Federal Court  Cour fédérale

Date: 20180802

Docket: IMM-5612-17

Citation: 2018 FC 813

[ENGLISH TRANSLATION]

Montréal, Quebec, August 2, 2018

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JULIE OGANDA TONDA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] On May 15, 2017, the manager of the immigration program at the Canadian embassy in Senegal [the Manager] concluded that Victoria Oganda, the minor niece of Julie Oganda Tonda, the respondent, did not meet the criteria for admission to Canada as a member of the family class, that she had misrepresented or withheld material facts, and that she was consequently

inadmissible for a period of five years under paragraphs 40(1)(a) and 40(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The Manager therefore refused Ms. Oganda's application for permanent residence.

[2] On the same day, the immigration officer in the immigration section at the Canadian embassy in Senegal [the Officer] told Ms. Tonda that Ms. Oganda's application had been refused because she did not meet the requirements of the Act.

[3] Ms. Tonda appealed to the Immigration Appeal Division [IAD], which allowed the appeal on December 15, 2017.

[4] The Court has before it an application for judicial review of this IAD decision filed by the Minister of Citizenship and Immigration [the Minister]. He essentially argues that the IAD (1) did not give him the opportunity to make submissions and therefore violated the rules of procedural fairness, and (2) had no jurisdiction to hear the appeal given that the refusal of the application for permanent residence was based on a finding of inadmissibility on the ground of misrepresentation and that Ms. Oganda is neither Ms. Tonda's spouse nor her child, which deprives her of an appeal under subsection 64(3) of the Act.

[5] Ms. Tonda, in turn, argues that (1) the IAD did not violate procedural fairness, because it was up to the Minister to make submissions, which he failed to do; (2) the IAD had jurisdiction to hear the appeal, because Ms. Oganda is her dependent child; and (3) the IAD considered the child's best interests, as it should.

[6] The Court is satisfied that the IAD made a fatal error by violating the elementary rules of procedural fairness, and will therefore allow the application for judicial review.

II. Background

[7] In 2015, Ms. Tonda, a Canadian citizen, filed an application to sponsor her minor niece, Ms. Oganda, so that she could obtain permanent residence in Canada under the family class. They therefore claim that Ms. Oganda is an orphan, her mother having died when she was born and her father having died in 2010.

[8] Subparagraph 117(1)(f)(ii) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] states that a respondent's niece, if she is a minor, orphan, and without a spouse, falls under the family class. Ms. Oganda then submitted documents to confirm the death of her parents.

[9] Yet the Manager, after an investigation, determined that the death certificates presented by Ms. Oganda as evidence that her parents were deceased were not authentic. On May 15, 2017, the Manager told Ms. Oganda that her application for permanent residence had been refused because, without evidence that she was an orphan, Ms. Oganda was not a member of the family class.

[10] In addition, in his decision on May 15, 2017, the Manager concluded that Ms. Oganda had directly or indirectly misrepresented material facts relating to a relevant matter that induced or could induce an error in the administration of the Act, in violation of paragraph 40(1)(a)

thereof. He therefore concluded that Ms. Oganda was inadmissible for five years as of May 15, 2017, as stated in paragraph 40(2)(a) of the Act. Still on May 15, the Officer told Ms. Tonda that the application had been refused, and mentioned sections in the Act about appealing to the IAD.

[11] On May 31, 2017, Ms. Tonda filed an appeal with the IAD. On June 2, 2017, an IAD case management officer wrote to Ms. Tonda and essentially (1) acknowledged receipt of her notice of appeal; (2) quoted subsection 64(3) of the Act, which says "No appeal may be made under subsection 63(1) in respect of a decision that was based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common-law partner or child"; (3) noted that Ms. Tonda's sponsorship application had been refused on the ground that the foreign national was inadmissible under subsection 40(1) of the Act for misrepresentation; (4) asked Ms. Tonda to send the necessary documents and submissions if she believed that this provision did not apply to her appeal; and (5) confirmed the procedure that would be followed in terms of the making of submissions by the Minister, that the Minister was not required to make submissions in the preliminary stage, and that if the appeal were to proceed, the IAD would continue with its regular appeal review process. (Emphasis added.)

[12] On June 5, 2017, Ms. Oganda filed an application for leave and for judicial review of the Manager's decision, and on August 24, 2017, the Court declined to grant her leave to file the application given her failure to complete her file.

[13] On September 22, 2017, Ms. Tonda replied to the IAD case management officer through her counsel. She then argued that no misrepresentations had been made, that the Manager was wrong, that she could file an appeal with the IAD, and that subsection 64(3) of the Act did not apply in this case, because Ms. Oganda was a "dependent child," Ms. Tonda and her spouse having sworn that she was under their legal custody and guardianship.

[14] The Minister received a copy of Ms. Tonda's letter dated September 22, but received no other news from the IAD and consequently sent no submissions. Lastly, on December 15, 2017, the IAD made its decision and allowed Ms. Tonda's appeal without ruling on its jurisdiction and without first giving the Minister the opportunity to make submissions.

[15] In its decision, the IAD allowed Ms. Tonda's appeal, essentially on the ground that there had been a breach of natural justice. Specifically, the IAD stated that (1) the file concerned the adoption of the appellant's niece; (2) the visa officer had considered only the death certificates and had not considered the other documents on file attesting to the death of Ms. Oganda's parents, especially given the tough consequences for the child; and (3) the visa officer should have ruled on the entire file, including the documents related to the proceedings in lower courts in Quebec.

III. Position of the parties

A. *Minister's position*

[16] The Minister argues that the decision raises questions of natural justice, procedural fairness, and jurisdiction and that they are all reviewable for correctness.

[17] The Minister argues that the IAD decision contains several errors: (1) the IAD was mistaken about the class, because this is not an adoption file but rather a family class file pursuant to paragraph 117(1)(f) of the Act; (2) the IAD erred with respect to its jurisdiction because it did not address the issue at all; (3) the IAD did not give the Minister the opportunity to make submissions on the issue of jurisdiction, and only the respondent's submissions were considered, which violates the rules of procedural fairness; and (4) the Manager neglected to take into account the fact that the other documents on file, submitted by the respondent to certify the death of the parents, had been checked and that the author of the documents had confirmed that they were fraudulent.

[18] In his reply, the Minister maintains that (1) to have a right to appeal to the IAD, the applicant must be a member of the family class, which is not the case, given that Ms. Oganda did not show that she was an orphan under subparagraph 117(1)(f)(ii) of the Regulations; and (2) Ms. Oganda cannot be considered a dependent child within the meaning of the Act, as she is neither Ms. Tonda's biological nor adoptive child.

B. *Ms. Tonda's position*

[19] Ms. Tonda replies that the applicable standard of review in this case is reasonableness, that the issue is therefore to determine whether the interpretation of subsection 64(3) of the Act is reasonable, and that the issue is not the IAD's jurisdiction. She also replies that procedural fairness should be reviewed on a standard of correctness.

[20] Ms. Tonda maintains that this judicial review application reveals no serious issue, because the IAD reasonably concluded that the Manager had not considered the other evidence on file, and properly considered the child's best interest. In addition, Ms. Tonda states that the IAD had jurisdiction to hear the appeal because the child who was the subject of the sponsorship application is her dependent child and the exception provided for under subsection 64(3) of the Act applies. Lastly, she submits that the IAD did not breach procedural fairness, because it was not required to ask the Minister for submissions before deciding on the issue of jurisdiction, and that it was the Minister who chose not to make any submissions.

IV. Decision

[21] The Court will rule only on the issue of the violation of the rules of procedural fairness, as this allows for the disposition of this application.

[22] Opinion is divided on the standard of review applicable to issues of procedural fairness and natural justice (*Vavilov v. Canada (Citizenship and Immigration*), 2017 FCA 132, at paragraph 12). The Federal Court of Appeal recently addressed this issue again in *Canadian*

Pacific Railway Company v. Canada (Attorney General), 2018 FCA 69. At that time, it seemed to decide against reviewing procedural fairness through the prism of a standard of review and, instead, found that this review ultimately consisted of determining whether the applicant was aware of the allegations against it and had the opportunity to be heard fully and fairly.

[23] In this case, the Court is satisfied that there was a violation of procedural fairness because the Minister did not have the opportunity to make submissions on either the IAD's jurisdiction or the merits of the appeal and was not notified by the IAD before it rendered its decision. However, it is well established in law that the IAD, in accordance with the principles of natural justice, is required to give both parties the opportunity to make submissions and to notify them when it plans to render a decision (*Canada (Citizenship and Immigration) v. Conteh*, 2018 FC 416, at paragraphs 8-9 [*Conteh*]; *Canada (Citizenship and Immigration) v. Chen*, 2011 FC 514, at paragraphs 8-9 [*Chen*]).

[24] Moreover, in its letter dated June 2, 2017, the IAD indicated that it would inform the parties, in writing, if the member found that the regular appeal review process should continue and that, if it asked for submissions from the Minister, the respondent would have the opportunity to respond to them. However, the IAD never notified the Minister before rendering a decision and never gave the Minister the opportunity to make submissions.

[25] By rendering its decision based solely on the respondent's submissions, the IAD denied the Minister's right to be heard, which is "one of the most fundamental rights of a party to a proceeding" (*Chen*, at paragraph 8). This breach is fatal to procedural fairness, which justifies

the Court's intervention and setting aside the decision rendered by the IAD (*Conteh*, at paragraph 11; *Chen*, at paragraphs 8-10).

[26] Since the IAD's decision cannot stand because of this breach, it is not necessary to address the other aspects of the dispute (*Bajwa v. Canada (Immigration, Refugees and Citizenship*), 2017 FC 202, at paragraph 82).

[27] During the hearing, Ms. Tonda's attorney announced his intention to submit to the Court a question for certification, but subsequently sent the Court a waiver regarding the submission of a question for certification.

JUDGMENT in IMM-5612-17

THIS COURT'S JUDGMENT is that:

1. The application is allowed;
2. The case is referred back to the IAD for reconsideration taking into account these reasons;
3. There is no question to be certified;
4. Without costs.

"Martine St-Louis"
Judge

APPENDIX

***Immigration and Refugee Protection Act*, SC 2001, c 27**	***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27)**
Misrepresentation 40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**Fausses déclarations** 40 (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
Application 40 (2) The following provisions govern subsection (1):	**Application** (2) Les dispositions suivantes s'appliquent au paragraphe (1) :
(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and	a) l'interdiction de territoire court pour les cinq ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi;
Right to appeal — visa refusal of family class 63 (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member	**Droit d'appel : visa** 63 (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus

of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

de délivrer le visa de résident permanent.

Misrepresentation
64 (3) No appeal may be made under subsection 63(1) in respect of a decision that was based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common-law partner or child.

Fausses déclarations
64 (3) N'est pas susceptible d'appel au titre du paragraphe 63(1) le refus fondé sur l'interdiction de territoire pour fausses déclarations, sauf si l'étranger en cause est l'époux ou le conjoint de fait du répondant ou son enfant.

Immigration and Refugee Protection Regulations, **SOR/2002-227**

Règlement sur l'immigration et la protection des réfugiés, **DORS/2002-227**

Member
117 (1) A 8foreign national is a member of the family class if, with respect to a sponsor, the foreign national is

Regroupement familial
117 (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :

[…]

[…]

(f) a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner and who is

f) s'ils sont âgés de moins de dix-huit ans, si leurs parents sont décédés et s'ils n'ont pas d'époux ni de conjoint de fait :

[…]

[…]

(ii) a child of a child of the sponsor's mother or father, or

(ii) les enfants des enfants de l'un ou l'autre de ses parents,

. . .

. . .

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jocelyne Murphy	FOR THE APPLICANT
François Kasenda Kamemba	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Montréal, Quebec	FOR THE APPLICANT
Cabinet François K. Law Office Ottawa, Ontario	FOR THE RESPONDENT