Date: 20070207

Docket: IMM-3357-06

Citation: 2007 FC 140

Montréal, Quebec, the 7th day of February 2007

PRESENT: THE HONOURABLE MR. JUSTICE SIMON NOËL

BETWEEN:

GLADYS ANNOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB) delivered on May 29, 2006, dismissing Gladys Annor's (applicant) appeal relating to the refusal of the sponsored application for a permanent resident visa made by Isaac Sarkwa, her purported adopted son.

I. Facts

[2] On February 17, 2000, the applicant and her husband, in accordance with the laws of Canada and Ghana, adopted their nephew Isaac Sarkwa, the biological son of the applicant's husband's brother.

[3] In December 2001, the applicant and her husband filed their sponsorship undertaking form for Isaac Sarkwa.

[4] On February 3, 2004, visa officer Xochi Bryan (the officer) informed Mr. Sarkwa in writing that his sponsored application for a permanent resident visa had been refused under section 4 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations) because his adoption was deemed to be not genuine and was entered into primarily for the purpose of acquiring a status or privilege under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). The officer found that even though Mr. Sarkwa's adoption was in accordance with the laws of Canada and Ghana, Mr. Sarkwa's country of origin, he could not be characterized as a "dependent child" of the applicant because they did not have a genuine parent-child relationship.

[5] On March 3, 2004, Alfred Benjamin Annor (Mr. Annor), the applicant's husband, filed an appeal against the officer's decision with the IAD. An appeal hearing was held on May 30, 2005. At the outset of this hearing, counsel for Mr. Annor stated that Mr. Annor had died in April 2004 and that his wife, the applicant in this case, was proceeding with the appeal in her deceased husband's stead.

[6] At the May 30, 2005, hearing, the members of the IAD panel decided that it would treat Ms. Annor's request to proceed with her deceased husband's appeal as a preliminary motion. After requesting written submissions from the Minister and the appellant, member Eric Whist of the IAD decided on September 28, 2005, that Ms. Annor could continue with the appeal of the officer's decision commenced by her deceased husband.

[7] The appeal of the officer's decision was consequently referred to another member of the IAD. A hearing was held before member Hazelyn Ross (member Ross) on May 1, 2006. On May 28, 2006, member Ross signed a decision dismissing the appeal. In the decision, member Ross dismissed the appeal by reason of no genuine parent-child relationship existing between the applicant and Isaac Sarkwa, resulting in the adoption being not genuine even though it was in accordance with the laws of Canada and Ghana, because it was entered into primarily for the purpose of acquiring a status or privilege under the IRPA. This decision is the subject of the present judicial review.

II. Issues

(1) Was it a violation of procedural fairness in this case to have five members of the IRB hear the case at different times?

(2) Were the findings of fact by member Ross patently unreasonable?

(3) Did member Ross err in not considering international law or the concept of reuniting families, which is one of the objectives of the IRPA?

III. Applicable statutory provisions

[8] Section 117 of the Regulations sets out the criteria for an adoption to be deemed in accordance with the IRPA. In particular it requires that a purported adopted child be a "dependent child" and that the adoption be characterized by a genuine parent-child relationship. The relevant provisions in section 117 are as follows:

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

…

(*b*) a dependent child of the sponsor;

…

(2) A foreign national who is the adopted child of a sponsor and whose adoption took place when the child was under the age of 18 shall not be considered a member of the family class by virtue of that adoption unless it was in the best interests of the child within the meaning of the Hague Convention on Adoption.

(3) The adoption referred to in subsection (2) is considered to be in the best interests of a child if it took place under the following circumstances:

(*a*) a competent authority has conducted or approved a home study of the adoptive parents;

(*b*) before the adoption, the child's parents gave their free and informed consent to the child's adoption;

(*c*) the adoption created a genuine parent-child relationship;

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

[…]

b) ses enfants à charge;

[…]

(2) N'est pas considéré comme appartenant à la catégorie du regroupement familial du fait de sa relation avec le répondant l'étranger qui, ayant fait l'objet d'une adoption alors qu'il était âgé de moins de dix-huit ans, est l'enfant adoptif de ce dernier, à moins que l'adoption n'ait eu lieu dans l'intérêt supérieur de l'enfant au sens de la Convention sur l'adoption.

(3) L'adoption visée au paragraphe (2) a eu lieu dans l'intérêt supérieur de l'enfant si les conditions suivantes sont réunies :

a) des autorités compétentes ont fait ou ont approuvé une étude du milieu familial des parents adoptifs;

b) les parents de l'enfant ont, avant l'adoption, donné un consentement véritable et éclairé à l'adoption de l'enfant;

c) l'adoption a créé un véritable lien affectif parent-enfant entre l'adopté et l'adoptant;

(*d*) the adoption was in accordance with the laws of the place where the adoption took place;

(*e*) the adoption was in accordance with the laws of the sponsor's place of residence and, if the sponsor resided in Canada at the time the adoption took place, the competent authority of the child's province of intended destination has stated in writing that it does not object to the adoption;

(*f*) if the adoption is an international adoption and the country in which the adoption took place and the child's province of intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have stated in writing that they approve the adoption as conforming to that Convention; and

(*g*) if the adoption is an international adoption and either the country in which the adoption took place or the child's province of intended destination is not a party to the Hague Convention on Adoption, there is no evidence that the adoption is for the purpose of child trafficking or undue gain within the meaning of that Convention.

[Emphasis added]

d) l'adoption était, au moment où elle a été faite, conforme au droit applicable là où elle a eu lieu;

e) l'adoption est conforme aux lois du lieu de résidence du répondant et, si celui-ci résidait au Canada au moment de l'adoption, les autorités compétentes de la province de destination ont déclaré par écrit qu'elle ne s'y opposaient pas;

f) s'il s'agit d'une adoption internationale et que le pays où l'adoption a eu lieu et la province de destination sont parties à la Convention sur l'adoption, les autorités compétentes de ce pays et celles de cette province ont déclaré par écrit qu'elles estimaient que l'adoption était conforme à cette convention;

g) s'il s'agit d'une adoption internationale et que le pays où l'adoption a eu lieu ou la province de destination ne sont pas parties à la Convention sur l'adoption, 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.

[Je souligne]

[9] Section 2 of the Regulations provides the following definition for "dependent child":

"dependent child", in respect of a parent, means a child who

(*a*) has one of the following relationships with the parent, namely,

(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or

(ii) is the adopted child of the parent; and

(*b*) is in one of the following situations of dependency, namely,

(i) is less than 22 years of age and not a spouse or common-law partner,

(ii) has depended substantially on the financial support of the parent since before the age of 22 —

« enfant à charge » L'enfant qui :

a) d'une part, par rapport à l'un ou l'autre de ses parents :

(i) soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait,

(ii) soit en est l'enfant adoptif;

b) d'autre part, remplit l'une des conditions suivantes :

(i) il est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait,

(ii) il est un étudiant âgé qui n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents à compter du

or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner — and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student

(A) continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and

(B) actively pursuing a course of academic, professional or vocational training on a full-time basis, or

(iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition. (*enfant à charge*)

moment où il a atteint l'âge de vingt-deux ans ou est devenu, avant cet âge, un époux ou conjoint de fait et qui, à la fois :

(A) n'a pas cessé d'être inscrit à un établissement d'enseignement postsecondaire accrédité par les autorités gouvernementales compétentes et de fréquenter celui-ci,

(B) y suit activement à temps plein des cours de formation générale, théorique ou professionnelle,

(iii) il est âgé de vingt-deux ans ou plus, n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents à compter du moment où il a atteint l'âge de vingt-deux ans et ne peut subvenir à ses besoins du fait de son état physique ou mental. (*dependent child*)

[10] Subsection 3(2) of the Regulations provides the following definition for "adoption":

3(2) For the purposes of these Regulations, "adoption", for greater certainty, means an adoption that creates a legal parent-child relationship and severs the pre-existing legal parent-child relationship.

3(2) Pour l'application du présent règlement, il est entendu que le terme « adoption » s'entend du lien de droit qui unit l'enfant à ses parents et qui rompt tout lien de filiation préexistant.

[11] Under section 4 of the Regulations, a foreign national cannot be considered an "adopted child" if the adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the IRPA:

4. For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.

[Emphasis added]

4. Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait, le partenaire conjugal ou l'enfant adoptif d'une personne si le mariage, la relation des conjoints de fait ou des partenaires conjugaux ou l'adoption n'est pas authentique et vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi.

[Je souligne]

IV. Analysis

(1) Was it a violation of procedural fairness in this case to have five members of the IRB hear the case at different times?

[12] The applicant submits that the fact that five different members of the IRB heard her case at "different times" prior to the issuance of a final decision regarding her appeal breaches the rules of procedural fairness. In her submission, the applicant refers to the fact that three members of the IAD were present at the hearing of May 30, 2005, that member Whist issued a decision on September 28, 2005, on the preliminary motion concerning whether the applicant could proceed with the appeal in her deceased husband's stead, and that member Ross ruled on the appeal on its merits in her decision of May 28, 2006.

[13] The three members present at the hearing of May 30, 2005, decided only that a decision on the preliminary motion was necessary before hearing the appeal on its merits. They requested written submissions from the parties, and they indicated that they were not seized of this matter. As for the decision of member Whist on September 28, 2005, section 25 of the *Immigration Appeal Division Rules*, S.O.R./2002-230 (the Rules), allows the IAD to require the parties to proceed in writing, and, under sections 57 and 58 of the Rules, the IAD may, on its own initiative, do whatever is necessary to deal with a matter raised during an appeal. Consequently, that fact that member Whist dealt with the preliminary issue on the basis of the written submissions only does not in any way breach the rules of procedural fairness.

[14] Ultimately, there were only two decision makers who made a decision on the substantive issue of whether a permanent resident visa would be granted to Isaac Sarkwa, namely the officer who made the initial decision and member Ross, who made the decision dismissing the appeal of the officer's decision. Since only member Ross heard the appeal on its merits and this same member made the decision concerning the applicant's appeal, no breach of the rules of procedural fairness occurred.

[15] In any case, the applicant did not identify any prejudice able to justify a procedural fairness argument. Moreover, during the hearing of May 1, 2006, the applicant was at liberty to submit her evidence, and she did not object, nor at that time raise a procedural fairness argument.

(2) Were the findings of fact by member Ross patently unreasonable?

[16] This Court's jurisprudence establishes that for reviewing questions of pure fact decided by the IAD, the standard of review is patent unreasonableness (see *Canada (Minister of Citizenship and Immigration) v. Jessani* (2001), 200 D.L.R. (4th) 139, 2001 FCA 127).

[17] The applicant submits that, in her decision, member Ross did not consider evidence from the applicant and her daughter and that, consequently, her finding that the applicant and Isaac Sarkwa did not have a genuine parent-child relationship was patently unreasonable. In *De Guzman v. Canada (Minister of Citizenship and Immigration*) (1995), 33 Imm. L.R. (2d) 28, the IAD

identified factors to be used in assessing the genuineness of a parent-child relationship between a parent and the purported adopted child. The IAD listed the following factors:

> (a) motivation of the adopting parent(s) and;
>
> (b) to a lesser extent, the motivation and conditions of the natural parent(s);
>
> (c) authority and suasion of the adopting parent(s) over the adopted child;
>
> (d) supplanting of the authority of the natural parent(s) by that of the adoptive parents(s);
>
> (e) relationship of the adopted child with the natural parents(s) after adoption;
>
> (f) treatment of the adopted child versus natural children by the adopting parent(s);
>
> (g) relationship between the adopted child and adopting parent(s) before the adoption;
>
> (h) changes flowing from the new status of the adopted child such as records, entitlements, etc., including documentary acknowledgment that the [*sic*] is the son or daughter of the adoptive parents; and
>
> (i) arrangements and actions taken by the adoptive parent(s) as it relates to caring, providing and planning for the adopted child.

[18] In this case, member Ross considered a good deal of evidence, including the evidence from the applicant and her daughter. After having considered the totality of the evidence, the member found on the basis of the following evidence that the applicant and her purported adopted son did not have a genuine parent-child relationship:

- The applicant took a long time to adopt Isaac Sarkwa (more than 13 years);
- Isaac Sarkwa displayed a limited knowledge of his “sisters” during his interview with the officer;
- Before the death of the child’s natural father, it was the father who had parental authority over Isaac Sarkwa, even though the applicant and her husband had already “adopted” him. However, the IAD did note that the applicant took on a somewhat more important role in the child’s life after his natural father died in 2004;

- There was not sufficient evidence showing that Isaac Sarkwa thought of the applicant as his mother;
- The applicant visited the child three or four times over a period of almost 20 years, even though the applicant made other trips overseas.

[19] Based on the above-mentioned evidence, I am of the opinion that the finding of member Ross that there was no genuine parent-child relationship between the applicant and Isaac Sarkwa was not patently unreasonable. Therefore, this Court cannot review this decision.

(3) Did member Ross err in not considering international law or the concept of reuniting families, which is one of the objectives of the IRPA?

[20] Member Ross did not err in not considering the concept of reuniting families, one of the objectives of the IRPA. In her decision, member Ross found that the applicant's adoption of Isaac Sarkwa was not genuine because it was entered into primarily for the purpose of acquiring a status or privilege under the IRPA. I do not see how it is possible to find that an adoption that is not genuine owing to an absence of a genuine parent-child relationship goes against the IRPA's objective of reuniting families.

[21] As for the applicant's claim of a violation of international law, the applicant never submitted a concrete argument in this regard. In any case, I do not in any way see how international law was violated in this case.

V. Conclusion

[22] Based on the foregoing reasons, the Court's intervention is not warranted in this case. Member Ross's decision is reasonable, and the application for judicial review is therefore dismissed.

[23] The parties were invited to submit a question to be certified but none was submitted.

JUDGMENT

THE COURT ORDERS THAT:

- The application for judicial review be dismissed.

- There is no question to be certified.

"Simon Noël"

Judge

Certified true translation
Gwendolyn May, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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