Date: 20071105

Docket: IMM-4834-06

Citation: 2007 FC 1143

Ottawa, Ontario, November 5, 2007

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

LEAKE G. TESFAYE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant, Mr. Leake G. Tesfaye, seeks judicial review of a decision of a panel of the Immigration Appeal Division of the Immigration and Refugee Board (Appeal Division) dated August 21, 2006.

[2] The Applicant is a Canadian citizen born in Ethiopia. He came to Canada in 1991 as a Convention refugee, accompanied by his wife and one child. Ms. Terhas Leake Gebreslase (Ms. Gebreslase) is a citizen of Ethiopia. In 2004, Ms. Gebreslase submitted an application for

permanent residence, asserting that she was the biological daughter of the Applicant by a woman with whom he had a common law relationship in Ethiopia. During the processing of the application, a visa officer determined that the documentation to establish a biological relationship was unsatisfactory. Rather than dismissing the application, the visa officer provided the parties with the option of undergoing DNA testing. The Genetic Test Report concluded that the probability that the Applicant was the biological father of Ms. Gebreslase was 0.00%. In a letter decision dated June 27, 2005, the visa officer denied Ms. Gebreslase's application as the officer concluded that she was not a member of the family class, and therefore inadmissible pursuant to s. 11(1) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (the IRPA).

[3] By Notice of Appeal dated July 26, 2005, the Applicant commenced an appeal to the Appeal Division. The Appeal Division made its decision to dismiss the appeal based on the written record and did not convene an oral hearing. The conclusion of the Board was as follows:

> The evidence before the panel is that the applicant is not the biological child of the appellant. There is no evidence that the applicant is the adopted child of the appellant. Consequently, the panel finds that the applicant simply does not meet the definition of a dependent child and the definition of a member of a family class as is defined in section 117(1) of the *Regulations* and, consequently, this appeal is dismissed.

This is the decision that is the subject of this judicial review.

1. Issues

[4] The Applicant raises the following issues:

1. Did the Appeal Division breach the rules of procedural fairness by (a) holding a hearing in the presence of the Respondent's counsel, without the presence of the Applicant's counsel or (b) by failing to hold an oral hearing?

2. Did the Appeal Division err by not allowing the appeal on the basis that the Applicant and Ms. Gebreslase had been forced to take a DNA test?

2. Relevant Statutory Framework

[5] In general, the provisions of IRPA allow a permanent resident or Canadian citizen "to sponsor a foreign national who is a member of the Family class" (IRPA, s. 13(1)). As explicitly permitted under s. 14 of the IRPA, the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations) provide the necessary framework for application of s. 13(1).

[6] Of particular relevance to this application, s. 117(1)(*b*) of the Regulations states that "a foreign national is a member of the family class if, with respect to a sponsor, the foreign national is . . . a dependent child of the sponsor".

[7] The term "dependent child" is defined in s. 2 of the Regulations as follows:

2. "dependent child", in respect of a parent, means a child who	2. « enfant à charge » L'enfant qui :
(a) has one of the following relationships with the parent, namely,	(a) d'une part, par rapport à l'un ou l'autre de ses parents :

(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 — 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

(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 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

unable to be financially self-supporting due to a physical or mental condition.	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.

3. Analysis

[8] The determinative issue in this application for judicial review is whether the Appeal Division erred by making its decision without an oral hearing. When issues of procedural fairness are raised, the Court must determine whether the requirements of procedural fairness are met based on a standard of correctness. The Court need not apply the pragmatic and functional analysis (*Canadian Union of Public Employees v. Ontario (Minister of Labour),* [2003] 1 S.C.R. 539 at para. 100). If the Court concludes that the conduct of the tribunal has breached natural justice or procedural fairness, no deference is owed and the Court will set aside the decision of the tribunal.

[9] The Applicant asserts that the Appeal Division erred by not holding an oral hearing. For the reasons that follow, I conclude that the Appeal Division did err and will allow this application for judicial review.

[10] There were a number of written submissions made by the Applicant and by his legal counsel and one by the Respondent Minister's counsel. The main ground for appeal related to the interpretation of the term "dependent child" in the IRPA. In his Case Statement, the Applicant raises an issue about the DNA results and suggests that a further DNA test should be done. The

Respondent's only submission was in the form of an application, dated June 15, 2006. In this application, the Respondent argued that, since Ms. Gebreslase could not meet the statutory requirements for inclusion as a family member under the Regulations, the appeal should be dismissed "on grounds that the Appeal Division does not have jurisdiction in this matter as he has not filed an appeal in respect of a member of the Family Class". The Applicant's counsel, in a submission dated July 8, 2006, responded to the Minister's submission.

[11] In dealing with the application, the Appeal Division stated, in its decision that:

> Having considered the evidence before it and the arguments of the Minister and the appellant's counsel, the panel dismisses the appellant's appeal. The *Regulations* do clearly define who is a dependent child and this definition excludes the applicant. There is no point proceeding to an oral hearing in this case and the panel is prepared to make a decision based on the written material it has before it. Such a decision is open to the panel pursuant to Rule 25(1) of the *IAD Rules*. (Emphasis added)

[12] The Respondent submits that there is no error; that the Appeal Division is authorized, under Rule 25(1) of the *Immigration Appeal Division Rules,* S.O.R./2002-230 (IAD Rules) to proceed in writing. That Rule provides that:

25. (1) Instead of holding a hearing, the Division may require the parties to proceed in writing if this would not be unfair to any party and there is no need for the oral testimony of a witness.	25. (1) La Section peut, au lieu de tenir une audience, exiger que les parties procèdent par écrit, à condition que cette façon de faire ne cause pas d'injustice et qu'il ne soit pas nécessaire d'entendre des témoins.

[13] I agree that this rule gives the Appeal Division the ability to proceed by way of a written proceeding. Further, as master of its own procedure, the Appeal Division should be afforded significant deference in determining when to hold an oral hearing.

[14] However, the question is whether, on the facts of this case, the Appeal Division's decision to proceed in writing was fair to the Applicant. The duty of fairness, at its most basic level, contains a right to participate in the decision making process (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 22). Did the process followed by the Appeal Division in this case provide adequate participatory rights to the Applicant? I do not think that it did.

[15] Rule 25(1) of the IAD Rules contemplates that the Appeal Division will "require the parties to proceed in writing". It appears to me that, by using this language, the parties must be made aware that the Appeal Division will or may proceed in writing prior to the close of the record.

[16] Today, in a case such as this, appellants would be aware of the use of a paper hearing for issues of membership in the family class. By going to the appropriate website, parties would know that the standard procedure for the Appeal Division appeals is to have a paper hearing when the issue is "proof of relationship" (Canada, Immigration and Refugee Board of Canada, *Procedures for Streaming Immigration IAD Cases Streaming Criteria and Analysis*, online: Immigration and Refugee Board of Canada <http://www.irb-

cisr.gc.ca/en/references/procedures/iad/procedures_stream-cat_iad-sai_e.htm#II>). Unfortunately these guidelines are dated December 2006. The Applicant's hearing was in August 2006. The older, more general, information guide on appeals to the Appeal Division, that was in place when the Applicant's appeal was under consideration, makes no mention of a paper hearing (See Canada, Immigration and Refugee Board of Canada, *Information Guide – General Procedures for All Appeals to the Immigration Appeal Division (IAD)*, online: <http://www.irb-cisr.gc.ca/en/references/procedures/processes/iad/infoguides/index_e.htm>).

[17] In the absence of any general procedural directive, as is now in place, what was the Applicant told about the procedures for his appeal?

[18] There were three different communications to the Applicant concerning his appeal rights.

1. In the letter decision of June 27, 2005, no mention was made of the fact that the issue of whether Ms. Gebreslase was a member of the family class would be dealt with as a preliminary matter in writing.
2. On August 11, 2005, the Appeal Division wrote to the Applicant to advise that his Notice of Appeal had been received. In that letter, there is a sentence that reads, "When we receive the appeal record from the Minister's counsel we will contact you or your counsel to fix a date for your appeal hearing".
3. The final letter on the process to be followed is dated December 15, 2005, and came from Counsel for the Minister. In that letter, to which was attached the

> Record of Appeal, there are at least three separate, specific references to a hearing.

No further correspondence from the Appeal Division is contained in the record prior to the decision.

[19] When viewed as a whole, there is little doubt that the Applicant was operating with the expectation that there would be an oral hearing where evidence could be adduced and further arguments made on the issues related to membership in the family class. In particular, the Applicant wanted to provide more evidence on the issue of the visa officer's DNA request.

[20] The Applicant cites the case of *M.A.O. v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1799 (T.D.) (QL), where Justice Heneghan allowed an application on similar facts. In that case, the applicant had similarly been "invited" to take a DNA test. Justice Heneghan allowed the application and directed that the IAD reconsider the application for appeal without regard to the DNA evidence. The Respondent argues that this case is not relevant, because it was decided on the Appeal Division decision made under the provisions of the former *Immigration Act*. That may well be. However, in my mind, this is an issue that was raised – at least indirectly – by the Applicant in his written submissions with an expectation that he would be able to argue the point at a hearing. Because there was no oral hearing, he was not able to make those arguments.

[21] In the particular circumstances of this case, I am persuaded that the process followed by the Appeal Division was unfair to the Applicant. It follows that the application for judicial review will be allowed and the matter sent back to the Appeal Division for redetermination.

[22] I should make it very clear that I am not directing that the Appeal Division proceed by way of oral hearing. The current procedures outlined on the website state that a matter such as this may be dealt with in a paper hearing. The Applicant must either make all of his submissions in writing or persuade the Board that it would be unfair not to have an oral hearing or that oral testimony is necessary.

[23] Nor am I suggesting that the Appeal Division must deal with any humanitarian and compassionate considerations raised by the Applicant unless it first decides that Ms. Gebreslase is a member of the family class; s. 65 of the IRPA is very clear in that regard. On this point see *Phan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 184; *de Guzman v. Canada*, 2004 FC 1276 at para. 6, aff'd 2005 FCA 436, leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 70; *Asuncion v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1002 at para. 10.

[24] Neither party proposed a question for certification.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is allowed;

2. The decision under review is set aside and the matter referred back to the Appeal Division for reconsideration by a different panel of the Appeal Division; and

3. No question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4834-06
STYLE OF CAUSE:	LEAKE G. TESFAYE v. MCI
PLACE OF HEARING:	Toronto, Ontario
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