Federal Court  Cour fédérale

**Date: 20191128**

**Docket: IMM-1373-19**

**Citation: 2019 FC 1520**

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

**Ottawa, Ontario, November 28, 2019**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**MAI, VAN ANH**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Nature of the matter

[1] This is an application for judicial review of a decision rendered on February 13, 2019, by the visa services of the Consulate General of Canada in Vietnam. In the decision, the officer refused to issue a study permit to the applicant.

## II. Facts

[2] The story is very simple (based on the origins of a child who could not be raised by her birth mother as a result of poverty). An application for a student visa was submitted overseas to Canadian authorities. The application was refused.

[3] The refusal is based on a lack of understanding of the situation of a nine-year-old at the time of the decision. The circumstances surrounding the child led to speculation about the situation of the child, who is adopted and who is currently living with her adoptive father. The child's adoptive father did not live with her for a few years after the adoption. During the time when the child did not live with her adoptive father, she lived with his mother, therefore a de facto grandmother in the circumstances experienced by the child.

[4] The reason for the visa application is based on the fact that an aunt of the child (sister of the adoptive father), who lives in Canada with her husband, would like to accommodate the child during her studies. This aunt and uncle have also undertaken to provide for the child's financial needs.

[5] The visa refusal was based on the child's young age and the belief that the child would not return to her country of birth.

[6] First, it is worth recalling here that it is entirely legitimate and legal for a foreign national to have a dual intent when seeking to become a temporary resident (subsection 22(2) of the

*Immigration and Refugee Protection Act*, SC 2001, c 27; *Bteich v Canada (Citizenship and Immigration)*, 2019 FC 1230).

[7] Second, speculations about the applicant's intentions revolve around the situation of the young adopted child and the people around the child, all because of the degrees of the ties these people have with the child.

[8] So, how can we fill in the gaps or blanks to consider the story and the story behind the story within the narrative, if indeed such a story behind the story exists?

[9] The easy and simple answer is that procedural fairness is the art of active listening (*Reyes Tolosa v Canada (Citizenship and Immigration)*, 2008 FC 791 at para 2). This is particularly true for a child who has reached the age of reason since the age of 7, given that the child is 9 years old (see *Kim v Canada (Citizenship and Immigration)*, 2010 FC 149, and *Li v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 451 [*Li*]).

[10] True common sense and reasonableness dictate that the child should be interviewed to give her an opportunity to explain her situation and the circumstances that led to the application for a student visa. A child's comments or thoughts should be taken into consideration in a case where the child is the only applicant.

[11] Dr. Janusz Korczak is the spiritual father of the United Nations *Convention on the Rights of the Child*. Sixty years after the first declaration of the rights of the child of the United Nations

General Assembly and thirty years after the adoption of the Convention, it is good to remember the words of Dr. Korczak:

> Children are not the people of tomorrow, but are people of today. They have a right to be taken seriously, and to be treated with tenderness and respect. They should be allowed to grow into whoever they were meant to be—the unknown person inside each of them is our hope for the future.

[12] As this Court wrote in *Li*, above, *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, is a landmark court decision because it truly affects all present and future decisions regarding the best interests of the child. Thus, it is essential to look at the facts of this case in the light of this leading decision.

[13] Reasonableness, logic and procedural fairness dictate that a representative of the Canadian authorities must ask the child to express herself so that the story can be filled in as much as possible. This is the only way to ensure that the best interests of the child are actually taken into account in this case. Without the possibility of having the child's testimony, an obvious gaping hole or blank leads to speculation without resolution, and therefore an absurdity that requires at least trying to find the truth of the situation as much as possible; and, therefore, the case is referred back so that the child can explain her situation; so that this situation can be understood more clearly for a reasonable decision to reduce the chances of speculation. This is the only way to ensure that clarity prevails as much as possible.

[14] The decision in this case is not reasonable. For all these reasons, the case is referred to another officer for reconsideration, giving the child the opportunity to fully express her views on the student visa situation.

## III. Conclusion

[15] For the reasons mentioned above, the application for judicial review is allowed. The file is referred to a different officer for reconsideration.

**JUDGMENT in IMM-1373-19**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed, the decision is set aside and the file is referred to another officer for reconsideration. There are no questions of general importance to certify. Under the *Department of Citizenship and Immigration Act*, SC 1994, c 31, the legal name of the respondent in this proceeding is Minister of Citizenship and Immigration. The style of cause is amended accordingly.

"Michel M.J. Shore"
Judge

Certified true translation
This 4th day of December 2019.

Johanna Kratz, Reviser

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-1373-19 |
| **STYLE OF CAUSE:** | MAI, VAN ANH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | NOVEMBER 20, 2019 |
| **JUDGMENT AND REASONS:** | SHORE J. |
| **DATED:** | NOVEMBER 28, 2019 |

**APPEARANCES:**

| | |
|---|---|
| Duc Anh Thu Tran | FOR THE APPLICANT |
| Edith Savard | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Duc Anh Thu Tran<br>Montréal, Quebec | FOR THE APPLICANT |
| Attorney General of Canada<br>Montréal, Quebec | FOR THE RESPONDENT |