Federal Court  Cour fédérale

Date: 20180322

Docket: T-971-17

Citation: 2018 FC 330

Ottawa, Ontario, March 22, 2018

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

SHABIRA KAPADIYA
NILAM HANIF HUSSEIN
SAMIR HANIF HUSSEIN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Shabira Kapadiya's niece and nephew live in Tanzania. She adopted them after their parents died and later applied on their behalf for Canadian citizenship. On June 5, 2017, a Counsellor and Immigration Program Manager with Citizenship and Immigration Canada (the Officer) refused both citizenship applications for the same reason: they both failed to satisfy

sections 5.1(1)(b) and (d) of the *Citizenship Act*, RSC, 1985, c C-29 [*Citizenship Act*]. This means their parent-child relationship was not genuine, and the adoption was entered into primarily for the purpose of acquiring a status or privilege in relation to immigration or citizenship. In other words, the Officer determined these were adoptions of convenience.

[2] The Applicants asked this Court to judicially review the decisions, which they say breached their right to procedural fairness. I agree, and am granting these applications for the reasons that follow.

II. Background

[3] The Principal Applicant, Ms. Kapadiya, was born in Tanzania and later moved to Canada where she became a Canadian citizen in 2004. She is the adoptive mother of the other two Applicants in this judicial review: Nilam Hanif Hussein (born in 1990) and Samir Hanif Hussein (born in 1994), as well as their older brother Jabir Hanif Hussein. This judicial review only concerns the citizenship applications of Nilam and Samir because Jabir's citizenship application was refused after his interview with Citizenship and Immigration Canada (CIC) in 2014.

[4] Nilam, Samir and Jabir lost their father in 1999. Their mother then abandoned them in Tanzania before she passed away herself in 2007. Ms. Kapadiya applied to adopt the children as they had gone to live with their grandmother in Tanzania after their father died. On March 10, 2008, the High Court of Tanzania granted the adoption petition. In 2010, the Principal Applicant began the process to apply for Canadian citizenship on behalf of Samir and Nilam.

[5] The Officer who reviewed their applications for Canadian citizenship had concerns about whether a genuine parent-child relationship existed and whether the adoption was not entered into primarily for the purpose of acquiring a status or privilege in relation to immigration or citizenship. Both are requirements under sections 5.1(1)(b) and (d) of the *Citizenship Act*. The Officer's Global Case Management System (GCMS) notes in Nilam's file address the facts leading to these concerns. For example, the Officer references Jabir's interview with the CIC where he said that the children had only seen Ms. Kapadiya on 2 or 3 occasions. The GCMS notes also say there was no evidence of contact or financial support in the application. The Officer expressed concern over Ms. Kapadiya's delay in applying for Canadian citizenship, saying "[a]lthough the adoptions were completed in 2008, Part 2 of these applications were not received until 2014 and 2015, respectively." The GCMS notes of course were not disclosed to Ms. Kapadiya until after leave for judicial review was sought.

[6] Due to these concerns, on May 25, 2016, the Officer sent two procedural fairness letters (the fairness letters) to Ms. Kapadiya (one for each child), alerting her that the applications did not satisfy sections 5.1(1)(b) and (d) of the *Citizenship Act*. Specifically, the Officer requested the following:

> I would like to provide you an opportunity to these concerns. I would request that you submit a statement and any supporting documents to demonstrate how this adoption has created a parent-child relationship. Such a statement and associated documents should address any and all emotional and financial support you are providing to the adoptive child; the motivation and reasons for the adoption of the child; the authority an influence you hold in the life of the adoptive child; the arrangements and actions you have taken related to caring, providing and planning for the adopted child; how you exert a "parenting role" in the adopted child's life; and any other information you believe would be relevant to addressing these concerns.

[7] The Principal Applicant provided information to address the concerns in the fairness letters. After reviewing her reply, the Officer found that positive factors included statements from the children that they speak to Ms. Kapadiya frequently, evidence of Ms. Kapadiya's phone bills to Tanzania, as well as evidence of financial support. The Officer also acknowledged that Ms. Kapadiya is unable to have her own children.

[8] Yet the Officer found that Ms. Kapadiya's response did not address why she had waited a further five years to submit an application for their citizenship without providing any explanation for the delay, and had not travelled to see the children in seven years. The Officer noted that in *Canada (Citizenship and Immigration) v Young,* 2016 FCA 183, the Federal Court of Appeal said that adoptions of older children may require closer scrutiny, and these children were now 22 and 27 years old. The Officer also found that the age and independence of each child were negative factors in the decision.

[9] As a result, the Officer concluded that the applications failed to satisfy sections 5.1(1)(b) and (d) of the *Citizenship Act.* The reasons for the decision were provided in two letters dated June 5, 2017, one for each child. Each letter sets out the same basis for the refusal.

[10] On June 30, 2017, the Applicants applied for judicial review of these decisions. By Order of this Court, both of the decisions were heard together as they are based on the same facts and reasons for the decision.

III. Preliminary Issue

[11] The Respondent asks this Court to strike paragraphs 10 and 11 of Ms. Kapadiya's affidavit and their related Exhibits C and E, arguing they are extrinsic evidence that was not before the decision maker.

[12] On judicial review, the general rule is that it is inappropriate for an applicant to supplement argument with material that was not before the decision maker. Although there is an exception to this principle, paragraph 10 and Exhibit C does not meet the exception (*Ochapowace First Nation v Canada (Attorney General)*, 2007 FC 920; *Smith v Canada*, 2001 FCA 86). I will strike paragraph 10 and Exhibit C as it was information that was not before the decision maker.

[13] I will allow Exhibit E and paragraph 11, as that information goes towards the procedural fairness exception to the general rule. This evidence goes to the heart of the Applicants' procedural fairness argument that there had been no notice that visitation was an area of concern.

[14] The Principal Applicant says that she was denied natural justice because she had no meaningful opportunity to participate— but if she had notice of the Officer's concern, she could have submitted the Doctor's letter at Exhibit E. Although this letter is dated July 20, 2017 (after the decision was rendered), the information contained in it speaks to a period of time from before the decision, in regards to "negative environmental effects on her health" being the medical reason why she could not travel to Africa (Tanzania) since 2010. This shows that medical

evidence existed regarding why the Principal Applicant did not travel to see the children as well as a one possible explanation. Further evidence concerning delay and explaining why she did not travel is contained in paragraph 11 of her affidavit. Had she known of the Officer's concerns, she could have explained these reasons and had the opportunity to submit evidence. I will allow this evidence as an exception as it goes to the procedural unfairness arguments.

IV. Issues

[15] The issues are:

A. Did the Officer breach the Applicants' right to procedural fairness by:
   i. failing to raise the concerns the Officer had regarding lack of visitation and delay in filing the application in the procedural fairness letter?
   ii. failing to provide an interview?

B. Did the Officer fail to consider all the evidence, and rely on erroneous and unreasonable interpretations of the evidence?

V. Standard of Review

[16] Decisions about whether an adoption is an adoption of convenience or created a genuine relationship of parent and child as described in sections 5.1(b) and (d) of the *Citizenship Act* are questions of mixed fact and law, and they are subject to the reasonableness standard of review (*Canada (Minister of Citizenship and Immigration) v Dufour*, 2014 FCA 81 at para 30). Issues of procedural fairness attract the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 42-43).

VI. Analysis

A. *Procedural Unfairness*

[17] The Applicants submit that the Officer breached their right to procedural fairness in two ways.

[18] First, the Applicants submit procedural fairness was breached because the fairness letters did not inform them of all the Officer's major concerns. Namely, they say they were not informed of concerns related to Ms. Kapadiya's failure to travel to Tanzania to visit the children since 2010, nor about concerns over the delay in filing the applications. They say these concerns should have been brought up in the fairness letters, because the point of a fairness letter is to allow an opportunity to respond to concerns before the decision is rendered.

[19] Second, the Applicants submit that their right to procedural fairness was breached because the younger children were not interviewed, yet their older brother was interviewed in his own (earlier) application. The Applicants submit that an interview was necessary because it would have provided them with an opportunity to prove the authenticity of the adoption and parent-child relationship. In addition, the Applicants' written materials cited section 14.2 of the Citizenship Manual, which states that if an adoption of convenience is suspected, the adoptive parents should be interviewed. Despite this, at the hearing counsel for the Applicants only argued that the two children should have been interviewed and that none of the parties had waived their right to an interview. In this case, as the "children" are adults now, that makes sense and does not preclude the adoptive parent from also being interviewed.

[20] Sometimes, fairness requires an interview so that an applicant can have "a meaningful opportunity to present their case fully and fairly," (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 30, 33). CIC's own guidelines say that suspected adoptions of convenience are one of those circumstances where an interview is necessary to allow an applicant that opportunity for meaningful response. Specifically, section 14.2 of the Citizenship Manual on Adoptions pronounces that an interview should only be conducted when it is essential, but then goes on to say an interview should be provided for suspected adoptions of convenience:

> 14.2 Interviews
>
> When examining an application made under A5.1, officers may request that the applicant or another party to the adoption attend an interview. Officers should call people for an interview only when it is essential in assessing a citizenship application. Interviews can help to confirm a person's identity and relationships pertinent to the adoption and application. Interviews may also provide answers to questions or concerns raised by the application.
>
> **If an officer suspects an adoption of convenience, an interview with the adoptive parents should be conducted** and, if applicable, a separate interview with the biological parents to identify discrepancies. The officer should ensure that the principles of natural justice and procedural fairness are followed when assessing the file. **The officer should inform the applicant of their concerns and provide them the opportunity to respond to those concerns.** The officer should record all questions posed to the applicant and their answers (see Annexes, letter template 10 for an interview request letter template).
>
> [Emphasis added]

[21] This passage in the Citizenship Manual means that an interview could have been requested either after the fairness letters were sent and a new concern arose, or before the fairness letters were sent if a concern already existed. The decision depends on whether the

suspicion about the adoption of convenience arose before or after the fairness letters were sent. As the eldest child had previously been interviewed in another application, this indicates that in this same family unit CIC found that an interview with the adopted child was essential as well.

[22] Neither of the children in this application nor the adopted mother was interviewed. None of the Applicants waived their right to be interviewed.

[23] I find a breach of procedural unfairness as the fairness letters do not indicate the major concerns in the Officer's decision— their delay in filing and the fact the adoptive mother did not travel to Tanzania to see the children since 2010. Though of course these concerns do not have to be in such detail, the unfairness in this case is heightened because there was no interview either.

[24] In regards to the travel issue, looking at the letter alongside the decision and with the benefit of hindsight, it would appear that the adoptive mother might have been able to surmise that evidence about "the arrangements and actions you have taken related to caring, providing and planning for the adopted child" would include detailed evidence about why she did not travel to Tanzania to see the children in person after 2010. After all, the onus is on the applicant to provide the evidence. She did provide some insight regarding travel when she addressed emotional support part of the fairness letters, but only in the context of emotional support. In the Officer's notes the only stated concern is: "The adoptive parent has not seen the children in seven years." But what is clearer now with the benefit of hindsight was not clear then—just as we now know medical evidence was available at the time to explain all the reasons that she did

not travel to Tanzania now that it is known this was a reason that the Officer decided it was not a genuine parent-child relationship.

[25] Of course there is no obligation on the Officer to provide a running score about where the application is weak (*César Nguesso v Canada (Minister of Citizenship and Immigration*), 2015 FC 880 at para 62). Just as it is not necessary to interview every person involved every time. But in these circumstances, where the Citizenship Manual expressly recognizes that procedural fairness requires an interview. It was still prudent and necessary to interview any combination of the adoptive mother and the children to address this concern.

[26] In addition the adoptive mother must have sufficient notice of what, in the end, was a seemingly decisive factor in the negative determination. In these circumstances, the fairness letters were not sufficiently clear that what all the concerns were.

[27] In contrast, I see nowhere in the fairness letters where notice is given to the adoptive mother to explain why she delayed in bringing the applications. The GCMS notes show that the delay is a specific concern of the Officer both before sending the fairness letters, and after receiving Ms. Kapadiya's response. The GCMS notes say that Ms. Kapadiya provided no explanation for the delay in applying for citizenship, a delay which the Officer felt "effectively removed the opportunity for her to parent these applicants while they were still under the age of majority and needed the parental authority and guidance that young adolescents require." This comment illustrates the factor was given heavy weight without notice that it was even a concern that needed to be addressed.

[28] This too was not remedied by the fairness letters or proceeding with an interview as an opportunity to provide a response.

[29] I do not need to address the other issues raised as the breach of procedural fairness is determinative.

[30] I am granting these applications and sending them back to be re determined by a different decision maker that can address the procedural unfairness issues that arose in these two decisions.

[31] No costs are awarded.

JUDGMENT in T-971-17

THIS COURT'S JUDGMENT is that:

1. The applications are granted and the decisions quashed and sent back to be re-determined by a different decision maker.

2. No costs are awarded.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-971-17
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