Federal Court  Cour fédérale

Date: 20140808

Docket: IMM-658-14

Citation: 2014 FC 788

Ottawa, Ontario, August 8, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

CAROLIN ANDREA TOBAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

UPON the Applicant seeking judicial review of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board dismissing her appeal of the refusal of an application for permanent residence made by her husband wherein the Applicant had applied to sponsor her husband under the family class category pursuant to sections 12 and 13 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA);

AND UPON reading the Certified Tribunal Record (CTR) and materials filed by the parties;

AND UPON hearing the submissions of counsel for the parties;

AND UPON the Court having considered the following in reaching its decision:

[1] The Applicant is a Canadian citizen. She met her husband, Mr. Efe Stanley Ogboru who is a Nigerian citizen, online on May 5, 2011. They pursued a relationship and he proposed to her on June 5, 2011. They met in person in Nigeria on September 12, 2011 and married there on September 17, 2011. Following the marriage, the Applicant returned to Canada to resume her employment. During a subsequent visit to Nigeria, they conceived a child and, on January 20, 2014, the Applicant and her husband had a son who was born in Canada.

[2] In December 2011, the Applicant sponsored her husband as a member of the family class. A Visa Officer refused this application on April 26, 2012 on the basis of subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPA Regulations) that the marriage was not genuine and was entered into primarily to acquire immigration status or privilege. The Visa Officer's Global Case Management System (GCMS) notes indicate that there were concerns about the husband's identity and birth date.

[3] The Applicant appealed the Visa Officer's decision to the IAD, a panel member of which (Member) dismissed the appeal on November 21, 2013, with written reasons dated January 10, 2014.

[4] The Member was satisfied that the Applicant was credible and that for her the marriage is genuine and she did not primarily enter into it in order to assist her husband to acquire status or privilege in Canada. However, her husband was not credible due to inconsistencies in his evidence and his identity. The Member concluded that while the marriage was genuine, she was not satisfied that the husband did not enter it in order to acquire status or privilege under the IPRA.

[5] Amongst other things, the Member noted that the marriage happened quickly and found that there were some inconsistencies in the husband's evidence. Further, that there was no clear, convincing and cogent evidence regarding the husband's identity, in particular with respect to his birth date, and that there was no record of his birth. For those reasons the Member found that the Applicant's husband was not a credible witness and highlighted the issue of his identity.

[6] On this application for judicial review the sole issue that must be addressed is whether the failure to adjourn the hearing resulted in a denial of procedural fairness. This attracts the correctness standard of review (*Bi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 293 at para 12).

[7] The Applicant submits that the Member erred in failing to adjourn the hearing so that her husband's birth certificate and corresponding affidavit could be produced. These documents were referenced in the Visa Officer's decision, and put before the Visa Officer, but copies of these documents were not included in the CTR and were not before the Member when she made her decision. The transcript of the hearing demonstrates that the issue of the birth certificate was prominent, and therefore, the Member did not properly balance the competing interests or consider her ability to proceed in the absence of the missing information without causing injustice (*Immigration and Appeal Division Rules*, SOR/2002-230 (IAD Rules), subparagraph 48(4)(e); *Bryndza v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1250). This is manifest and magnified by the Member's reliance on the missing documents and formed the central basis for finding that the husband was not credible.

[8] The Respondent submits that there was no breach of procedural fairness. Rather, the Applicant is simply attempting to rectify what she perceived to be a mistake on her part at the IAD hearing. The Applicant cites subparagraph 48(4)(e) of the IAD Rules to substantiate her argument, but she did not submit a request to adjourn prior to the hearing nor did the Applicant pursue this when the Member raised this issue at the hearing. The issue of identity would only be relevant if the Member found the marriage to be genuine. In any event, based on the identity concerns, granting an adjournment to produce the birth certificate would not likely change the outcome.

[9] The Respondent submitted at the hearing before me, and I agree, that the circumstances surrounding the hearing of this matter are unusual. A review of the transcript shows that the

Member raised the fairness concern at the hearing in regard to the absence of documents from the record pertaining to the Applicant's husband's identity. There is also a question of whether the Applicant's interests were well served by her counsel at the hearing before the Member. Additionally, it appears that the telephone interview of the Applicant's husband was, in part, inaudible to those in attendance at the hearing.

[10] A review of the hearing transcript indicates that, at the conclusion of questioning of the Applicant by her own counsel, the Member noted that the Visa Officer's concerns about her husband's identity had not been addressed. At that stage, counsel for the Respondent requested that section 40 of the IRPA be added as a ground of refusal and the Member agreed. This prompted the Applicant to ask for clarification of what this meant. The Member took her through the Visa Officer's interview notes and conclusion that there were concerns as to her husband's identity including that that his documents indicated three different birth dates and that he had recently declared that his date of birth was not as indicated on the older documents. The Applicant stated that the problem with the birth date had been recognized and that when the sponsorship application of her husband was submitted it included a sworn statement giving his actual birth date and attaching a copy of his birth certificate. When questioned by counsel for the Respondent, she confirmed that she had seen the birth certificate and that the date of birth recorded on it was April 22, 1978. The Member noted that Applicant's counsel had not objected to the adding of misrepresentation as a ground of refusal and that the Member had given him the opportunity to ask the Applicant questions as to her husband's identity but that counsel had not done so.

[11] The Applicant's husband was then contacted by telephone. What is apparent from the transcript is that, regardless of who was directing the questions, a significant portion of his responses were and are recorded as "inaudible". At the hearing before me, counsel for the Respondent advised that he had listened to the tape of the hearing and, while a little more could be discerned, portions were still inaudible.

[12] That said, when asked by the Applicant's counsel about the two birth dates given to the Visa Officer, her husband acknowledged this and gave a reply that was unintelligible and partly inaudible but confirmed his birth date was April 22, 1978. He confirmed when questioned by the Respondent's counsel that he had a birth certificate that was issued in Lagos in 2011 by the High Commission. There was a confusing exchange as to the date the birth certificate was issued (a review of the birth certificate shows that it does not have a date of issue) and whether his birth had been registered which was complicated by multiple inaudible sections. At this point counsel for the Respondent stated that he was leaving that line of questioning and submitted that the issue was not addressed in clear and cogent evidence. The birth certificate was then raised by the Member. The Applicant's husband confirmed that he had obtained a birth certificate from the High Commission but was unclear as to whether his birth had been registered in Auchi where he was born. When asked by the Member if counsel for the Applicant had any questions for the husband on the issue he said that he did not.

[13] After the examination ended and Applicant's counsel made submissions, the Member stated that she wanted to put on the record that her job was to ensure that the Applicant had a fair hearing. She acknowledged that the Applicant was represented by counsel but that, in the middle

of the hearing, the Respondent's counsel had asked to add misrepresentation as a ground of refusal. Her concern was that there was no documentation about the identity issue and Applicant's counsel had indicated that he had not looked at all of the documents submitted by the Applicant. She proposed that either misrepresentation be dropped as a ground of refusal or that she would hear submissions with respect to subsection 4(1) of the IRPA Regulations and then adjourn the hearing and allow the Applicant's counsel to provide documentation with respect to the Applicant's husband's identity and an opportunity for the Respondent's counsel to respond at that time.

[14] The subsection 40(1)(a) ground of refusal was withdrawn. Counsel for the Applicant, when asked, agreed, stating that he did not think identity was a real issue. The Member pointed out that it was an issue in the record. Counsel for the Applicant stated that he had read this now but, when asked by the Member, confirmed that he had not read it before. The Member stated that this was a concern:

> As I said this is a very serious issue for the appellant, it's before me, I have to ensure that she has a fair hearing. This is no fault of mine or the Minister's Counsel, but this issue has not been addressed with respect to his identity. Unless you object, Mr. Munro, I am going to adjourn the hearing so that this issue can be adequately looked at because frankly she seems surprised by it. Appellant's counsel has admitted that he hadn't really read the notes and wasn't aware that this was an issue for the visa officer, this was clearly an issue for the visa officer, it's at page 18 of the record: please have a look.

[15] The Applicant herself submitted that she thought the sponsorship application with the birth certificate and the sworn affidavit had addressed the identity issue. The Respondent's counsel stated that those were not in evidence and the Member acknowledged that this was the

problem and, again stated that she was going to adjourn unless there were objections. The Respondent's counsel then objected on the basis that subsection 4(1) was pivotal and that the Minister would be disadvantaged by an adjournment as the Respondent's counsel was retiring.

[16] The Member did not make a ruling on the adjournment, but instructed the Respondent's counsel to proceed with his submissions. Upon the conclusion of those submissions, the Member immediately issued her decision orally.

[17] That decision hinges primarily on the husband's identity and birth certificate. The Member states that the issue of his identity and birth date was not squarely addressed through documentation or oral evidence and that she did not have clear, convincing and cogent evidence with respect to his identity or his birth date. The Member went on to note that, given that the Visa Officer's refusal was a year ago, that the husband should have addressed this issue and inquired whether there was some sort of record of his birth or provided some sort of other document to prove his real birth date. She listed her other concerns but highlighted that the issue of the husband's identity with respect to his birth date was not addressed.

[18] The problem with this, of course, is that the Applicant had advised the Member that the birth certificate and a sworn affidavit had been provided with her sponsorship application and that she had believed that this was before the IAD and was sufficient to address the identity concern. The Member at the hearing acknowledged this and also that identity was a critical issue, that she did not have the document before her, and, that it raised a procedural fairness issue.

[19] In this regard, it is problematic that the Applicant's counsel at the hearing before the Member did not object to the proposed addition of the section 40 misrepresentation ground of refusal, subsequently dropped because of the identity evidentiary concerns, and did not advocate for the adjournment even though he acknowledged that he was not aware of the identity concern prior to the hearing and this concern was squarely raised by the Member who wished to adjourn so that it could be properly addressed in the interests of a fair hearing. In this regard, it is questionable if the Applicant's interest were well served. However, the Applicant did not impute the competence of her previous counsel (*Kaur v Canada (Minister of Citizenship and Immigration)*, 2014 FC 505 at para 23) in her application for judicial review.

[20] When deciding whether to grant an adjournment requested by a party the IAD must balance the factors set out in subsection 48(4) of the IAD Rules which include: any exceptional circumstances for allowing the application; in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the IAD to proceed in the absence of that information without causing an injustice; the knowledge and experience of any counsel who represents the party; whether allowing the application would unreasonably delay the proceedings; and, the nature and complexity of the matter to be heard. This is a question of mixed fact and law on which the standard of review is generally reasonableness (*Bell v Canada (Minister of Citizenship and Immigration)*, 2012 FC 783 at para 33; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 51).

[21] In this circumstance, it was the Member who raised the question of the need for an adjournment to ensure a fair hearing and, accordingly, subsection 48(4) has no application.

However, it would appear that the IAD Rules would permit her to take that step of her own accord:

57. In the absence of a provision in these Rules dealing with a matter raised during an appeal, the Division may do whatever is necessary to deal with the matter.	57. Dans le cas où les présentes règles ne contiennent pas de dispositions permettant de régler une question qui survient dans le cadre d'un appel, la Section peut prendre toute mesure nécessaire pour régler la question.
58. The Division may	58. La Section peut :
(a) act on its own initiative, without a party having to make an application or request to the Division;	a) agir de sa propre initiative sans qu'une partie n'ait à lui présenter une demande;
(b) change a requirement of a rule;	b) modifier une exigence d'une règle;
(c) excuse a person from a requirement of a rule; and	c) permettre à une partie de ne pas suivre une règle;
(d) extend or shorten a time limit, before or after the time limit has pass	d) proroger ou abréger un délai avant ou après son expiration.

[22] And, while the subsection 48(4) factors do not apply, they are perhaps useful as a nonbinding basis by which the need for an adjournment can be assessed (*Omeyaka v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 78 at para 29 [*Omeyaka*]) and, all of which factors listed above would have favoured an adjournment in this case. In that regard I would also note that the Respondent's reasons for objecting to the adjournment were weak as this matter is not complex, could easily have been assumed by new counsel for the

Respondent, as it ably was, and that no prejudice to the Minister would have arisen from an adjournment.

[23] In my view, in these circumstances, the Member should have followed her own proposed course of action and adjourned the matter so that the identity and birth date issue could be addressed. The Member had the discretion to adjourn (*Omeyaka*, above, at para 25) and explicitly recognized a potential injustice if the matter proceeded in the absence of the identity documents. Yet, having done so, she proceeded with the hearing. This was open to her. However, her conclusion that she was not satisfied that the Applicant's husband had not entered into the marriage in order to acquire status or privilege under the IRPA hinged primarily on her finding that there was no clear, convincing and cogent evidence regarding the husband's identity, in particular with respect to his birth date and that there was no record of his birth. That issue potentially could have been addressed by the birth certificate and sworn statement not included in the record before her and was the very potential injustice that she had identified. Further, the Member had also identified that the Applicant's counsel was not alert to the identity issue prior to the hearing and had failed to address it during the hearing. In these unusual and particular circumstances, the failure to adjourn resulted in a breach of procedural fairness.

[24] I recognize that, in the face of the identity concerns raised by the Visa Officer and upon review of the birth certificate and sworn statement when the matter is redetermined by another Member of the IAD, it is not at all certain that the outcome will differ. However, I am unable to conclude that the outcome would not have been any different regardless of the breach of procedural fairness and, therefore, the matter must be remitted for redetermination.

ORDER

THIS COURT ORDERS that

1. The application for judicial review is granted. The decision of the IAD dated January 10, 2014 is set aside and the matter is remitted back to the IAD for redetermination by a different member;
2. No question of general importance is proposed by the parties and none arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-658-14
STYLE OF CAUSE:	CAROLIN ANDREA TOBAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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