Federal Court Cour fédérale

Date: 20180911

Docket: IMM-5298-17

Citation: 2018 FC 904

Ottawa, Ontario, September 11, 2018

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

BARWAQO KHALIF NUR
AHMED AHMED ABINASER
AYAN AHMED ABINASER
LAYLA AHMED ABDINASER
MAHAMED AHMED ABDINASER

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On April 4, 2014 (the "lock in date") Barwaqo Khalif Nur (the "Principal Applicant") and her children Ahmed, Ayan, Layla, and Mahamed (the "Minor Applicants") applied for permanent residence as family members in a protected person's In-Canada application for

Permanent Residence under section 176(1) of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 (the "Regulations").

[2] In order to qualify as family members, the Minor Applicants needed to satisfy the definition of "dependent child" under section 2 of the Regulations. This definition includes children who are less than 22 years of age and do not have a spouse or common-law partner. A Visa Officer with the Canadian High Commission removed the Minor Applicants from the application for permanent residence after determining that they had misrepresented their ages. The Principal Applicant and Minor Applicants now come before this Court, asking that the decision be set aside and sent for reconsideration by a different officer.

[3] I have reviewed the decision and find that it is based on irrelevant considerations and fails to explain why the Minor Applicants do not satisfy the Regulations. Accordingly, the decision is unreasonable and I will set it aside.

II. Facts

[4] The Principal Applicant and the Minor Applicants (collectively, the "Applicants") were sponsored to come to Canada by Abdinaser Mohamed (the "Sponsor"), who is their father and husband respectively. He came to Canada as a protected person and became a permanent resident on October 6, 2015.

[5] The Applicants are citizens of the Somali Republic and come from the port city of Kismayo. They presently reside in Nairobi, Kenya. Following their application to become

permanent residents, the Applicants were informed by way of a letter dated November 6, 2015, that they would need to attend an interview at the Canadian High Commission in Nairobi, Kenya (the "High Commission") to confirm their relationship to the Sponsor.

[6] They attended the interview on December 1, 2015. The Principal Applicant was asked about her children's ages and she answered as follows: Ahmed, 15 years old; Ayan, 13 years old; Layla, 12 years old; and Mahamed, 11 years old. The interviewing officer, Angela Nyathama (the "Officer" or "Officer Nyathama") was of the view that the children were older than their stated ages, but that bone age testing would not be necessary because she was satisfied that all of the Minor Applicants were under the age of 22. However, the Officer was suspicious that they might not be the biological children of the Principal Applicant and the Sponsor.

[7] By way of a letter dated December 9, 2015, the Sponsor was notified that the children would need to undergo DNA testing to confirm paternity. The DNA test results state that the Principal Applicant and Sponsor are "practically proven" to be the biological mother and father of the Minor Applicants. The Applicants were then referred for medical processing.

[8] On June 10, 2016, Dr. Damaris Miriti ("Dr. Miriti"), a medical officer working for the International Organization for Migration, wrote to Dr. Patrick Theriault ("Dr. Theriault"), Medical Attaché at Citizenship and Immigration Canada in London, United Kingdom. She stated:

> The applicants whose forms are attached above are/appear significantly older than indicated dates of birth (DOB). <u>They are adults</u> although the DOB indicate children <15years.

> The Canadian Guidelines are clear that we should raise an ID concern in emedcial and then proceed with the IME as per procedure.
>
> The reason for this query is to find out if you would like us to proceed with the IME for the adult i.e. include blood screen tests for HIV & syphilis as well or do the IME based on their age as per the date of birth on these forms i.e. CXR and medical exam only. One of the applicants who is 12 years as per this record's DOB is actually currently pregnant.
>
> [Emphasis added].

[9] Dr. Theriault instructed Dr. Miriti to conduct an adult exam, and passed the information on to officials at the visa office in Nairobi for further investigation for "possible impersonification (sic)."

[10] The Officer asked that bone age tests be conducted after noting that: the Minor Applicants' ages were still in question; there was an absence of documentation; there was a notion that they were not forthcoming during the interview; and that one child was supposedly pregnant.

[11] The Minor Applicants underwent the bone age tests. Dr. Miriti's findings dated October 4, 2016 stated that Ahmed was about 19 to 25 years old, Ayan was about 25 years old, Layla was about 18 to 25 years old, and Mahamed was about 18 to 25 years old.

[12] On October 31, 2016, the Officer wrote to the London Regional Medical Office to advise that the Minor Applicants were older than they had declared, but appeared to remain eligible

dependants as of the lock-in date. The same day, the Officer asked for the generic immigration forms to be filled out by the Minor Applicants (in view of the determination that they are adults).

[13] The Officer sent a procedural fairness letter (dated July 25, 2017) to the Principal Applicant explaining that her children may not qualify as "dependents." It says that the interview at the High Commission was inconclusive, that the medical examinations indicated that Layla (whose stated age was 12) was pregnant, and that bone age tests suggest that their ages were not as represented. Accordingly, the Principal Applicant was invited to provide additional information. The Sponsor responded by way of an email dated July 29, 2017, stating that none of his children could be above 21 years of age, because he did not have a relationship with the Principal Applicant before 1995.

[14] By way of a letter dated November 27, 2017, the Officer informed the Principal Applicant that she was not satisfied that the Minor Applicants had not misrepresented their ages, and that she was not satisfied that they are dependent children as defined in the Regulations. The Officer also advised that the Minor Applicants had been removed from the Principal Applicant's application for permanent residence.

III. Issues

[15] I see the issue in this case as follows:

- Is the Officer's decision unreasonable because it is based on irrelevant factors?

IV. Standard of Review

[16] Whether or not the Minor Applicants satisfy the definition of "dependent child" in section 2(b)(i) of the Regulations is reviewed for reasonableness (*Dono v Canada (Citizenship and Immigration)*, 2015 FC 400 at para 1 [*Dono*]).

V. Analysis

A. *Is the Officer's decision unreasonable because it is based on irrelevant factors?*

[17] The Applicants contend that the Visa Officer issued a refusal based on an irrelevant factor. In particular, according to the Applicants, Officer Nyathama's refusal is only purportedly based on the definition of "dependent" and is actually based on a finding of misrepresentation. The Applicants further allege that the London office effectively pressured the Nairobi visa office into refusing the application.

[18] The Respondent submits that the Officer made her decision because she was unsatisfied that the children met the definition of "dependent child." The Respondent argues that the Officer's transitory statements about the Minor Applicants' ages do not constitute a final determination on the matter and that, on the contrary, a contextual review of the reasons illustrates that the Officer was concerned about the Minor Applicants' ages throughout the process. Moreover, the Respondent submits that the Officer made a series of discrete findings that led to her conclusion, including the fact that there was an absence of documentation to establish the Minor Applicants' ages, the notion that they were not forthcoming during the

interview at the High Commission, the suspicion that they were older during their medical assessments, the pregnancy of the alleged 12-year-old (Layla), and finally, the results of the bone age tests. Thus, according to the Respondent, the only objective information the Officer had about the Minor Applicants' ages was that they were adults who were significantly older than declared. Finally, the Respondent rejects the suggestion that the Officer was under any pressure from the medical office in London to arrive at a particular conclusion, but that the exchanges show a normal interaction between colleagues in the routine processing of a file.

[19] I agree with the Applicants. While it is true that the Officer did not find the Minor Applicants to be inadmissible for misrepresentation (the term is not used in the decision, and the inadmissibility provisions of the *Immigration and Refugee Protect Act,* SC 2001, c 27 (the "IRPA") are not referenced), the reasons indicate that the motivation behind the Officer's decision was some combination of alleged misrepresentation about the children's ages and an assertion that she was not satisfied that they are "dependent children."

[20] There are two reasons that this approach is flawed. First, misrepresentation of one's age is irrelevant in determining whether a person is a "dependent child" under the IRPA. The Officer recognized as much after the interview at the High Commission, when she found that the Minor Applicants had misrepresented their ages but were nevertheless under the age of 22, and again after the bone age test when she expressed that they appeared to be eligible dependents at the lock-in date.

[21] Yet the reasons illustrate that the Officer took the alleged misrepresentation into account, saying she was "not satisfied that the ages of Ahmed, Ayan, Layla and Mahamed have not been misrepresented and that they meet the definition of dependents" [emphasis added]. As a result, she erred by basing her decision on an irrelevant factor (the alleged misrepresentation), and this decision is unreasonable.

[22] The second flaw is that there is no explanation or analysis about how the Minor Applicants did not satisfy the definition of "dependent child." This is contrary to the evidence in the GCMS notes which point out that even if the Minor Applicants are older (as indicated on the test results), all of the children were still within an age range that satisfied the Regulations as of the lock in date. A visa officer has no discretion—once the definition of "dependent child" as it is used in the Regulation is satisfied, an applicant is automatically a dependent child (*Dono* at para 6). The Court does not know on what basis the Officer later concluded that no Minor Applicant was under the age of 22 as of the lock in date.

[23] For example, the reasons show that although other individual medical tests were reported, they have not been subject to any analysis, and my own review reveals substantial concerns. Dr. Miriti concluded that Ayan was "about or above" 25 years of age in October 2016, and yet one report indicates that her onset of menarche was in 2013. This report is highly suspicious because it suggests that the onset of menarche was at 22 years of age, which is highly improbable. This is to say nothing of the fact that Dr. Miriti's "conclusions" are copied and pasted from the bone age results, with no apparent consideration of the other tests performed and how those results would

impact any estimate of the Minor Applicants' ages. For example, the evidence before the Officer included Ayan's "Serum Alkaline phosphatase" test, which indicates she is 17 to 23 years old.

VI. Conclusion

[24] This application for judicial review is allowed, and I will set aside the decision. I am troubled by the suspicion and disbelief with which the Applicants have been treated in this case. The Officer first questions whether the children are the biological children of the Principal Applicant and the Sponsor, based on the notion that the Principal Applicant was "vague about their wedding" and that she was "unclear about whether [the Sponsor] had any other children or spouse (sic)"—as if marriage or the possibility of additional wives is dispositive of paternity. And with complete disregard of factors such as cultural norms, fear of authority, or respect, Officer Nyathama dismissively records in her notes that Mahamed "would not dare look me in the eyes." Dare is not language used by someone who is addressing or approaching her task with objectivity. It is confrontational language. Then, after the positive DNA results were received, Dr. Theriault suggested that the visa officers investigate the Applicants for "impersonification"—importantly, this shows that his concern is not misrepresentation of age, but rather that the Minor Applicants are not who they claim to be. Finally, Officer Nyathama did not focus her analysis on determining whether the children were under the age of 22 at the lock-in date, but rather uses their alleged misrepresentation to inform her decision to remove them from the application for permanent residence. This is a reviewable error which must be corrected upon redetermination.

VII. Certification

[25] Counsel for both parties was asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

JUDGMENT in IMM-5298-17

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.
2. Given the prolonged period of separation of this family, the redetermination is to take place in no more than sixty (60) days from the date of this decision.
3. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5298-17
STYLE OF CAUSE:	BARWAQO KHALIF NUR, AHMED AHMED ABINASER, AYAN AHMED ABINASER, LAYLA AHMED ABDINASER, MAHAMED AHMED ABDINASER v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	JULY 25, 2018
JUDGMENT AND REASONS:	AHMED J.
DATED:	SEPTEMBER 11, 2018

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