Federal Court  Cour fédérale

Date: 20151029

Docket: T-360-15

Citation: 2015 FC 1227

Ottawa, Ontario, October 29, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

GURCHARAN SINGH BIRAK
& IQBAL KAUR BIRAK

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants' application for Canadian citizenship for their adopted son, Gursimran Singh Birak [Gursimran], was denied by an officer who held that the adoption did not create a "genuine relationship of parent and child," as required by section 5.1(1)(b) of the *Citizenship Act*, RSC, 1985, c C-29.

[2] The Applicants are Canadian citizens living in Vancouver, British Columbia. Their son Gursimran lives in Village Kaley in India.

[3] In 2009, the Applicants visited India from Canada. They had wanted to have a child and had tried *in vitro* fertilization, but it had failed. During their visit, they met with Gursimran's biological parents, with whom they have a family connection: Gursimran's biological father is the uncle of Ms. Birak. All agreed to the Applicants adopting Gursimran and, in June 2009, the Applicants participated in a ceremony in which they adopted Gursimran as their son. The Deed of Adoption was completed and registered in early July.

[4] Gursimran's caregiver in India is the Applicants' friend and driver. He also looks after the Applicants' land. On August 10, 2009, the Applicants granted him a power of attorney to act as their son's guardian.

[5] The Applicants have had minimal physical contact with Gursimran since his adoption. In August 2009, Ms. Birak visited India after her grandmother-in-law died. She saw her son at this time but did not stay with him. In 2012, both Applicants visited India. They saw their son at this time and also attended a wedding.

[6] The Applicants have telephone contact with their son. They say that they generally call their son 3 to 4 times a week. They speak with their son for 25 to 30 minutes on Sundays and for shorter periods during the week. They also discuss business matters with the guardian during these calls. The Applicants send their son cards at Christmas, New Year and on his birthday.

[7] On January 19, 2015, the officer held an interview in India with the Applicants, their son, the biological mother, and the son's guardian, in order to determine whether the son qualified for citizenship. She found that he did not.

[8] Subsection 5.1(1) of the Act provides that "the Minister shall, on application, grant citizenship to a person who, while a minor child, was adopted by a citizen on or after January 1, 1947 … if the adoption" meets the four conditions set out in the subsection. The second condition in paragraph 5.1(1)(b), and that which lies at the heart of this application, is that the adoption "created a genuine relationship of parent and child."

[9] The officer gave three reasons for finding that there was no genuine parent-child relationship: (i) the Applicants' lack of knowledge of Gursimran, (ii) the low level of financial support they provide to Gursimran, and (iii) their limited contact with Gursimran.

[10] The officer found that the Applicants had little knowledge about their son, and vice versa. The officer noted that the Applicants were unable to name their son's school friends and did not know that he had "conditionally passed with grace marks." She also found that Gursimran "knew very little about [the Applicants], his adoptive parents, and [the Applicants'] life in Canada."

[11] The officer found that the Applicants paid 5000 INR per month in remittances for the support of their son and found that "[t]his is insufficient to cover the cost of living, where twice that amount would be about the average cost, though still low, for a teenager."

[12] The officer found that Mr. Birak had only visited his son once in the five and a half years between the adoption in July 2009 and the interview in January 2015. Ms. Birak visited on one additional occasion. The officer found that the phone bills presented as evidence of their contact with their son were "inconclusive." She found that the calls listed on the bills were "short" and that "[g]iven that the calls were to discuss land and business related issues with Power of Attorney, as well as issues related to Gursimran, very little time is left to speak with Gursimran personally."

[13] The Applicants submit that the officer's decision was unreasonable based on the facts before her and procedurally unfair in that she failed to raise with them her concern about the level of financial support they provided to their son.

[14] In their memoranda of argument, both parties engage with issues that are not raised by the officer in the written decision. Her notes include sections entitled "Conclusion" and "Summary." In these sections, the officer provides reasons; some of these reasons make it into the final decision letter, while others do not.

[15] No one provided authority for the suggestion that the officer's notes should comprise part of her reasons. In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] the Court held that an immigration officer's internal notes should be considered to be the reasons for the officer's decision, given that the applicant was entitled to reasons, no other reasons were provided, and the notes had been produced in response to the appellant's request for reasons. *Baker* suggests that an officer's notes may count as reasons in some cases. There

are similar cases in the human rights context where the Federal Court of Appeal has stated that, where the Commission accepts the recommendation of an investigator with respect to whether a complaint should be sent to the Tribunal for a hearing but offers no reasons of its own, then the investigator's reasons may be considered to be the reasons of the Commission: *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392 at para 37, *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 60).

[16] *Baker* and the human rights jurisprudence are clearly distinguishable from the facts here because, in this case, the officer provided detailed reasons in her decision letter. There is no need to look behind the decision letter in order to discover her rationale for denying the Applicants' claim. Moreover, in my view, in these circumstances it would be unfair to assess the officer's decision through reference to reasons that she mentions in her notes but ultimately decided not to include in her final decision. Therefore, while I will consider the notes to the extent that they provide context and background with respect to the decision, the focus of this review must be on issues raised in the decision under review.

[17] The Court's review is also restricted to the information that was before the officer. The Applicants rely on additional information, not before the officer, to address her concerns. This is not properly before the Court and thus is not considered. At the hearing, counsel wisely did not rely on this information in making his submissions.

[18] It is agreed by the parties, and accepted by the Court, that the standard of review for the officer's finding under paragraph 5.1(1)(b) of the Act is reasonableness, while the standard for the question of procedural fairness is correctness.

[19] The officer found that the Applicants had minimal knowledge of their adopted son and noted that they "seemed unaware of his educational situation, particularly, that he conditionally passed with grace marks." Both parents described him as doing well at school.

[20] The Applicants submit that the officer's decision is unreasonable in this respect because they relied on information provided to them by their son's guardian and he says that he told the officer that the school told him that Gursimran was doing well.

[21] I am unable to find the officer's finding unreasonable. The Applicants had copies of Gursimran's report cards and in fact presented them to the officer. They show a child who is not doing well in school and in fact is doing very poorly. That the Applicants took little interest in his schooling is evident from the conflict between their answers and the facts. If they relied on the words of the guardian when they had evidence in front of them to the contrary, then this too shows a lack of interest in their son's endeavours at school. As was noted by the officer: "This seems especially concerning given the amount of importance placed on education in the Indian culture in a genuine parent-child relationship."

[22] The Applicants also challenge as unreasonable the officer's assessment of their telephone contact with Gursimran, namely that the evidence of phone calls with their son was

"inconclusive." They object to the officer's observation that their phone bills show "short calls" to India. However, a review of the phone bills reveals that many of these calls were, indeed, of short duration. Furthermore, the Applicants themselves told the officer that most of their conversations with their son are for 2 to 3 minutes (with longer conversations on Sundays). The officer expressed concern about the length of the calls overall, as well as about the fact that the calls included time spent speaking to the guardian about issues unrelated to Gursimran. Her concerns are borne out by the evidence.

[23] The Applicants also submit that the officer erred in stating that the calls "were to discuss land and business related issues with Power of Attorney, as well as issues related to Gursimran." However, this statement is supported by the officer's notes. The notes record the following exchange between the officer and Gursimran's guardian:

> **Q** Do the adoptive parents call Gursimran on the telephone?
>
> **A** yes, mostly on Sundays, or maybe every 2-3 days
>
> **Q** whose phone do they use when they call?
>
> **A** they call on my phone (… I've had this number last ten years), Gursimran doesn't have a phone, they call on my cell phone which is usually with me
>
> **Q** how long do they talk for on Sunday?
>
> **A** about half an hour with him directly and some talk with me
>
> **Q** you talk with them also?
>
> **A** yes, I manage land for them.

[24] This exchange supports the officer's observation that the calls involved discussions of land and business with the guardian and were not solely focused on Gursimran.

[25] Lastly, the applicants submit that the officer acted in a procedurally unfair manner when she concluded that their remittances were inadequate without giving them an opportunity to make submissions on this point.

[26] The Applicants cite *Yuan v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1356 [*Yuan*] in support of their contention that they had a right to respond to the officer's concerns. The Court in *Yuan* at para 12 held that: "While the duty of fairness does not necessarily require an oral hearing, there is a requirement that the visa officer provide the applicant with an opportunity to address a major concern, in other words, respond." They also rely on *Hernandez Bonilla v Canada (Minister of Citizenship and Immigration)*, 2007 FC 20 at para 25 for the proposition that "visa officers may not base their decisions upon stereotypes or generalizations, without allowing the applicant to respond."

[27] The respondent cites *Tran v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1377 [*Tran*] in support of its position that no breach of procedural fairness has occurred in this case: At para 31 of *Tran* the Court observes that "it is reasonable to expect that Visa Officers will bring their own experience and expertise to the applications before them." According to the respondent, it was fair for the officer to rely on her personal experience of the cost of living in India in order to find that the Applicants' remittances were inadequate, without providing them with an opportunity to respond.

[28] Although the applicants submit that they were treated unfairly in not having this information put to them, they have not offered any evidence on this application that suggests that

the view of the officer was in error or that, aside from their remittances to India, they provided other financial support to their son.

[29] A minor breach of procedural fairness should not result in a re-determination absent some evidence that the breach affected the result. Here, the officer gave three reasons for rejecting the application and two of them have been found to be reasonable. I cannot conclude that putting the remittances issue to the Applicants would have produced any different result absent some evidence that the officer's view of the cost of living was in error. Even when there are procedural breaches, judicial review remedies are discretionary. Absent any evidence that the officer's conclusion that the financial support was insufficient to maintain Gursimran was wrong, and given the reasonableness of the remaining findings, I am not convinced, even if there was a breach, that it had any impact on the ultimate decision.

[30] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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