Federal Court  Cour fédérale

Date: 20210512

Docket: IMM-7560-19

Citation: 2021 FC 439

Ottawa, Ontario, May 12, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

PHAN SON TUNG MAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Phan Son Tung Mai, applies under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the November 28, 2019 decision of the Immigration Appeal Division [IAD] upholding the visa officer's refusal of an application to sponsor his biological parents and sister.

[2] Mr. Mai argues that the Court's intervention is warranted on two grounds:

A. The IAD violated his procedural fairness rights by not holding an oral hearing.

B. The IAD ignored and mischaracterized evidence thereby rendering the decision unreasonable.

[3] As explained in more detail below, I am not convinced that the IAD's decision to proceed without an oral hearing was procedurally unfair. I am also unable to conclude that the IAD's treatment of the evidence was unreasonable. The Application is dismissed.

II. Background

[4] Mr. Mai is a Canadian citizen. He was born in Vietnam where he was adopted by his aunt in 1996. He entered Canada in 1999 with his adoptive mother. In processing his application for permanent residence, Canadian officials were concerned that the adoption was an "arranged adoption of convenience" and that the adoption certificate was "not legal." The visa officer conducted an interview. The Computer Assisted Immigration Processing System [CAIPS] notes state that, "[d]espite paper screening concerns, 10 [year] old child was interviewed and convincing, [sponsor] was also here for the [interview], as [was] his [natural mother]…we are proceeding favourably with aplication [*sic*] and visa will be issued once [medical] clearance is obtained." It appears the interview addressed the concerns.

[5] In December 2014, Mr. Mai applied to sponsor his birth parents and sister for permanent residency. The application was denied on the basis that Mr. Mai's adoption had the effect of severing the legal parent-child relationship with his biological parents pursuant to subsection 3(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[6] Mr. Mai appealed this decision to the IAD.

III. The IAD Decision

[7] In appealing the decision, Mr. Mai submitted Canadian officials had concluded that the certificate of adoption relied upon in 1999 was not a legal adoption certificate, that the adoption was invalid, and he was granted status at that time on humanitarian and compassionate [H&C] grounds. In dismissing the appeal, the IAD found insufficient evidence to show that Mr. Mai was not adopted pursuant to the IRPR subsection 3(2) as he alleged.

[8] The IAD considered the CAIPS notes and a letter from Alberta Family and Social Services [AFSS], both relied upon by Mr. Mai. The IAD acknowledged that the CAIPS notes questioned whether the adoption certificate was legal. However, the IAD found the concern arose early in the processing of the application and, when considered as a whole, the CAIPS notes indicated this concern was alleviated after the interview in 1999. The IAD also held that the AFSS letter did not lead to the conclusion that the adoption certificate was not legal. Rather, the IAD found the letter expressed no opinion in this regard.

[9] The IAD further noted there was little evidence that Mr. Mai had maintained any form of ongoing relationship with his biological parents or sister. The IAD acknowledged the Applicant signed an affidavit agreeing to support his biological sister if she came to study in Canada, but found it insufficient to establish evidence of an ongoing relationship. The IAD also noted there was little evidence showing the Applicant had not created a parent-child relationship with his adoptive mother.

IV. Standard of Review

[10] As noted above, Mr. Mai submits the IAD acted in a procedurally unfair manner and submits that the decision itself is unreasonable.

[11] Procedural fairness issues are reviewed by asking whether a fair and just process was followed, having regard to all of the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]. This reviewing exercise is "best reflected in the correctness standard," although no standard of review is actually being applied (*CPR* at para 54; see also *Grewal v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1186 at para 5; *Sun v Canada (Minister of Citizenship and Immigration)*, 2020 FC 477 at para 27; *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 319 at para 49; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[12] The IAD's findings of fact are reviewable on the reasonableness standard (*AB v Canada (Minister of Citizenship and Immigration)*, 2020 FC 19 at para 28). The IAD's decision will be reasonable where it is "based on an internally coherent and rational chain of analysis and…is justified in relation to the facts and law" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85).

V. Analysis

A. *The process was fair*

[13] Mr. Mai argues that the IAD acted unfairly on two grounds. First, the failure to hold an oral hearing, particularly in light of his expressed request for a hearing, was unfair. Secondly, he argues that the IAD's request for submissions was limited to the issue of whether an oral hearing was required. The IAD's final determination of the matter on the basis of those submissions alone resulted in the IAD failing to consider the whole case as it was obligated to do and as Mr. Mai legitimately expected (*Kahlon v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 104, 7 Imm LR (2d) 91; *Albarahmeh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1153 [*Albarahmeh*]).

[14] I begin by noting that the IAD may dispose of matters in writing without a hearing where to do so is not unfair to the parties and there is no need for oral testimony (*Immigration Appeal Division Rules*, SOR/2002-230, s 25(1)). Where an applicant submits that the IAD's failure to conduct an oral hearing resulted in an unfair process, as here, a reviewing court must carefully consider the circumstances. In assessing the need for an oral hearing, the IAD is the "master of its own procedure." (see *Tesfaye v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1143 at para 13 [*Tesfaye*]; and *Garces Caceres v Canada (Minister of Public Safety and Emergency Preparedness)*, 2020 FC 4 at para 28)

[15] The IAD's ability to dispose of a matter in the absence of an oral hearing is not only reflected in the IRPR but was specifically highlighted in a notice letter provided Mr. Mai. The

letter acknowledges receipt of the appeal and invites Mr. Mai to submit any documents and argument supporting his position. The letter further advises Mr. Mai that any documents and argument he provides are to also be provided to the Minister's counsel, that the Minister's counsel may respond, that Mr. Mai would receive a copy of any response, and that he would be given an opportunity to reply. The letter then addresses the possibility of an oral hearing, stating:

> The IAD will use all of this information to decide whether or not to hold a hearing on your appeal. It will schedule a hearing if it needs more information. If this happens, you will receive a letter from the IAD called a Notice to Appear. This will tell you when and where the hearing will take place. However, in many cases there is enough information for the IAD to decide the appeal based on the information in the file. [Emphasis added.]

[16] Mr. Mai does request an oral hearing in his submissions to the IAD, although those submissions are general in nature. He does not identify how an oral hearing would assist the IAD, nor does he identify any specific evidence or witnesses he would seek to introduce or call should an oral hearing being held.

[17] The IAD was under no obligation to hold an oral hearing, nor did the process outlined by the IAD in its notice letter create any legitimate expectation that an oral hearing would be held. The leading Supreme Court case on legitimate expectations is *Mavi v Canada (Attorney General)*, 2011 SCC 30 [*Mavi*]. Where "clear, unambiguous and unqualified" representations are made to an individual by an official acting within the scope of their authority about an administrative process a legitimate expectation will result (*Mavi* at para 68). In this instance, Mr. Mai did not receive a clear, unambiguous, and unqualified statement that he would receive an oral hearing. Rather, Mr. Mai was advised an oral may not be needed and the matter decided on the information contained in the file. No legitimate expectation arises.

[18] This distinguishes this matter from the circumstances in *Albarahmeh*, upon which Mr. Mai relies. Although *Albarahmeh* was decided before *Mavi*, it can be read as fitting into the *Mavi* framework. In *Albarahmeh*, the applicants had a legitimate expectation of an oral hearing because they received a Notice to Appear setting the date for their third hearing. The IAD breached that legitimate expectation by rendering its decision without holding the hearing that it clearly stated it would hold.

[19] Mr. Mai's general request for a hearing could not and did not generate an obligation where none existed. Similarly, an applicant cannot unilaterally create a legitimate expectation by requesting a specific process. Mr. Mai was well aware of the case to be determined by the IAD. In these circumstances, it was neither unfair nor unreasonable for the IAD to decide the matter without an oral hearing.

[20] Mr. Mai further submits that in proceeding directly to a final decision, the IAD did not allow him to address the Certified Tribunal Record [CTR] upon which the decision being appealed was based. The CTR was not forwarded to the IAD until September 13, 2019 and Mr. Mai provided final reply submissions to the Board on September 20, 2019. His counsel suggested in oral submissions that the reply was provided to the IAD before counsel received or at least fully considered the CTR. The result was that the IAD did not have the opportunity to fulfill its obligation to consider the whole of the case, and in turn, the process was unfair.

[21] These submissions are unpersuasive. There is no evidence to indicate the record was not received before final submissions were made. Even if I were accept this to have been the case,

Mr. Mai's counsel did not raise these concerns with the IAD. An extension of time was not sought to allow reply submissions, nor did counsel request to make supplementary submissions. A final decision was not rendered by the IAD until November 28, 2019.

[22] I am satisfied, having regard to all of the circumstances, that the process before the IAD was fair and just.

B. *The IAD did not ignore or mischaracterize evidence*

[23] Mr. Mai submits the IAD's decision is unreasonable. The CAIPS notes establish his adoption was one of convenience and that the adoption certificate was not legal. He submits the CAIPS notes reflect his application for permanent residence was allowed only after conducting an interview where the officer concluded an emotional bond existed between Mr. Mai and his adoptive mother. This, he submits, is reflective of a decision made on H&C grounds, not on the basis of a lawful adoption. He also points to the letter from AFSS officials, which states an adoption cannot be finalized in Alberta until a legally valid certificate of adoption is provided, as supporting the view that his adoption was not legal. He submits the IAD failed to address this evidence of an unlawful adoption and instead relied upon irrelevant factors including whether there was evidence of an ongoing relationship between Mr. Mai and his biological family.

[24] Contrary to Mr. Mai's submissions, the IAD explicitly considered his arguments relating to the CAIPS notes and the AFSS letter.

[25] In respect of the CAIPS notes, the IAD acknowledged that they evidenced initial concern over the legitimacy of the adoption. The IAD then goes on to state that after "nearly two years and substantial due diligence, the visa office concluded that the application could proceed" and that "[a]ppellant's counsel's submissions focussed on the earlier part of the CAIPS notes and did not accurately incorporate the overall findings."

[26] In considering the AFSS letter, again the IAD found the letter "does not speak to the adoption being not legal." Instead, the IAD found the letter simply states provincial officials were not in a position to render an opinion as to the legality of the adoption and that it would be unreasonable to interpret the letter as supporting the view that the adoption was not legal.

[27] The IAD details its reasoning for its interpretation of the CAIPS notes and the AFSS letter. The reasons are justified, intelligible, and transparent. It was not unreasonable for the IAD to find that the visa officer concluded the adoption was legal after interviewing Mr. Mai, his adoptive mother, and his biological mother. The notes allow this conclusion to be drawn and it is consistent with the coded basis for landing in the Record of Landing and the CAIPS notes: FC-9, adopted child.

[28] The Applicant submits that the IAD failed to address evidence contradicting its decision, namely, a Household Record Book from his biological family in Vietnam. He submits the failure to address this contradictory evidence rebuts the presumption that the tribunal considered all the evidence and invites the intervention on judicial review (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC)).

[29] This book shows that Mr. Mai had left the household of his biological parents on June 8, 1999 but does not speak to the issue of adoption. The evidence does not "squarely contradict" the IAD's findings (*Basanti v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1068 at para 24). The household record book demonstrates Mr. Mai left the home of his biological parents. This fact is not in dispute. The book is silent on the reasons for him leaving at ten years of age and certainly does not address whether or not he was lawfully adopted.

[30] Finally, I find no fault in the IAD having considered the evidence of an ongoing relationship. It was neither unreasonable nor improper for the IAD to inquire into the nature of the ongoing relationship between Mr. Mai and his biological family members in assessing whether Mr. Mai had satisfied his burden that subsection 3(2) of the IRPR were of no application in this instance.

VI. Conclusion

[31] The Application is dismissed. The parties have not identified a question of general importance for certification, and none arises.

JUDGMENT IN IMM-7560-19

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed;

2. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7560-19
STYLE OF CAUSE:	PHAN SON TUNG MAI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY ZOOM VIDEOCONFERENCE FROM CALGARY, ALBERTA
DATE OF HEARING:	APRIL 6, 2021
JUDGMENT AND REASONS:	GLEESON J.
DATED:	MAY 12, 2021

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