Federal Court  Cour fédérale

Date: 20160620

Docket: IMM-5452-15

Citation: 2016 FC 694

Ottawa, Ontario, June 20, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

LETICIA NDAYINASE

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board [IAD] holding that a sponsorship refusal of a visa officer at the Canadian High Commission in Accra, Ghana, was not legally valid. The visa officer had denied the sponsored family class application of a minor child because the sponsor, his mother Leticia Ndayinase, failed to provide documents establishing that she either had full custody of him or written confirmation that his biological father did not object.

I. Background

[2] The Respondent, Leticia Ndayinase, is a citizen of Ghana who became a permanent resident of Canada in March 2010, after marrying a Canadian citizen in January 2008.

[3] In December 2013, the Respondent applied and was found eligible to sponsor her fourteen year-old son, Emmanuel Ndayina-nse, as a member of the family class.

[4] In processing the permanent resident visa application, the High Commission of Canada in Accra, Ghana [the High Commission], requested that Emmanuel provide a "no objection letter" from his biological father, with signed photographic identification.

[5] The Respondent submitted a "no objection letter" from Joseph Kaku Ndayina-nse, her father, as Emmanuel's legal guardian, without further documentation proving legal guardianship.

[6] On March 10, 2014, a visa case analyst noted that Emmanuel's birth certificate indicated his father as "Kwesi Odroh". The High Commission thus again requested that Emmanuel provide a "no objection letter" from Kwesi Odroh, or alternatively, court documents indicating the Respondent has full custody of him.

[7] Visa case analyst notes indicate that the Respondent submitted a statutory declaration in early April of 2014, yet the requested documents had still not been received.

[8] The High Commission thus sent a procedural fairness letter to Emmanuel, notifying him of the requirement under subsection 16(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] to produce all relevant evidence and documents the officer reasonably requires to process the application. The documents were again requested, and were to be filed within 30 days.

[9] On September 10, 2014, a visa officer refused the application for permanent residence due to the failure to comply with subsection 16(1) of the Act [Refusal Letter]. The Refusal Letter notes that based on the available information, the visa officer was not satisfied that Emmanuel, a minor child, is not inadmissible and that he meets the requirements of the Act pursuant to subsection 11(1), since his father did not authorize his immigration to Canada.

[10] The Respondent appealed the refusal to the IAD and a hearing was held on June 23, 2015.

[11] The November 16, 2015 decision of the IAD allowed the Respondent's appeal [the Decision]. The IAD concluded that in the specific circumstances, it would be impossible for the Respondent to secure the documents requested in such a way that would render them meaningful or truthful. The Decision provides the following basis for this conclusion:

a. The Respondent explained she was unable to obtain a *"no objection letter"*: she testified at the hearing that she became pregnant at age 17, and had not seen or heard from Emmanuel's biological father since his birth. She had attempted to find him, to no avail, and the only evidence of his whereabouts was that he may have moved to Liberia.

b. The Respondent also claimed she was unable to secure the requested court documents proving sole custody due to corruption of the courts in Ghana and the high cost of legal counsel. She testified that she had returned to Ghana in 2014 and had spent considerable funds to obtain a nonsensical "statutory declaration", believing it was the proper custody document.

[12] The Decision also outlined that the Minister had canvassed the attempts the Respondent could have made to secure some type of documentation attesting to the disappearance of Emmanuel's biological father, or court documents demonstrating sole custody.

[13] The IAD found the Respondent to be credible: she testified in a straightforward and consistent manner, and there was no reason to doubt the veracity of her version of events, particularly that the whereabouts of Emmanuel's biological father are unknown.

[14] The IAD cited as applicable paragraphs 14 and 15 of *Lan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 770 [*Lan*], which deals with a refusal under subsection 16(1) of the Act, where the Court noted:

> [14] The approach advocated by the visa officer cannot hold because it put too heavy a burden on the applicant.
>
> [15] In fact, it was unreasonable to require the applicant to produce documents which are too difficult if not impossible to access…

[15] Accordingly, on a balance of probabilities, the IAD concluded that the visa officer's refusal was not legally valid and allowed the appeal.

II. Issue

A. Was the IAD Decision that the visa officer's refusal was not legally valid reasonable?

III. Standard of Review

[16] Findings of mixed fact and law by the IAD are afforded considerable deference and are reviewed on a standard of reasonableness (*Ma v Canada (Minister of Citizenship & Immigration)*, 2010 FC 509 at para 26; *Dunsmuir v New Brunswick*, 2008 SCC 8).

IV. Analysis

[17] The Applicant claims the IAD Decision is unreasonable, as it was not legally invalid for the visa officer to refuse the application on the basis that the visa applicant did not provide requested documents thereby demonstrating he or she meets the requirements of the Act. A visa officer is bound to refuse to issue a visa to an applicant who has not fulfilled the obligations provided in section 16 of the Act (*Lan*, above, at para 10).

[18] The Applicant argues the IAD's reliance on *Lan*, above, was unreasonable, as it is distinguishable from the present case. In *Lan*, the visa officer's request for documents was unreasonable because the documents requested pre-dated the period of consideration and were not relevant to the officer's concerns surrounding the legality of funds indicated in the permanent residence application (*Lan*, above, at paras 12-16).

[19] In the present case, the Applicant submits the visa officer's request for documents to establish the custody of a minor child is highly relevant to assessing that child's permanent residence application to ascertain whether the child is in the legal custody of someone other than the sponsor (*Rojas v Canada (Citizenship and Immigration)*, 2012 FC 1303 at paras 12-13).

[20] The Respondent's difficulties in obtaining the requested documents does not render the the visa officer's request for certain documents unreasonable or legally invalid. Particularly so, the Applicant argues, where the Respondent's evidence is inconsistent with respect to her son's guardianship.

[21] On this point, I disagree with the Applicant that the evidence is inconsistent with respect to Emmanuel's guardianship. The transcript reveals that Emmanuel was left under the care of the Respondent's aunt, and when she became ill he then went to live with his grandfather. The IAD found this testimony credible, and there are no unexplained inconsistencies which call into question the reasonableness of IAD's acceptance of the evidence.

[22] The Applicant further submits that the IAD ignored the following evidence suggesting the Respondent did not exhaust all avenues to obtain the requested documents, and which runs

contrary to the IAD's conclusion that obtaining the documents was an "impossible" endeavour:

a. the country-wide Legal Aid scheme in Ghana provides assistance in custody issues to the poor: advisory services are free and legal representation requires proof of inability to pay;
b. articles submitted by the Respondent are from 2007 and simply speak to *attempts* to interfere with judicial independence and official duties, and a 2013 website indicating the "perception" that Ghana is a corrupt country: they provide no recent evidence corroborating the Respondent's claim regarding the extent of corruption in the courts of Ghana.

[23] Though the IAD need not refer to every piece of evidence before it, significant evidence is expected to be considered and analyzed, especially when it contradicts the IAD's finding. Accordingly, the Applicant claims the IAD's failure to consider this contradictory evidence makes the conclusion it was "impossible" for the Respondent to obtain the requested documents unreasonable, and without regard to the material before it (*Cepeda-Gutierrez v Canada (Citizenship and Immigration)* (1998), 157 FTR 35 (FC) at paras 16-17 [*Cepeda-Gutierrez*]).

[24] The Respondent made no written submissions.

[25] In my view, and as further explained below, the IAD's Decision is unreasonable. The IAD found that the visa officer's refusal of the sponsorship application was "not legally valid", as the visa officer had demanded documents the IAD found were impossible for the Respondent to secure in a way that would render them meaningful or truthful to the visa application. With

respect to the Respondent's ability to obtain a court order proving custody, I find this conclusion was made without regard to the facts before it.

[26] The IAD cites *Lan*, above, as standing for the proposition that a visa officer's request to produce documents under subsection 16(1) of the Act is unreasonable if those documents are too difficult, or impossible to access. At paragraphs 14 and 15 of *Lan*, above, cited only partially by the IAD, the Court stated:

> 14 Yet, the only concern of the visa officer that led her to her decision to refuse was the source of the applicant's revenues accumulated in the years between 1984 and 1989. The approach advocated by the visa officer cannot hold because it put too heavy a burden on the applicant.
>
> 15 In fact, it was unreasonable to require the applicant to produce documents which are difficult if not impossible to access, for a period so long ago, which are also without relevance or of very little relevance with regard to the legality of the funds indicated on her application for permanent residence.
>
> [Emphasis added]

[27] Notably, it was also the *irrelevance* of such requested documents that rendered the visa officer's refusal unreasonable in *Lan*. Thus, I find *Lan* is applicable to the present facts insofar as it outlines that a request for documents must be reasonable, in the sense that the documents sought must be relevant, and not impossible to obtain.

[28] In fact, this is essentially what is conveyed by the wording of subsection 16(1) of the Act:

> 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.
>
> [Emphasis added]

[29] With regards to the "no objection letter" by the biological father, the evidence before the IAD was that: (i) the Respondent had never been close with the father of her son and has not spoken with him since before Emmanuel's birth; and (ii) the biological father has never met Emmanuel and has never cared for him in any manner, physically, financially or emotionally. In light of this accepted evidence, I find the IAD's conclusion that the request for a "no objection letter" from the biological father was not reasonably required under subsection 16(1) of the Act (and was therefore not legally valid) is a reasonable decision. Given the rather unique set of factual circumstances in this case, I find that it is justified on the evidence before the IAD and explained in the reasons provided.

[30] The visa officer alternatively requested a court order proving the Respondent has sole custody of her son. Requiring proof of custody where a "no objection letter" cannot be obtained before permitting a minor child's immigration across international borders is both reasonable and relevant, as required by subsection 16(1).

[31] The IAD found that the Respondent testified credibly. Her testimony explained at length the substantial effort (including travelling to Ghana twice and at one point spending a month

there), and significant sum of money spent in attempting to obtain the requested court order, which was ultimately rejected by the High Commission on the basis that the document obtained, a statutory declaration, was "not acceptable".

[32] The Respondent also testified at the hearing of the difficulties she would face in attempting to obtain a court order of custody in Ghana. She provided evidence speaking to the corruption in Ghanaian court, and the implications that attempting to obtain such an order would have on her and her family, considering the time commitment, expense, loss of employment and the effect it would have on the ongoing financial support she provides her son and family.

[33] Notwithstanding this testimony, I find that the IAD made an erroneous finding of fact, without regard to the evidence in concluding that it would be impossible for the Respondent to secure the documents requested in a way that would render them meaningful or truthful. Thus, the IAD's conclusion that the visa officer's request for such documentation was legally invalid is also not reasonable.

[34] Section 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7 provides that this Court may set aside a tribunal's finding of fact if it is satisfied that the tribunal "based its decision or order on an erroneous finding of fact it made in a perverse or capricious manner or without regard to the material before it" (*Khosa v Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12 at para 46). Parliament quite evidently intended that a high degree of deference be afforded administrative fact finding.

[35] Though it is trite that the IAD need not refer to every piece of evidence before it, there is evidence in the record that is both critical and contradictory to the IAD's conclusion that it would be impossible for the Respondent to obtain a court order proving custody. Though a statement conveying that the decision-maker "reviewed all the documentary evidence and testimony before it" may be sufficient in some cases to assure the parties and the Court that the IAD directed itself to the totality of the evidence, such a blanket statement will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact (*Cepeda-Gutierrez*, above, at paras 16, 17).

[36] In concluding it was impossible to secure the requested documents, the IAD provides no analysis of the evidence provided that is contradictory to this finding – an omission which in my view suggests the IAD's conclusion was made without regard to the material before it (*Cepeda-Gutierrez*, above, at para 17).

[37] The following evidence runs directly contrary to the IAD's conclusion, and there is no discussion within the Decision as to why it would be impossible for the Respondent to access these services, or why the evidence was ultimately not accepted, such that the IAD could reasonably conclude obtaining the court order was impossible.

[38] First, the Applicant provided evidence of the Legal Aid scheme in Ghana, which is free of charge to children under the age of 18, who are "exempted from providing their ability to pay". The Respondent did not know this assistance existed, or that her son or his grandfather

could access this avenue for assistance. The evidence in the record explains that services are provided for civil matters, including custody.

[39] Secondly, in the record before the IAD, but mentioned nowhere in its reasons, is the scale of fees adopted by the Ghana Bar Association that indicates the price for initial consultation, hourly rates for lawyers of various levels of seniority, and the estimated costs for legal proceedings, including custody. The Respondent's testimony was that she had already spent approximately CAD $10,000 in attempting to find the biological father, and paying for a statutory declaration from the Ghanaian court, rather than a court order. Though the Respondent provided no corroborating documentation of this, her testimony was accepted as credible.

[40] Considering this above evidence, and without it having been discounted or found not probative, it is difficult to conceive of how the IAD arrived at the conclusion it would be "impossible" for the Respondent to secure a court order. Moreover, there was no evidence the Respondent had exhausted the reasonable options open to her: since the statutory declaration was rejected by the visa office as insufficient to prove custody, the Respondent has not attempted to obtain the court order, or have her father or son do so in Ghana, nor has she looked into how long it would take.

[41] The Respondent's testimony, accepted by the IAD, was that she distrusted the courts, and believed them to be corrupt. This is understandable given her negative experience thus far in paying for what she thought would be a custody order. Nonetheless, the only other evidence before the IAD on the issue of the corruption of the courts of Ghana are two one-page articles

from 2007, and an internet website indicating Ghana was ranked as the third most perceived corrupt country. It was open to the IAD to accept this evidence over that provided by the Applicant. However, absent express findings and an analysis as to why the evidence suggesting it would *not* be impossible for the Respondent to secure a court order was not accepted, the Court is entitled to infer that this contradictory evidence was overlooked when the IAD made its finding of fact.

[42] In order to allow a permanent resident visa application, the visa officer must be convinced that "that the foreign national is not inadmissible and meets the requirements of this Act" (subsection 11(1)). Here, the visa officer was not satisfied of the Respondent's son's eligibility, as the documents required for the immigration of a minor child had not been received.

[43] Though I have sympathy for the Respondent's desire to be reunited with her son, the visa officer is not only entitled to request, but is mandated to require, on a reasonable basis, proof of valid custody of the Respondent's minor child under section 16(1) of the Act – either by way of (1) a "no objection letter" from the biological father, which I agree here was impossible as found by the IAD, or (2) court documents indicating that the Respondent has full custody of her son – which were not obtained or provided.

[44] The Respondent is now aware of options available to her, and without having attempted those options, and without the Court having the benefit of the IAD's reasons justifying why it ultimately decided it would be impossible to secure the documents requested in the face of contradictory evidence, the IAD's conclusion that the visa officer's refusal was not legally valid

amounted to an erroneous finding of fact, made without regard to the evidence. For this reason, I would allow the application and remit the matter to the IAD for redetermination in accordance with these reasons.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is remitted to a different IAD member for reconsideration;

2. No question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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