Federal Court		Cour fédérale

Date: 20101221

Docket: IMM-1986-10

Citation: 2010 FC 1317

Ottawa, Ontario, December 21, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

JUANITA CASTILLO AFABLE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, dated February 23, 2010, denying the applicant's appeal from the decision of a visa officer refusing the applicant's application to sponsor her alleged niece for permanent residence in Canada.

FACTS

Background

[2] The applicant is a 62-year-old Canadian citizen who came to Canada from the Philippines twenty years ago, in June 1989, as a landed immigrant. She has no children, no family members in Canada, and her parents and grandparents are deceased. She is a schoolteacher, and anticipates retiring from her teaching career in the near future.

[3] The applicant sponsored the application for permanent residence of Alma Toni Castillo Lasalita, who she claimed was her niece, the daughter of her deceased elder sister.

[4] By letter dated October 5, 2006, a visa officer informed the applicant that her application had been denied. The reason for the denial was that the officer was not persuaded of the genuineness of the applicant's relationship to Ms. Lasalita, and determined that Ms. Lasalita was not a member of the family class under section 117(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

[5] The applicant appealed the refusal of the visa officer to the IAD on November 3, 2006. The applicant's first scheduled hearing before the IAD, on October 14, 2009, was adjourned in order to allow the applicant to provide additional evidence regarding her relationship to Ms. Lasalita. Following a hearing on January 26, 2010, the IAD dismissed the applicant's appeal. It is this dismissal that forms the basis of this application for judicial review.

[6] Attached to her supplementary affidavit on this application, the applicant included the results of a DNA test dated June 28, 2010 – that is, subsequent to her hearing before the IAD.

Decision under Review

[7] The applicant represented herself at her hearing before the IAD. In its decision, the IAD stated that the issue before it was whether Ms. Lasalita fell within the definition of a member of the family class. The relevant aspect of that definition was paragraph 117(1)(h) of the Regulations, which provides that any relative of the sponsor is a member of the family class in cases where the sponsor does not have another member of the family class who is a Canadian citizen or permanent resident, or who may otherwise be sponsored as a member of the family class. The IAD agreed with the visa officer that the applicant did not have any other relative who is a Canadian citizen or permanent resident or who could be sponsored to come to Canada by the applicant as a member of the family class. As a result, the IAD agreed with the immigration officer that if Ms. Lasalita was in fact the applicant's niece then she would be eligible to be sponsored as a member of the family class. The critical issue before the IAD was whether the applicant and Ms. Lasalita were in fact blood relatives.

[8] The IAD stated that the applicant had the onus of proving that she and Ms. Lasalita were blood relatives on the balance of probabilities. The IAD considered the evidence that the applicant had provided, recognizing that she had been given additional time to adduce more and better evidence by having the original October 14, 2009 hearing adjourned. In particular, the IAD considered the following evidence:

a. A copy of a document that the applicant stated was the birth certificate of her elder sister, Eugenia Imaguin Castillo, submitted with a sworn Affidavit for Delayed Registration of Live Birth, sworn by the applicant's brother, who resides in the Philippines. The document stated that Eugenia's birth date was June 5, 1932. The applicant testified that the original birth certificate had been destroyed in bombings of the government office during World War II.
b. A copy of a document that the applicant stated was her birth certificate, submitted with a sworn Affidavit for Delayed Registration of Live Birth, sworn by the applicant's brother, who resides in the Philippines. The document stated that the applicant's birth date was December 7, 1947. The applicant testified that the original birth certificate was destroyed in a fire at the government office.
c. A copy of a Certificate of Live Birth for Ms. Lasalita. The birth certificate listed Ms. Lasalita's mother as Eugenia Castillo Lasalita, the applicant's elder sister.
d. Eugenia's school record, which stated her birth date as June 8, 1932.
e. Eugenia's marriage certificate, which stated that she was 30 years old at the time of her marriage on June 8, 1965.

[9] The IAD questioned the reliability of the information contained in the birth certificates of Ms Lasalita and of Eugenia. In particular, the IAD raised the following concerns:

a. The IAD questioned Eugenia's date of birth for the following reasons:
    i. The date of birth stated on the school record differed from that on the birth certificate (June 8, 1932, as opposed to June 5, 1932).

ii. The marriage certificate, dated June 8, 1965, lists Eugenia's age as 30 at the time of marriage, but if the birth certificate were correct then she would have been 33 at that time.

iii. Ms. Lasalita's birth certificate states that her mother's age was 34 at the time of her birth, but if the birth certificate were correct then she would have been 36 at that time. Because the birth certificate and the marriage certificate corresponded – that is, if Eugenia was 30 at the time of marriage then she would have been 34 at the time of Ms. Lasalita's birth – the IAD questioned the reliability of the document purporting to be Eugenia's birth certificate.

b. The IAD related additional reasons that it had for doubting the reliability of the documentary evidence:

i. Eugenia's birth certificate stated that at the time of her birth her mother was 18 years old. The birth certificate of the applicant, who was apparently born of the same mother 15 years later, however, stated that at the time of her birth her mother was 17 years old.

ii. The birth weight of Eugenia and the applicant were listed as an identical 2722 grams.

iii. The IAD doubted the likelihood of both the applicant's and her sister's birth certificates being destroyed.

iv. The IAD further doubted the destruction because the affidavits provided by the applicant's brother state the reason for delay in registration was "negligence," whereas the applicant testified to the cause of destruction being bombing and fire.

v. The IAD was “deeply disturbed” that the affidavits sworn by the applicant’s brother were sworn in 2006 and 2007, as opposed to soon after the destruction of the original documents.

[10] The IAD found that the applicant’s oral testimony was not sufficiently detailed to dispel its concerns regarding the reliability of the documentary evidence. Because those were the only documents submitted to the IAD, the IAD concluded that there was not enough reliable or credible evidence before it to establish on the balance of probabilities that the applicant and Ms. Lasalita were aunt and niece as claimed.

LEGISLATION

[11] Section 117(1) of the Regulations defines who is a member of the family class who may become a permanent resident in Canada:

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 :
. . .	. . .
(h) a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child of that mother or father, a mother or father of that mother or father or a relative who is a child of the mother or father of that mother or father	h) tout autre membre de sa parenté, sans égard à son âge, à défaut d’époux, de conjoint de fait, de partenaire conjugal, d’enfant, de parents, de membre de sa famille qui est l’enfant de l’un ou l’autre de ses parents, de membre de sa famille qui est l’enfant d’un enfant de l’un ou l’autre de ses parents, de parents de l’un ou l’autre de ses parents ou de membre de sa

(i)	who is a Canadian citizen, Indian or permanent resident, or	famille qui est l’enfant de l’un ou l’autre des parents de l’un ou l’autre de ses parents, qui est :	
(ii)	whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor.	(i)	soit un citoyen canadien, un Indien ou un résident permanent,
		(ii)	soit une personne susceptible de voir sa demande d’entrée et de séjour au Canada à titre de résident permanent par ailleurs parrainée par le répondant.

[12] Section 2 of the Regulations defines a relative:

“relative” means a person who is related to another person by blood or adoption.	« membre de la parenté » Personne unie à l’intéressé par les liens du sang ou de l’adoption.

ISSUE

[13] The applicant raises the following issue:

1. The IAD exceeded its jurisdiction, erred in law and made a decision that is patently unreasonable in that it ignored relevant evidence in coming to its decision to dismiss the appeal.

[14] In addition, the respondent raises a preliminary issue, which is that the DNA report attached as an exhibit to the supplementary affidavit submitted by the applicant prior to this hearing should not be admitted into evidence.

[15] I shall deal first with the issue of whether the supplementary affidavit will be admitted into evidence.

STANDARD OF REVIEW

[16] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, per Justice Binnie at paragraph 53.

[17] As I recognized in *Wu v. Canada (Citizenship and Immigration)*, 2009 FC 929, at paragraph 17, credibility determinations are factual in nature. Post-*Dunsmuir* jurisprudence has established that the appropriate standard of review applicable to these factual determinations is reasonableness: see also, for example, *Saleem v. Canada (Citizenship and Immigration)*, 2008 FC 389, at paragraph 13; *Malveda v. Canada (Citizenship and Immigration)*, 2008 FC 447 at paras. 17-20; *Khokhar v. Canada (Citizenship and Immigration)*, 2008 FC 449 at paras. 17-20, and my decision in *Dong v. Canada (Citizenship and Immigration)*, 2010 FC 55, at paragraph 17.

[18] The standard of review is therefore reasonableness. In reviewing the IAD's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of

possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, *supra*, at paragraph 47; *Khosa*, *supra*, at paragraph 59.

[19] The first issue, however, regarding the admissibility of the DNA Analysis Report, is a question of law which is reviewed by the Court on a standard of correctness.

ANALYSIS

Issue No. 1: Should the supplementary affidavit be admitted into evidence?

[20] On applications for judicial review, the parties are entitled to submit supplementary affidavits. In this case, the applicant filed a supplementary affidavit that was sworn on October 16, 2010. As an exhibit to that affidavit, the applicant attached a copy of a document entitled "Results of DNA Analysis," dated June 28, 2010.

[21] The respondent submits that this evidence cannot be admitted because it is new evidence that post-dates the decision of the IAD and was, therefore, not before the IAD when it rendered its decision.

[22] The Court agrees with the respondent. The law is clear that judicial review applications are to be conducted strictly on the evidence that was before the decision-maker, unless the additional evidence pertains to questions of procedural fairness or jurisdiction: see, e.g., *Vasquez Encinas v. Canada (Citizenship and Immigration)*, 2006 FC 61. In this case, the applicant's affidavit purports to put into evidence the results of a DNA test conducted subsequent to the visa officer's decision.

As explained by Justice Dubé in *Chopra v. Canada (Treasury IAD)*, [1999] F.C.J. No. 835 at paragraph 5,

> There is considerable jurisprudence to the effect that only the evidence that was before the initial decision-maker should be considered by the Court on judicial review. These decisions are premised on the notion that the purpose of judicial review is not to determine whether or not the decision of the Tribunal in question was correct in absolute terms but rather to determine whether or not the Tribunal was correct based on the record before it. . . . [references omitted]

[23] The applicant's affidavit attempts to submit evidence that the decision of the officer was incorrect in absolute terms. This Court has no capacity to assess that evidence.

Issue No. 2: Did the IAD err by ignoring relevant evidence in making its decision?

[24] The applicant submits that the IAD ignored or misconstrued the applicant's documentary evidence. In particular, the applicant submits that the IAD committed the following errors:

a. The IAD ignored the two marriage contracts showing Eugenia and the applicant having the same parents.

b. The IAD ignored the fact that Eugenia's high school record showed Eugenia's father's name.

c. The IAD ignored Ms. Lasalita's baptism certificate, which showed her parents' names.

d. The IAD ignored Ms. Lasalita's birth certificate, which showed her parents' names.

e. The IAD ignored the applicant's university transcript, which showed the applicant's parents' names.

f. The IAD ignored the joint affidavit of elders from the applicant's hometown, Florentina Torres and Feliza Pastores, dated August 24, 1990, swearing that Eugenia and the applicant are sisters.

[25] The IAD is presumed to have considered all of the evidence before it, and need not refer to individual pieces of evidence. As stated by Justice Evans in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (F.C.)(QL), 157 F.T.R. 35, at paragraph 16,

> ¶16. On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. . . .

[26] In this case, however, the IAD stated, at paragraph 29, that it was rejecting the applicant's testimony regarding her relationship with her niece because the documents that it had expressly considered were "the only ones tendered into evidence by the applicant". Thus, the IAD's failure to expressly consider other documents submitted into evidence by the applicant leads this Court to conclude that the IAD did not consider that evidence. If that evidence could have led to a different result, then this review application must be granted.

[27] The Court accepts that the IAD has made a reviewable error because it failed to consider evidence submitted by the applicant that indicates that the applicant and Eugenia are sisters. That is,

the IAD rejected the purported birth certificates of the applicant and Eugenia, but failed to consider whether other evidence could itself support their alleged relationship. In particular, the Court accepts that the IAD did not adequately address the applicant's documentary evidence regarding the fact that both the applicant and Eugenia had the same parents. Although the IAD rejected the authenticity of the two birth certificates, the IAD nevertheless ought to have considered whether the other documentation was sufficient to establish the relationship between the applicant and Ms. Lasalita.

[28] The applicant submitted two marriage contracts to the IAD. At the Court hearing, both parties agreed that these marriage contracts had been accepted as authentic documents. The first marriage contract was that of the applicant's sister, Eugenia, dated June 8, 1965. The IAD expressly considered this marriage contract at paragraph 22 of its decision, where it states that the fact that Eugenia's age is consistent between her marriage contract and the birth certificate of Ms. Lasalita suggests that those documents, as opposed to Eugenia's birth certificate, correctly state her age. The IAD held that this fact "calls into question the reliability of the information contained in the document that purports to be Eugenia's birth certificate." That is, the IAD concluded that the marriage contract was an authentic document.

[29] The second marriage contract submitted by the applicant was from her own marriage, dated January 2, 1988. The IAD did not expressly refer to this document in its reasons.

[30] Both marriage contracts list the names of the parents of the parties, and the names of the parents of the applicant and of Eugenia are the same. The IAD accepted the validity of Eugenia's marriage contract. Although the IAD found that that undermined the legitimacy of the purported

birth certificate, the IAD ought to have considered whether it could itself constitute evidence of the relationship between the two alleged sisters when considered together with the applicant's marriage contract.

[31] The applicant also provided school records showing the applicant's shared parentage with Eugenia. The IAD did not expressly consider the applicant's university transcript, which names both of her parents. The IAD did consider Eugenia's high school records, but did not refer to the fact that those, too, listed the names of her parents.

[32] The IAD did not appear to doubt that Eugenia is Ms. Lasalita's mother. As a result, had the IAD accepted that the applicant and Eugenia shared parents – that is, were sisters – then the IAD would have concluded that Ms. Lasalita is, indeed, the applicant's niece.

CONCLUSION

[33] Because the IAD stated that the only evidence before it was the evidence referred to in the reasons for decision, and because the IAD failed to refer to probative evidence, this Court concludes that the IAD committed a reviewable error so that this matter must be referred back to a different panel of the IAD for redetermination. At that new hearing, the applicant can submit the results of the DNA Analysis showing, as both parties agreed at the hearing, that the applicant and Ms. Lasalita are related on a probability threshold of 99.98 percent.

CERTIFIED QUESTION

[1] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is granted and the matter referred back to a different panel of the IAD for redetermination.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1986-10
STYLE OF CAUSE:	*Juanita Castillo Afable v. The Minister of Citizenship and Immigration*
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