002-230 as amended, provides that instead of holding a hearing, the IAD may require the parties to proceed in writing if this would not be unfair to any party and there is no need for the oral testimony of a witness. The applicant has not persuaded me that the decision to proceed in writing was unfair, nor am I convinced there was a need for any witnesses to testify orally.

[35] To the contrary, I conclude that the appeal process before the IAD upheld the applicant's rights to procedural fairness. The applicant received a detailed letter from the IAD. She had until August 6, 2007 to establish that MCCEP is an approved post-secondary institution in St. Vincent (Notice of Decision, July 5, 2007, Tribunal Record, at page 66). The applicant was accordingly given an opportunity to know the case against her and the issue before the IAD (*i.e.*, whether her Daughter was a member of the "family class" as defined in the Act and in the Regulations). She was given an opportunity to submit evidence and argument on this issue, and she did so (see letter dated

August 6, 2007 from applicant’s counsel to the IAD and the enclosed e-mail from MCCEP, Tribunal Record, at pages 68-69). Further, as stated, she could have responded to the respondent's submissions in writing, but chose not to. The IAD based its decision on all of the material before it, including the applicant's evidence and submissions. In short, the process followed by the IAD complied with the requirements of procedural fairness.

[36] In conclusion, the present application must fail. No question of general importance has been raised and none shall be certified by the Court.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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