Federal Court

Cour fédérale

Date: 20090807

Docket: IMM-373-09

Citation: 2009 FC 810

BETWEEN:

JALIL ASGHARPOUR-KHIABANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] This is a case of international adoption which has gone terribly wrong. Mr. Asgharpour-Khiabani and his wife Johanne Burton, Canadian citizens both, intended to adopt an Iranian child. Instead of living together as a family in British Columbia, the child, Dariush, is in England on a temporary visa because the Canadian immigration authorities will not issue him a permanent resident visa.

[2] The basis of the application for a permanent resident visa was that Dariush is a member of the family class as defined in section 116 and following of the *Immigration and Refugee Protection*

Regulations, SOR/2002-227. These regulations draw a fundamental distinction between the formal adoption of a child in his home country and approval by that country to the removal of the child to Canada to be adopted in accordance with provincial law. This distinction appears to have been lost on the Asgharpour-Khiabanis and on the visa officer who initially denied the application. However, the paperwork makes it abundantly clear that the route intended was a Canadian adoption, not an Iranian one.

[3] The visa officer refused to issue a permanent resident visa because he was not satisfied that Dariush was a member of the family class. He went on to suggest, not without some justification, that some of the documents provided to him were likely obtained by misrepresentation.

[4] That decision was appealed to the Immigration Appeal Division of the Immigration and Refugee Board (IAD). It became clear that the intended adoption was to take place in Canada. Proof positive to that effect was that the file contained a letter of no objection from the British Columbia authorities, a letter which is only required in cases of intended adoption in accordance with provincial law. The Board member found that the appellant failed to provide conclusive evidence that Dariush was legally available for adoption in Iran. The member conceded that the visa officer was required by law to suspend the application while matters were being sorted out with provincial authorities. Although he failed to do so, the member was of the view that no harm was done.

[5] This is the judicial review of the decision of the IAD to dismiss the appeal. This case is so froth with misunderstandings, misrepresentations, findings of fact based on insufficient evidence, errors of law and a failure to observe the principles of natural justice that judicial review is granted.

The matter shall be referred back to another member of the IAD to be dealt with in accordance with specific directions contained herein.

BACKGROUND

[6] Both Mr. Asgharpour-Khiabani and Ms. Burton hold dual citizenship: he, Canada and Iran; she, Canada and the United Kingdom. They met and married in Canada. Being childless, they considered adoption. Through his family in Iran, Mr. Asgharpour-Khiabani came to learn of a couple who was expecting but was willing to give the child up for adoption because they could not afford to raise it. Their son Dariush was born April 25, 2006. He was taken into the Asgharpour-Khiabani's care the following day and has been with them ever since. In one way or another, the Asgharpour-Khiabanis obtained an identity certificate (SHENASNAMEH) for Dariush in which they are identified as the parents. There are also letters on file from the biological parents consenting to the adoption. In one of the documents the parents note that the Asgharpour-Khiabanis accept permanent guardianship and custody of Dariush and "this agreement was concluded for daily care of the child and making his necessary final arrangements until the child adoption is definite at British Columbia, which is expected to occur in January 2007."

[7] Regulation 117 deals with, among other things, the international adoption of persons under 18 years of age. The details vary somewhat depending on whether the country in which the person intended to be adopted resides (Iran) and the province of intended destination are parties to the Hague Convention on Adoption. Section 51 of the *Adoption Act*, R.S.B.C. 1996, c. H-5,

incorporates the Convention into British Columbia law. However Iran is not a party thereto.

Consequently, under Regulation 117(1)(*g*) the requirements are that:

Family Class
Member
117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is

[…]

(*g*) a person under 18 years of age whom the sponsor intends to adopt in Canada if

[…]

(iii) where the adoption is an international adoption and either the country in which the person resides or the person's province of intended destination is not a party to the Hague Convention on Adoption

(A) the person has been placed for adoption in the country in which they reside or is otherwise legally available in that country for adoption and there is no evidence that the intended adoption is for the purpose of child trafficking or undue gain within the meaning of the Hague Convention

Regroupement familial
117. (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :

…

g) la personne âgée de moins de dix-huit ans que le répondant veut adopter au Canada, si les conditions suivantes sont réunies :

…

(iii) s'il s'agit d'une adoption internationale et que le pays où la personne réside ou la province de destination n'est pas partie à la Convention sur l'adoption :

(A) la personne a été placée en vue de son adoption dans ce pays ou peut par ailleurs y être légitimement adoptée et rien n'indique que l'adoption projetée a pour objet la traite de l'enfant ou la réalisation d'un gain indu au sens de cette convention,

(B) les autorités compétentes de la province de

on Adoption, and (B) the competent authority of the person's province of intended destination has stated in writing that it does not object to the adoption;	destination ont déclaré, par écrit, qu’elles ne s’opposaient pas à l’adoption;

[8] On file is a letter from the Director of Adoption, British Columbia Ministry of Children and Family Development, stating that there is no objection to the adoption of Dariush pursuant to the Immigration Regulations. An adoption home-study had been completed and the family was approved to adopt a healthy child. The approval was conditional upon the immigration authorities having determined that the adoption was not primarily for the purpose of acquiring privilege or status under the *Immigration and Refugee Protection Act* (IRPA) or *Regulations*, that the child was legally available for adoption and that there was no evidence of child trafficking or undue gain. The basis of the approval was “it is my understanding that this child is being admitted to British Columbia for the purpose of adoption by Joanne Marie Burton and Jalil Asgharpour-Khiabani”.

[9] There is no evidence and it has never been suggested that the adoption was primarily for the purpose of acquiring privilege or status under the IRPA, undue gain, or child trafficking. Indeed, this fiasco may well be leading to the Asgharpour-Khiabanis financial ruin.

[10] Matters proceeded slowly in Iran. Ms. Burton, with her western dress, was harassed by the police. She applied at the Canadian Embassy in Teheran for travel documents for Dariush. She represented that she was his birth mother. The authorities were suspicious and checked with the

hospital. She withdrew the application.

[11] Later Mr. Asgharpour-Khiabani attempted to forge a Canadian travel document, an old immigrant visa on which he added Dariush's name.

[12] These two incidents naturally raised great concern, and put into doubt the various documents which had been provided as purportedly emanating from the Iranian authorities. Before rendering his decision the visa officer said the whole situation was such so as to "lead me to believe that Dariush has not been legally adopted in Iran."

[13] This led Ms. Burton to write a long letter in which she freely admitted what can only be termed her stupidity which she attributed to frustration and panic, partly because of incessant and interminable bureaucratic red tape. At that point Regulation 117(7) and (8) requires that an officer who receives evidence that the foreign national does not meet the applicable requirements for becoming a member of the family class suspend the application so as to provide that evidence to the province which my confirm or revise its position.

[14] The visa officer did not suspend the application. He denied it and so informed the British Columbia Director of Adoption. He told her that the Director that only the Iranian Welfare Organization and the appropriate court have authority to legally approve an adoption in Iran. The British Columbia Director of Adoption replied that when she had issued the letter of no objection it was her understanding that the family intended to bring the child to British Columbia to complete the adoption. She went on to say:

> "It appears that this intended process is not aligned with the laws of Iran. The information you submitted indicates that the adoption process should be complete in the child's country of origin. Furthermore, it is concerning that the Canadian Embassy believes that the adopted parents obtained Iranian documents required for adoption through misrepresentation."

[15] I light of this information British Columbia revoked the letter of no objection.

STANDARD OF REVIEW

[16] Although the courts have given some deference to some decision-makers in the interpretation of their home statutes (*Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] 1 S.C.R. 190) no deference has been given in the interpretation of IRPA and the *Regulations* thereunder. The standard of review is correctness.

[17] Although the general standard of review with respect to findings of fact is reasonableness, the same may not hold true with respect to findings as to the state of foreign law. Findings of foreign law are somewhat distinctive. In *General Motors Acceptance Corp. of Canada v. Town and Country Chrysler Ltd.*, [2007] O.J. No. 5046, 88 O.R. (3d) 666, 2007 ONCA 904, the Ontario Court of Appeal held that they were reviewable on a correctness standard. The Federal Court of Appeal did not consider it necessary to agree or disagree in *Kent Trade and Finance Inc. v. JP Morgan Chase Bank*, 2008 FCA 399, [2008] F.C.J. No. 1736, 305 D.L.R. 4th 442. It is not necessary for me to decide the standard of review in this case as, in any event, the findings of the IAD with respect to Iranian law were unreasonable.

ISSUES

[18] As I see it, there are three issues:

a. Does Iranian law permit an Iranian child to be removed from Iran to be formally adopted elsewhere? How is a child who is not actually in Iran treated?

b. What standard of proof is required of the applicant?; and

c. The significance of the failure of the visa officer to deal with the British Columbia Adoption Authorities before deciding not to issue a permanent resident visa.

DISCUSSION

[19] The IAD member held :

> "Given the Minister's counsel's unrebutted evidence that only the Iranian Welfare Organization and appropriate court have authority to approve an adoption in Iran I find that the appellant failed to provide conclusive evidence that the applicant was legally available for adoption in Iran."

[20] It is unclear to what extent the IAD needed to be satisfied before making a finding of fact. At different places in the reasons reference is made to the preponderance of reliable evidence, the balance of probabilities and failure "to provide conclusive evidence". Failure to identify a consistent standard of proof is in itself a reviewable error. If the member meant to say the standard was anything but the balance of probabilities he was wrong.

[21] The evidence on which the visa officer relied was to a large extent based on informal discussions with an advisor at the Nationality Refugees Department of the Iranian Ministry of Foreign Affairs. According to the Iranian Welfare Organization, the only way to adopt a child officially was through them. A court verdict was also required. This case was sent to the Welfare Organization which was unable to find any confirming record (presumably of an adoption) as the document had no registration number. However, the letter concluded "it is suggested to clarify with the Justice Administration Office". The visa officer did not do so.

[22] This evidence, if such it be, only touches upon formal adoptions in Iran. There is no evidence whatsoever as to whether Iranian law permits a child to be removed from the country in order to be adopted elsewhere. The situation was misrepresented to the British Columbia Director of Adoption which led her to assume that Iranian law only contemplates formal adoptions in Iran. There is also an opinion on file from an Iranian attorney retained by the Asgharpour-Khiabanis. However it also only addresses formal adoption in Iran. The right questions were not put to him.

[23] Given the misrepresentation by Ms. Burton and the forged document authored by Mr. Asgharpour-Khiabani, the visa officer was understandably concerned that the Iranian identity document may have been obtained by misrepresentation. However, a full explanation was given. Rather than suspend the application as required by the Regulations, the visa officer rejected the application and informed the British Columbia authorities accordingly. The IAD conceded that this was a procedural error but stated that it was unable to correct it. With respect, this was not a simple procedural error. The hearing became unfair and led to British Columbia's withdrawal of consent, a

consent which is a necessary prerequisite of an adoption in that province.

[24] The appeal should have been allowed pursuant to subsection 67(1) of IRPA, as a principle of natural justice had not been observed (*Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643).

[25] For these reasons the judicial review is allowed. The matter is to be referred back to another member of the IAD.

DIRECTION

[26] The new hearing shall truly be *de novo*. The IAD, despite protests from the Asgharpour-Khiabanis' counsel, insisted that the original appeal proceed on the record which was before the visa officer. As stated, that record is silent as to the position of Iran with respect to children removed from the country in order to be adopted elsewhere.

[27] Although the rules of evidence are more relaxed in administrative hearings, findings of Iranian law in this very important matter shall not be based on informal discussions. If the Minister is to take the position that Iranian law does not permit a child to be removed so as to be adopted elsewhere, he must furnish an opinion from an Iranian attorney to that effect. (*Drew Brown Ltd. v. Orient Trader (The),* [1974] S.C.R. 1286).

[28] Unfortunately section 65 of IRPA provides that the IAD may not take into account humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class. However, it must consider the fact that Dariush is in England on a

temporary visa. What is the state of Iranian law with respect to the foreign adoption of an Iranian child who is not actually in Iran? If there is no evidence, then the IAD is to assume that Iranian and Canadian law are the same.

[29] Both the Minister and the Court Registry shall provide a copy of these reasons to :

Director of Adoption
British Columbia Ministry of Children and Family Development
5th Floor, 765 Broughton St.
Victoria, B.C. V8W 1E2

both by registered mail and by telecopier to (250) 356-1864 with reference to C.P.C. No. 23579806.

[30] The Minister shall have until August 20, 2009 to serve and file a question for certification which would support an appeal of this decision. The applicant shall have seven days from service to respond.

"Sean Harrington"

Judge

Ottawa, Ontario
August 7, 2009

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-373-09
STYLE OF CAUSE:	**ASGHARPOUR-KHIABANI v. MCI**
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DATE OF HEARING:	July 16, 2009
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