Date: 20071220

Docket: IMM-6025-06

Citation: 2007 FC 1345

Ottawa, Ontario, December 20, 2007

Present: The Honourable Mr. Justice Lemieux

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

KASSIM KANTE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister of Citizenship and Immigration (the Minister), the applicant in this judicial review, submits that a member of the Immigration Appeal Division (the panel) erred in law on October 20, 2006, in allowing the appeal by Kassim Kante, who has been a Canadian citizen since 2001. Mr. Kante had appealed the decision dated November 10, 2005, by a visa officer at the Canadian Embassy in Abidjan, Ivory Coast (the officer), refusing the applications for permanent residence of Boubacar (19 years old) and Karamoko Kante (18 years old) (the children), citizens of Mali, whom Mr. Kante had sponsored as dependent children.

[2] According to counsel for the Minister, the panel failed to consider and apply section 121 of the *Immigration and Refugee Protection Regulations* (IRPR). He also submits that Mr. Kante's evidence was contradictory before the officer and the panel.

[3] Section 121 requires that a person who is a member of the family class who applies for permanent residence must be a member of the family both at the time the application is made (here, February 24, 2004) and at the time the application is determined (here, November 10, 2005), in accordance with the Federal Court of Appeal's interpretation in *Minister of Citizenship and Immigration v. Ali Hamid*, [2007] 2 F.C.R. 152.

[4] Section 2 of the IRPR defines "dependent child" as a child who has one of the following relationships with the parent: "is the biological child (section 2(a)(i)) or the adopted child (section 2(a)(ii)) and is in one of the following situations . . . "

Facts

[5] Boubacar and Karamoko Kante were born in Mali on October 13, 1987, and April 25, 1989, respectively. Each of them filed an application for permanent residence in Canada on July 28, 2003, (the applications). Both applications indicated that Kassim Kante was their father and Mariam Kante was their mother.

[6] In his sponsorship application signed in Montréal on June 7, 2003, Kassim Kante stated that he was married to Mariam Kante and that both Boubacar and Karamoko Kante were dependent children. Mr. Kante did not complete section D of the sponsorship application entitled "adoption".

That section requires the sponsor to state whether the child has already been adopted abroad, will be adopted abroad or will be adopted in Canada. In other words, according to the information provided to the officer, the Kante brothers were portrayed as Mr. Kante's biological children.

[7] In February 2004, the embassy in Abidjan received the applications for permanent residence sponsored by Mr. Kante. Having heard nothing from the embassy, Mr. Kante sent an e-mail to the embassy on February 7, 2005, stating [TRANSLATION] "I applied for permanent residence (in Canada) for my sons . . . "

[8] On March 10, 2005, the visa officer required that a genetic test be done because in Mr. Kante's 1994 application for permanent residence in Canada, he stated that he was a widower and had no dependents. The DNA test was negative; Kassim Kante is not the biological father of Boubacar and Karamoko Kante.

[9] On November 10, 2005, the officer refused the applications for permanent residence visas in the family class category on the ground that the children did not meet the requirements for immigrating to Canada. He cited the definition of "dependent child" and section 4 of the IRPR, which provides that for the purposes of these Regulations, "a foreign national shall not be considered . . . an adopted child of a person if the . . . adoption is not genuine and was entered into

primarily for the purpose of acquiring any status or privilege under the Act". In his letter to the two children, the officer added:

> [TRANSLATION]
>
> I have concluded that your relationship [with Mr. Kante] is not genuine and was entered into primarily for the purpose of acquiring a status or privilege under the Act: the DNA tests indicate that you are not the biological children of the sponsor Kassim Kante. Therefore, for the purposes of these Regulations, you are not considered to be members of the family of your sponsor, Kassim Kante.

[10] On January 23, 2006, Mr. Kante launched an appeal to the Immigration Appeal Division (IAD). Mr. Kassim Kante testified at the hearing before the panel on September 28, 2006. He was represented by counsel.

[11] In support of his appeal, Mr. Kante filed written submissions on June 4, 2006, stating that

> (1) The children are truly the applicant's legitimate children and he acknowledges them as such, as appears from the children's birth certificates, copies of which are attached as an exhibit (P-1);
>
> (2) The applicant has always supported the children financially and emotionally from the day they were born until now. Boubacar Kante and Karamoko Kante have not known any other father; the applicant has always taken care of them and the whole family recognizes him as their legitimate father. This is confirmed by the mother of the children in a letter, which is attached as an exhibit (P-2);
>
> (3) The applicant is the sole financial provider for the children . . .

(4) Malian culture recognizes that children conceived during a prolonged absence of the husband are considered to be children of the husband in question, i.e., in this case, the applicant, as confirmed by Mr. Lamine Traore, PhD in his report, a copy of which is attached (P-3);

(5) The children are members of the family class under section 117(1) of the IRPR, since they meet the definition of "dependent child" within the meaning of section 2(a)(ii) of the Regulations;

(6) The children are dependent children . . . because they are the applicant's adopted children, he is their sole financial support and they are under 19 years old.

[12] The Minister filed a written reply on June 6, 2006. He maintained that the officer's refusal was valid, that the children did not meet the definition of "dependent child" because they were not the biological children of the appellant and Mr. Kante did not provide any documentary evidence to establish that the children were his adopted children. The Minister noted that when the applications for permanent residence were processed, Mr. Kante did not state that the children were adopted.

[13] Mr. Kante, through his counsel, replied. He maintained that the children fell within the definition of "dependent children" because they were Mr. Kante's adopted children. He submitted that Mr. Kante was their sole financial provider, which tended to prove that they were his adopted children. He suggested that Mr. Kante did not believe it was necessary to mention that Boubacar and Karamoko Kante were his adopted children [TRANSLATION] "because in the Malian culture,

there is no difference between biological and adopted children." Counsel wrote that he intended to demonstrate [TRANSLATION] "unequivocally and through documentary evidence that they are, in fact, his adopted children."

[14] The panel received the following exhibits in evidence; with the exception of exhibit P-1, they were not before the officer:

(1) Exhibit P-1, notary Keita's act dated July 30, 2002, to the effect that Kassim Kante appeared before him and acknowledged voluntarily and without duress that his son Boubacar Kante was the child of Kassim Kante and Marian Kante. The notarial act stated that [TRANSLATION] "A note of this will be made in any document that requires it and, in particular, in the margin of the birth certificate of the child who has been acknowledged." The notary provided the same attestation for Karamoko Kante.…

(2) Exhibit P-2, a letter dated April 24, 2006, from Ms. Kante to the panel.

(3) Exhibit P-3, the letter dated October 7, 2005, from Lamine Traore, PhD regarding the filiation of the Kante sons.

[15] On September 5, 2006, counsel for Mr. Kante sent the panel an adoption document for the children from the Tribunal de la Commune of Bamako dated August 22, 2006, determining the

adoption of the children in favour of Mr. Kante. I quote the relevant excerpts from the decision of the Malian Tribunal:

> [TRANSLATION]
>
> Having seen the evidence in the file;
> Having heard the applicant's claims and arguments;
> Having heard the consent of the parents;
> Having heard the Ministère Public ;
>
> Whereas by an application in writing dated August 14, 2006, Kassim KANTE, through his intermediary Hamidou KONE, lawyer at the Bamako court, requested from this Tribunal civil an adoption protection judgment or a simple adoption concerning the children Boubacar KANTE and Karamoko KANTE, born October 13, 1987, and April 25, 1989, respectively, in Bamako, to Mamadou KANTE and Mariam MANGARA;
>
> Whereas at the hearing, the applicant, represented by his lawyer, Hamidou KONE, explained that the children in question are his nephews; that they have both lived with him since they were quite young; that since he has been living for 15 years in Canada where he has a regular and substantial income, he would like, by means of this proceeding, to regularize this de facto adoption so that the children can take greater advantage of the benefits inherent in this status.

The panel's decision

[16] The panel's reasons can be summarized as follows:

- It believed Mr. Kante; it found his testimony trustworthy. In its view, Mr. Kante testified in a sincere manner, without hesitation, clearly and with conviction;

- It said that Mr. Kante did not dispute that he is not the biological father of the children, but that they are his dependent children and that under both customary law and the applicable civil law in Mali, they are his adopted children because they are

his brother's children, and, in accordance with African tradition, he assumed responsibility for them when they were very young.

- It believed that the judgment of the Malian Tribunal in August 2006 confirms that the children are the legally adopted children of Mr. Mamadou Kante and Mariam Kante under a state of fact and another legal tradition . . . customary law in Mali;

- It quoted Dr. Traore's opinion that a custom exists whereby a father must recognize the children of his wife even if he is not their biological father. The panel added:

> Moreover, the appellant testified that in accordance with tradition, he recognized the applicants as his children; their natural father is his brother, but they were born during his marriage to his wife. Consequently, they are his dependent children, and this relationship, which was recognized by customary law, was confirmed by an instrument of adoption, which I cited above, emerging from the other tradition, that of civil law.

- It cited the argument of counsel for the Minister that since the children are not Mr. Kante's biological children, they cannot be "dependent children." With respect to the act of adoption, [TRANSLATION] "counsel for the respondent submits that the sponsorship application was not submitted in the adoption category, and, consequently, I cannot take this established fact into consideration." The panel determined as follows:

> [11] I would like to recall that on June 6, 2006, a representative of the Minister, in a reply to the appellant's arguments, submitted to the panel that the applicants were not the appellant's natural children and that the appellant had not shown through documentary evidence that they were his adopted children. Now, the respondent is arguing that the

> fact that the applicants are the appellant's adopted children cannot be considered.
>
> [12] If we look at the Regulations, we see that the definition of "dependent children" does not specify that dependent children are solely and exclusively natural children. The term "dependent children" also covers adopted children. To say otherwise would be to contradict the Regulations.
>
> [13] That being said, the respondent had the liberty in this case to produce a second opinion to oppose the expert evidence I have from Dr. Traoré, Anthropologist, which confirms the adoption under customary law, subsequently ratified by the civil court of Bamako.
>
> [14] In this case, the appellant is not in any way taking the respondent by surprise in stating that the applicants are adopted children, since counsel for the respondent could have produced a second opinion or contrary evidence to undermine the credibility or legal effect of the adoption when the submissions were made in advance, prior to the hearing. Nothing of the sort was done. The argument being made today, namely that the appellant initially presented the applicants as his natural children and is therefore precluded from including them now in his *de novo* appeal as his adopted children, is not convincing. Such an approach seems to me not only improper, but incorrect. The same may be said of the conclusion of the visa officer, who determined that because the applicants were not the appellant's natural children, this relationship must have been entered into solely for the purposes of immigration.

- The panel concluded:

> [15] What we have to remember in this case is that the applicants have been living with the appellant's family for several years and that they are his sons within the meaning of Malian customary and civil law. Consequently, there is no doubt that the applicants are, on the balance of the evidence, his dependent children, being his adopted children. They are therefore members of the family class.

Analysis

(a) Standard of review

[17] The Minister's submissions raise two issues:

(a) The panel erred in law in failing to consider section 121 of the IRPR; and

(b) The finding that the applicant was credible was contradicted by the totality of the evidence before the panel.

[18] The first issue is a question of law, and the standard of review is correctness according to the Supreme Court of Canada in *Pushpanathan v. Minister of Citizenship and Immigration*, [1998] 1 S.C.R. 982.

[19] The second issue must be determined against the standard set out in section 18.1(4)(*d*) of the *Federal Courts Act*, which amounts to a patently unreasonable decision.

(b) Conclusion

[20] The Minister acknowledges

(a) that the definition of "dependent child" applies to both biological children and adopted children;

(b) that it is accurate to state that paragraph 117(1)(b) of the IRPR provides that dependent children are members of the family class;

(c) that the IAD hearing was a hearing *de novo*.

[21] In this context, it is my view that the application of the Minister must be allowed for the following reasons:

(1) Error of law

[22] Apparently, counsel for the Minister raised section 121 of the IRPR before the panel. At page 215 of the certified record, she stated as follows:

> [TRANSLATION]
>
> The time that must be considered is the time of the application. Section 121 . . . talks about the time when the application is made. At the time the application was made, he asked to sponsor children who were his biological children . . . Then, the date of the refusal was November 10, 2005. The issue of adoption was never raised in the file. Only quite recently, there was a judgment dated August 22, 2006, which is post-refusal. Clearly, the file would have been dealt with quite differently had it been known that there had been an adoption or that steps were being taken for an adoption and that it was not for a biological child. There was no previous mention of the adoption or of the customary rights that exist in the country to establish that the children he assumed responsibility for were not his biological children.

[23] In my view, the panel erred in law in failing to consider the application of section 121 of the IRPR as interpreted in the *Hamid* case, above.

(2) Error in fact

[24] After reading Mr. Kante's testimony, it is my opinion that the panel's finding that he was credible is not supported by the evidence. I cite the following examples:

- There is a major contradiction between his testimony and what is stated in the decision of the Tribunal de la Commune of Bamako. According to that court, the adoption application stated that the children's parents were Mr. Kante's brother and Mariam Mangara, not Mariam Kante, which explains why his lawyer in Mali advised the Tribunal of Bamako that the children were his nephews;

- There is a significant contradiction between the applicant's written submissions that he had been responsible for the children from the time they were born and his testimony that his brother supported them financially until they were ten years old (stenographic notes, pages 196, 201, 202, 203);

- The reasons for the 2006 adoption application were not analyzed (stenographic notes pages 207 to 212).

[25] In my view, the panel had an obligation to analyze these contradictions.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is allowed, the decision of the panel is set aside and the appeal by Kassim Kante is remitted to the Appeal Division for reconsideration by a new panel. No question of importance was raised in this judgment.

"François Lemieux"

_____

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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