Date: 20080227

Docket: IMM-3068-07

Citation: 2008 FC 252

Ottawa, Ontario, the 27th day of February 2008

Present: the Honourable Mr. Justice Beaudry

BETWEEN:

BINWA KISIMBA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), following a decision of the Immigration Appeal Division (Appeal Division) of the Immigration and Refugee Board on July 10, 2007 rejecting the application for permanent residence by the adoptive children of Binwa Kisimba (the applicant).

ISSUES

[2] The case at bar raises two issues:

(a) Did the Appeal Division err in refusing to consider documentary evidence dealing with the interpretation of Congolese law and in determining that the adoption had no legal validity?

(b) Did the Appeal Division err in considering that there was no real parent-child emotional bond between the adoptee and the adopter?

[3] For the reasons that follow, the application for judicial review will be dismissed.

FACTUAL BACKGROUND

[4] The applicant is a Canadian citizen originally from the Democratic Republic of the Congo (the Congo). She is 55 years old and works for Hydro-Québec. She lives with her husband, who is 60 years old and an education consultant. They are the parents of three children of full age, a boy and two girls.

[5] Their elder son works as a data processing consultant in Montréal and their daughters are engineers in North Carolina in the U.S.

[6] Following the death of her young brother on February 21, 2003, the applicant decided to adopt two of his four children: Kipimo Kisimba, born on April 16, 1990, and Kamona Kisimba, [born] on April 2, 1996. They live in Kinshasa in the Congo with their biological mother.

[7] The adoption was obtained through a Congolese lawyer on January 6, 2004. The adoption was subject to [TRANSLATION] *Law No. 87-010 of August 1, 1987*, titled the [TRANSLATION] "*Republic of Zaire Family Code*" (the Code – the last document in tab 5 of the applicant's record). Articles 653 and 656 of that Code provide the following:

> [TRANSLATION]
>
> Article 653: Only competent persons having reached the age of majority may adopt, with the exception of those persons from whom parental authority has been withdrawn.
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> Article 656: The fact that the potential adoptive parent has children does not preclude adoption. However, only those individuals who, on the day of the adoption, have fewer than three living children are permitted to adopt, unless special dispensation is granted by the President of the Mouvement populaire de la révolution, President of the Republic. No one may adopt more than three children, unless they are the children of his or her spouse.

[8] Since the judgment confirming the adoption in the Congo, the applicant and her husband have sent money for the support and education of the two children. They have also sent them presents and are in regular contact with them by telephone.

[9] In June 2006 the applicant and her biological daughter went to visit the adoptive children in Kinshasa.

[10] The application to sponsor the two adopted children was rejected by a visa officer at the Canadian Embassy in Kinshasa on August 30, 2005. The Appeal Division dismissed the applicant's appeal on April 27, 2007: hence the application for judicial review at bar.

IMPUGNED DECISION

[11] Two reasons were given by the Appeal Division for dismissing the application. First, it concluded that the adoption was not legally valid under Congolese law.

(a) It interpreted article 656 of the Code and concluded that a person who had three children still living could not adopt without a dispensation from the President of the Republic. As the applicant has three biological children and there is no evidence of a dispensation, the applicant could not adopt under Congolese law. The Appeal Division mentioned that [TRANSLATION] "living children" made no distinction between a dependent child and a child of full age who is independent.

(b) It attached no evidentiary value to a letter signed by the President emeritus (retired) of the Congolese Court of Appeal. This letter, dated December 28, 2006, mentioned that the phrase [TRANSLATION] "living children" implied minor dependent children. The Appeal Division disregarded this document since it was handwritten on lined paper, with no heading or official seal, and did not originate with an expert witness.

(c) The same fate was reserved for a letter of opinion from a Kinshasa lawyer as to the interpretation of article 656. Relying on a definition contained in the *Petit Robert* dictionary, the lawyer in question stated that in his view the word [TRANSLATION] "child" meant a human being within the age of minority.

(d) The Appeal Division pointed out that the applicant's testimony raised doubts as to the legality of the adoption. She had signed no form or document for the adoption proceedings to be initiated. She was not questioned by her counsel as to whether she had three living children. As the applicant and her husband are educated people, the Appeal Division did not find it either credible or plausible that the couple did not try to obtain information about the conditions for adoption in the Congo.

[12] Secondly, the Appeal Division concluded that the applicant had not established that the relationship between the adopting parent and the adopted children was genuine or that it was not primarily for the acquisition of a status or privilege within the meaning of the Act.

(a) It indicated that the replies given by the adopted children, Kipimo and Kamona, at their interviews in June 2005 at the Canadian Embassy left no doubt as to the person they regarded as their mother. The bond between them and their biological mother has never been severed and it is she who continues to assume the parental, emotional and physical responsibilities. She did not object to the adoption because she wished her children to have a better education.

(b) The Appeal Division did not accept the applicant's argument that she did not visit the adopted children from 2004 to 2006 because the air ticket was too expensive. It mentioned that the couple had an annual income of $120,000. The applicant's only visit to the children in question was in 2006, ten months after the refusal by the

visa officer. The Appeal Division noted that the applicant took ten weeks' vacation in June and July 2005 without going to see the children.

(c) The children indicated at the interview that they did not know much about their adoptive mother and did not know the name of their adoptive father. However, the Appeal Division commented favourably on the applicant's generosity to these children in helping them financially, but this did not amount to a bond of filiation or a parent-child relationship.

ANALYSIS

Standard of review

[13] The standard of review applicable when a visa officer is considering questions of fact is that of patent unreasonableness (*Annor v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 190, 2007 FC 140). This standard is applicable to the second question before this Court.

[14] To what standard should the first point at issue be subject?

[15] In *Canada (Minister of Citizenship and Immigration) v. Choubak*, [2006] F.C.J. No. 661, 2006 FC 521, Blanchard J. undertook a pragmatic and functional analysis and concluded that the standard applicable to a question involving the interpretation of foreign law by an administrative tribunal should be that of reasonableness *simpliciter*. This is what he wrote at paragraphs 37 and 40:

> [37] The Board's decision in this case, however, does not concern the evidentiary basis for the Respondent's claim for refugee protection or a finding in respect of the credibility of the Respondent. It is recognized that such factual determinations are within the purview of the Board's expertise. In this case, the Board's factual finding is not related to the core of its expertise. Rather, the decision at issue revolves around whether by operation of section 44(1)(2) of the *Aliens Act* the Respondent lost her residency status in Germany, including her right to return to Germany, from the moment she decided that she wanted to stay in Canada permanently. Ultimately, the Board's decision concerns an interpretation of German law and its effect on the Respondent's situation. In my view, such a finding is not within the expertise of the Board. I find that the Court is in a better position to determine whether the evidence sufficiently establishes the content of section 44(1)(2) of the *Aliens Act*. As a result, with regards to this second factor, I would extend less curial deference to the Board.
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> . . . .
>
> [40] In the present case, the question before the Board concerns the Applicant's residency status in Germany as of September 15, 1999 – the date of her admission into Canada. The Board must first determine the meaning of section 44(1) of the *Aliens Act*, and then it must apply the law as determined to the circumstances of the Respondent's case. The jurisprudence establishes that determining the content of foreign law is a finding of fact, while determining how the foreign law is applied is a question of law: see *Sharma*, above, at paragraph 10. In my opinion, the nature of the question militates towards affording less deference to the Board.

[16] I concur in the reasons of Blanchard J. and adopt this standard in answering the first question.

Did the Appeal Division err in refusing to consider documentary evidence dealing with the interpretation of Congolese law and in determining that the adoption had no legal validity?

[17] The Appeal Division did not attach any evidentiary value to the two letters of opinion filed by a Kinshasa lawyer and by the President emeritus (retired) of the Congolese Court of Appeal. The

applicant alleged that the content of the letters should have been considered in determining the legal validity of the adoption. I feel that the Appeal Division made no error when it found that the letters were not evidentiary. There is no evidence in the record that these two individuals could be described as experts. This conclusion by the Appeal Division is not unreasonable.

[18] What should be said about the interpretation of Congolese law by the Appeal Division?

[19] The Citizenship and Immigration Canada Overseas Processing manual (OP), chapter 3, titled “Adoptions”, deals with the question of foreign law in paragraph 5.7:

> The onus is on the adopting parent to provide evidence in respect of the minor’s adoption that establishes that the adoption was in accordance with the laws of the place where it took place as required by R117(3)(*d*). In most cases, this evidence will be in the form of an adoption order issued by the competent authority. In general, the submission of a valid adoption order issued by the competent authority would, unless there is some information to the contrary, be satisfactory evidence that the applicable foreign adoption-law requirements have been met.
>
> Officers should be particularly vigilant in assessing adoptions where:
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> - registration of the adoption order is not a legal requirement;
> - the requirements of adoption laws are not strictly followed;
> - the country does not authorize international adoptions.

[20] In the case at bar, the panel’s file contains the deed of adoption. There is no allegation that the Kinshasa Court of the Peace, which made the order, was not the competent authority. The respondent alleged that the adoption was not in accordance with Congolese law, based on his own interpretation of the Code. However, the Court considers that the interpretation put forward by the

applicant may be as valid as the respondent's. As this question is not crucial to the outcome of the case at bar, the Court does not rule in favour of either interpretation to be given to the Code.

Did the Appeal Division err in considering that there was no real parent-child emotional bond between the adoptee and the adopter?

[21] The applicant maintained that the Appeal Division made a reviewable error when it concluded that the parent-child relationship was not genuine. Both parties agreed that there are several factors to be considered in assessing the genuineness of the parental relationship. These factors are set out in *De Guzman v. Canada (Minister of Citizenship and Immigration),* 33 Imm. L.R. (2d) 28. This decision was recently followed in *Annor, supra*, at paragraph 17:

> (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, 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.

[22] Following an exhaustive analysis of the transcript contained in the panel's record, the Court does not intend to intervene in the factual interpretation given by the Appeal Division to the testimony regarding the adoptee-adopter relationship in this case.

[23] The Court considers that the conclusions of the Appeal Division are supported by the evidence. In particular, the Appeal Division found that the children regarded the applicant as their aunt, the biological mother performed the emotional and physical responsibilities of a parent with the applicant's financial assistance and contact was minimal between the applicant and the adopted children.

[24] In concluding, the Court can only congratulate the applicant for her continuing financial effort in support of these two young people.

[25] The parties suggested no serious question of general importance. The case does not contain any.

JUDGMENT

THE COURT ORDERS AND DIRECTS that the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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