

Federal Court



Cour fédérale

Date: 20210628

Docket: IMM-1785-20

Citation: 2021 FC 676

Ottawa, Ontario, June 28, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

OMAR MOHAMED HASHIM

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Omar Mohamed Hashim, is an Ethiopian citizen and a permanent resident of Canada who has applied to sponsor his wife and four children for permanent residency in Canada. The Visa Officer granted the application in respect of Mr. Hashim's wife and one of the four children. However, the Officer was not convinced the remaining three children, Sameya, Ibrahim, and Tewabech, were dependent children as defined by section 2 of

the *Immigration and Refugee Protection Regulations*, SOR/2002-227. The Visa Officer refused Mr. Hashim's application to sponsor Sameya, Ibrahim, and Tewabech.

[2] In a decision dated February 14, 2020, the Immigration Appeal Division [IAD] allowed the appeal with respect to Sameya. However, the IAD concluded the evidence did not establish that Ibrahim and Tewabech had been adopted in accordance with Ethiopian law. The IAD upheld the Officer's decision refusing the sponsorship applications for the two children.

[3] Mr. Hashim now seeks judicial review of the IAD decision pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. He submits the IAD unreasonably dismissed the appeal with respect to Ibrahim and Tewabech and that the IAD acted unfairly as the record before it was incomplete.

[4] For the reasons that follow, I am unable to conclude that the IAD's decision was unreasonable or that Mr. Hashim can now rely on an alleged breach of fairness to justify the Court's intervention. The Application is dismissed.

II. Decision under Review

[5] In dismissing the appeal, the IAD found that the onus was on Mr. Hashim to demonstrate, with cogent and convincing evidence, that the two children had been legally adopted. The IAD acknowledged that adoption documentation benefitted from a presumption of authenticity, having been issued by a foreign authority, but found the presumption of validity had been rebutted. In support of this conclusion, the IAD cited conflicting translations of the original

documentation, confusing testimony relating to the origins of the documents, and inconsistencies in the oral evidence relating to the adoptions.

[6] With respect to the oral evidence, the IAD noted unresolved inconsistencies, particularly in relation to Tewabech's alleged adoption in 1997. Citing these inconsistencies, the IAD found the oral evidence to be "notably vague and at times non-responsive" but found much of this "can be attributed to faded memory."

[7] However, the IAD held faded memories did not resolve the concerns the IAD had with the adoption documentation. The IAD detailed its concerns with the documentary evidence, finding that: (1) the evidence failed to establish the documentation before the IAD was the same documentation placed before the Visa Officer; (2) the Applicant failed to clearly explain a delay in the production of the original adoption documentation before the IAD; and (3) there were material and unexplained differences between the certified and uncertified translations of the documents. The IAD concluded that the identified concerns raised doubts as to the authenticity of the adoption documents.

[8] Having considered all of the evidence, the IAD concluded there was insufficient reliable and trustworthy evidence to demonstrate that Ibrahim and Tewabech had been legally adopted in Ethiopia.

III. Issues and Standard of Review

[9] This Application raises two issues:

- A. Was there a breach of procedural fairness?
- B. Did the IAD unreasonably conclude that Mr. Hashim had not met his onus to establish that Ibrahim and Tewabech had been legally adopted?

[10] 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 review 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).

[11] The IAD’s treatment of the evidence is reviewable on a reasonableness standard. In *AB v Canada (Minister of Citizenship and Immigration)*, 2020 FC 19, Justice Peter Annis confirmed that the presumption of reasonableness applies to the IAD’s credibility assessments as they are “quintessentially questions of fact” (at para 28). A decision will be reasonable if it “is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85).

IV. Analysis

A. *There was no breach of procedural fairness*

[12] Mr. Hashim argues that the IAD's acceptance of the Visa Officer's written statement indicating the adoption documents submitted to the Officer were recently issued was a breach of fairness. This is because the record produced by the Respondent on appeal did not include the adoption documents placed before the Officer. As a result, the IAD was not in a position to review the documents and accept the Officer's conclusion. Mr. Hashim also submits that in failing to produce this documentation, the Respondent acted contrary to Rule 4(1) of the *Immigration Appeal Division Rules*, SOR/2002-230 [IAD Rules] which requires the Minister to prepare an appeal record that includes "any document that the Minister has that is relevant to the applications...".

[13] The Respondent submits the issue should have been raised before the IAD. It was not and therefore the IAD had no opportunity to address the issue. It is not proper to now raise the issue on judicial review.

[14] Mr. Hashim argues the issue of an incomplete record was raised before the IAD. He argues the issue was raised when his counsel submitted to the IAD that it should disregard the Officer's conclusion that the adoption documents submitted were recently issued, because those documents were not in the record before the IAD.

[15] However, Mr. Hashim's counsel raised the absence of the documents placed before the Visa Officer. This was done in the context of arguing the weight to be given the Visa Officer's reasons. The issue now raised in this Application, a breach of either procedural fairness or of the IAD Rules, was not advanced before the IAD.

[16] Although the Court has the discretion to consider a new issue on judicial review, it is generally inappropriate to do so where the issue could have been raised before the decision maker (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 23 [ATA]). To do so deprives the Court of the benefit of the views of the decision maker the legislature has entrusted to decide the issue and may prejudice the opposing party (ATA at paras 24-26).

[17] It is also a well-established principle that a party must raise an issue of procedural fairness at the first opportunity. Failure to do so will amount to an implied waiver of the perceived breach (*McCallum v Peter Ballantyne Cree Nation*, 2019 FC 898 at para 54 citing *Muskego v Norway House Cree Nation*, 2011 FC 732 at para 42 and *Uppal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 338 at paras 51-52).

[18] I agree with the Respondent that Mr. Hashim's failure to raise fairness concerns relating to the completeness of the record before the IAD prevents him from now doing so. Even if I were to consider this new issue on judicial review, I would not find that the circumstances disclose any breach of procedural fairness. The documents Mr. Hashim argues were missing from the record (the original adoption documents) were produced before the IAD by Mr. Hashim

and his wife. While Mr. Hashim takes issue with the IAD's treatment of the adoption evidence, this does not raise an issue of fairness.

B. *The IAD reasonably found Mr. Hashim had not met his onus to establish that Ibrahim and Tewabech had been legally adopted*

[19] Mr. Hashim submits the adoption documents before the IAD were sufficient to establish that Ibrahim and Tewabech were adopted in accordance with the laws of Ethiopia. He relies on Halsbury's Laws of England for the proposition that a final order or judgment is the best evidence of adoption in accordance with the laws of a country and that this evidence should not be set aside unless it was obtained by fraud or irregularity. He argues that the inconsistencies between the certified and uncertified translations of the adoption documents are translation errors and the IAD erred by failing to consider the explanations offered for the inaccurate uncertified translation. He further submits that the IAD erred by failing to recognize that the Visa Officer's reference to the "recently issued" documents was not a reference to the adoption documents but instead a reference to documents attesting to the death of Ibrahim's mother.

[20] I can find no fault arising out of the IAD's treatment of the evidence in this instance that would warrant the Court's intervention.

[21] Although Mr. Hashim takes issue with the IAD's finding that the documents placed before the Visa Officer were recently issued, this finding was one that was reasonably available to the IAD and its reasons for reaching this conclusion are clearly set out.

[22] It is not disputed that the oral evidence in respect of some of the circumstances surrounding the adoptions was contradictory and inconsistent. Mr. Hashim explains these inconsistencies as normal given the passage of time. The IAD did not disagree. Instead, the IAD decision turns on its concerns with the documentary evidence and in particular the undisputed inconsistencies between the certified and uncertified translations of the adoption documents.

[23] In considering the translations, the IAD acknowledges Mr. Hashim's explanation that the inconsistent dates are the result of confusion in converting dates from the Ethiopian to Georgian calendar. However, the IAD notes date conversion errors cannot sufficiently explain other significant inconsistencies. These inconsistencies are identified by the IAD and evident upon a review of the record:

- A. The uncertified translation of Tewabech's adoption document provides an explanation for why the biological mother can no longer take care of Tewabech. The uncertified translation also provides what appears to be a quote from Mr. Hashim and his wife. The certified translation simply states Mr. Hashim and his wife will adopt Tewabech and says there has been a full hearing. The uncertified translation states the document was issued by the "Dessie Town Court," whereas the certified translation says it was issued by the "Supreme court southern Wello zone in the City of Dessie municipal civil court service."
- B. Ibrahim's translation bear the same issuing court. However, the certified and uncertified translations contain different content. The uncertified translation explains the circumstances of Ibrahim's biological father and refers to witnesses having been heard. The certified translation, however, simply recognizes there is an adoption and says there has been a full hearing.

[24] No explanation was provided for these inconsistencies. In the absence of an explanation, it was reasonable for the IAD to conclude, as it did, that the authenticity of the original adoption documents was called into question.

[25] The IAD, having considered the evidence as a whole, reasonably concluded that Mr. Hashim had failed to establish the adoptions were legally valid in Ethiopia and therefore Ibrahim and Tewabech were not eligible to be sponsored as dependent children.

V. Conclusion

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

JUDGMENT IN IMM-1785-20

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-1785-20

STYLE OF CAUSE: OMAR MOHAMED HASHIM v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE

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JUDGMENT AND REASONS: GLEESON J.

DATED: JUNE 28, 2021

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