Federal Court  Cour fédérale

Date: 20190924

Docket: IMM-5932-18

Citation: 2019 FC 1212

Ottawa, Ontario, September 24, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

WINTA YEBYO (BY HER LITIGATION GUARDIAN KEBEDESH TESFAZION WELD) AND KEBEDESH TESFAZION WELD

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a visa officer's [the Officer] decision [the Decision] to refuse Winta Yebyo's [the Dependent Applicant] application for a permanent resident visa as a family member of Kebedesh Tesfazion Weld [the Principal Applicant].

II. Style of Cause

[2] As a preliminary issue, the Applicant named the Minister of Immigration, Refugees and Citizenship Canada as the respondent in this matter. The correct respondent is the Minister of Citizenship and Immigration [the Minister] (*Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, paragraph 5(2)(b); *Immigration and Refugee Protection Act*, SC 2001, c 27, subsection 4(1) [IRPA]). As such, the respondent in the style of cause is hereby amended to the Minister of Citizenship and Immigration.

III. Background

[3] The Dependent Applicant was born on May 6, 2001 in Eritrea. She is currently eighteen years old.

[4] The Principal Applicant was born on January 1, 1932 in Eritrea. On May 16, 2012, the Principal Applicant legally adopted the Dependent Applicant in Eritrea. At the time of the adoption, the Dependent Applicant's father was deceased, and her mother was incapable of caring for her due to mental illness. The Dependent Applicant's biological mother passed away in 2016.

[5] In 2016, the Principal Applicant fled Eritrea for Canada, where she was granted refugee protection. Upon receiving refugee status, she applied for permanent residence in Canada as a protected person. On this application, the Principal Applicant included the Dependent Applicant

as a dependent child as defined in section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[6] On May 1, 2017, the Minister's Office sent a letter to the Principal Applicant requesting completion and submission of application forms related to the inclusion of the Dependent Applicant as a dependent child.

[7] On September 19, 2017, the visa office emailed the Dependent Applicant requesting the following further documents and evidence be submitted by October 19, 2017:

- Adoption documents: Adoption documentation &/or court order.
- Proof of ongoing relationship: family photos showing you and sponsor together; Any proof of financial support from the sponsor.
- Communication, proof: Proof of communication (photos, letters, E-mails, phone bills), between you and your sponsor.
- Additional Family Info IMM5406: A separate and newly completed Additional Family Information form (IMM5406) bearing original signatures.
- 4 Compliant-size photos: Compliant-size photographs.
- Parental consent.

[8] The Applicants responded to this request on January 19, 2018, submitting the requested photographs and IMM5406 form, along with letters from the Principal Applicant and her son explaining the relationship between the Principal Applicant and Dependent Applicant.

[9] On July 10, 2018, the visa office sent a fairness letter expressing concerns that the Dependent Applicant was not the adopted child of the Principal Applicant, as the Applicants had not provided any evidence that a legal adoption had taken place. The letter gave the Applicants thirty days to submit any additional information to address these concerns.

[10] On August 8, 2018, the Applicants obtained a translated copy of the Applicants' adoption contract from the High Court of Eritrea, dated May 16, 2012. The document had been previously misplaced, but was found. The adoption contract and its translation were sent to the visa office shortly thereafter.

IV. Decision Under Review

[11] In a decision dated September 28, 2018, the Officer refused the Dependent Applicant's application for permanent residence. The Officer reproduced the relevant provisions of the IRPA and IRPR before concluding:

> I am not satisfied that you meet the requirements to obtain a permanent resident visa as a family member of Kebedesh Tesfazion Weld. I am, therefore, refusing your application pursuant to subsection 11(1) of the Immigration and Refugee Protection Act.

[12] In the Global Case Management System [GCMS] notes, the Officer reviewed the background information and noted the procedural fairness letter and response thereto. The Officer found that the Applicants failed to provide sufficient evidence that a fully complete adoption had taken place in Eritrea.

V. Issue and Standard of Review

[13] The sole issue is whether the Decision was reasonable. The parties agree that the standard of review is reasonableness.

VI. Relevant Provisions

[14] Subsection 11(1) of the IRPA provides that a foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the Regulations:

> 11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

[15] Subsection 176(1) of the IRPR states that protected persons who apply for permanent residence may include family members in their application:

> 176(1) An applicant may include in their application to remain in Canada as a permanent resident any of their family members.

[16] The term "family member" is defined in subsection 1(3) of the IRPR:

> 1(3) For the purposes of the Act, other than section 12 and paragraph 38(2)(d), and for the purposes of these Regulations, other than paragraph 7.1(3)(a) and sections 159.1 and 159.5, family member in respect of a person means
>
> …
>
> (b) a dependent child of the person or of the person's spouse or common-law partner; and
>
> …

[17] The term “dependent child” is defined in section 2 of the IRPR:

> 2 **dependent child**, in respect of a parent, means a child who
>
> > (a) has one of the following relationships with the parent, namely,
> >
> > > …
> >
> > > (ii) is the adopted child of the parent; and
> >
> > (b) is in one of the following situations of dependency, namely,
> >
> > > (i) is less than 22 years of age and is not a spouse or common-law partner, or
> >
> > > …

[18] The term “adoption” is defined in subsection 3(2) of the IRPR:

> 3 (2) For the purposes of these Regulations, adoption, for greater certainty, means an adoption that creates a legal parent-child relationship and severs the pre-existing legal parent-child relationship.

[19] Subsection 16(1) of the IRPA imposes obligations on all applicants to answer questions truthfully and produce all relevant evidence and documents that an officer reasonably requires:

> 16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

VII. Analysis

[20] In order to come within the definition of a "dependent child" in the IRPR, the Applicants had to satisfy the Officer that the Dependent Applicant is the "adopted child of the parent" *and* "is less than 22 years of age and is not a spouse or common-law partner" (IRPR, section 2).

[21] To meet the "adopted child of the parent" branch of this definition, the Applicants needed to satisfy the Officer that the adoption created a genuine legal parent-child relationship, and was not entered into primarily for the purpose of acquiring any status or privilege under the IRPA (IRPR, subsection 4(2)).

[22] The Applicants submit that the Officer ignored most of the evidence. Specifically, the Applicants allege that contrary to the Officer's determination, the Applicants provided evidence of a legal adoption in the form of an adoption contract from the High Court of Eritrea. In light of the adoption contract, the Applicants submit that the Officer's comments that the Applicants "failed to provide sufficient evidence that a complete full completed (sic) adoption has taken place in Eritrea" are unreasonable, and could only have been made by dismissing the adoption contract entirely.

[23] The Minister argues that the Officer's decision was reasonable. The Minister advances one principle argument: in failing to provide the documents and evidence that the Officer requested and required, the Applicants acted contrary to subsection 16(1) of the IRPA and thus the Officer could not issue a visa.

[24] The Officer did not completely ignore the adoption contract, as it was noted two times in the GCMS notes:

> Response to procedural fairness noted – Court document dated 16 May 2012…The Court documents are reviewed…

[25] The Minister submits that the proof of legal adoption is not the only requirement under the IRPR. In addition, Applicants must submit evidence of an ongoing relationship that puts the minor in a situation of dependency.

[26] However, the Dependent Applicant satisfies paragraph (b) of the dependent child definition by virtue of the fact that she is less than 22 years of age and is not a spouse or common-law partner. The plain meaning of the definition does not require further evidence of a relationship of dependency beyond the categories clearly stated in the definition.

[27] The “lock-in” date for determining whether a person is a dependent child is the date on which the application is made (IRPR, subsection 25.1(1)). The Dependent Applicant was less than 22 years of age when the Principal Applicant applied for permanent residence. Accordingly, she falls within one of the situations of dependency.

[28] The Applicants further submit that the Officer ignored evidence about the Applicants’ relationship, specifically the letter from the Principal Applicant’s son explaining the relationship.

[29] The Minister submits that the Officer noted the lack of photos, lack of proof of communication between the Applicants, and the lack of parental consent. The Minister argued

that there needs to be some indication that the biological mother of the child consents to the child permanently leaving the country.

[30] The Minister's "parental consent" argument lacks any reasonable basis. The evidence in the Certified Tribunal Record establishes that the Dependent Applicant's biological mother passed away in 2016, prior to the application for permanent residence. The Officer also noted this in the Decision.

[31] However, the Officer also states that there is minimal evidence of a long-term relationship, presumably relying on the lack of photos and lack of proof of communication aside from the letter from the Principal Applicant's son, stating that the Applicants speak on the phone. Based on the lack of evidence of an ongoing relationship, the Minister's position is that viewing the evidence as a whole, the officer's decision is reasonable.

[32] The Applicants provided the adoption contract from the Eritrean High Court in response to the fairness letter dated July 10, 2018. The only concern raised in the fairness letter was the lack of documentation of a legal adoption.

[33] The Officer did not explain why the adoption contract from the Eritrean High Court was not sufficient to establish a legal adoption. Nor does the Officer explain what evidence could have been provided, but was not. As such, the decision is unintelligible.

[34] As well, the Applicants argue that the entire point of a fairness letter is to provide enough information to an applicant that a meaningful answer can be supplied (*Ntaisi v Citizenship and Immigration*, 2018 CanLII 73079 (FC) at para 6). Because the only concern raised in the fairness letter was proof of a legal adoption, the only information provided by the Applicants in response was the adoption contract. If the Officer still had concerns about other aspects of the application, such as proof of an ongoing relationship, this should have been included in the fairness letter. If the Officer was not convinced that the adoption contract was valid, or that the pre-existing legal parent-child relationship was severed, this view was not conveyed in the decision.

[35] While it appears that the Officer was not satisfied that the adoption created a genuine parent-child relationship, as required by subsection 4(2) of the IRPR, the brevity of the Officer's reasons make it very difficult to know exactly what she took into account in applying this provision (*Lee v Canada (Minister of Citizenship & Immigration)*, 2007 FC 814 at paras 13-15).

[36] Further, the Officer referred to the adoption contract from the Eritrean High Court twice, but did not provide any explanation for why this evidence did not satisfy her that a legal adoption had occurred. The Decision made no mention of the definition of "adoption" in subsection 3(2) of the IRPR. This definition appears to be satisfied on the facts of this case, but this provision was never addressed in the Decision.

[37] Moreover, while the Officer apparently was not satisfied that there was "sufficient consideration to exempt the application," the Officer does not clarify what exemption mechanism she is referring to. The Officer also stated that the Applicants "have not provided

sufficient submission for consideration and exemption of the criteria.” Again, the Officer does not make clear what exemption or criteria the Applicants failed to satisfy.

[38] Based on these brief reasons, this Court is not able to understand any intelligible reason for the decision. Accordingly, the Court cannot determine whether the conclusion falls within a range of possible, acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

JUDGMENT in IMM-5932-18

THIS COURT'S JUDGMENT is that

1. The respondent in the style of cause is amended to the Minister of Citizenship and Immigration.
2. The application is allowed and the matter is referred to a different officer for reconsideration.
3. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5932-18
STYLE OF CAUSE:	WINTA YEBYO (BY HER LITIGATION GUARDIAN KEBEDESH TESFAZION WELD) AND KEBEDESH TESFAZION WELD v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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