Federal Court  Cour fédérale

Date: 20160630

Docket: IMM-5845-15

Citation: 2016 FC 739

Ottawa, Ontario, June 30, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

CYNTHIA ERHATIEMWOMON

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review by the Minister of Citizenship and Immigration [the Minister] pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] seeking to set aside a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board which had set aside a visa officer's decision to refuse the

Respondent's son's permanent resident application. For the reasons that follow, the application is allowed.

[2] The Respondent, Cynthia Erhatiemwomon, is a Nigerian citizen. On December 31, 1999, she arrived in Canada and made a refugee claim, which was ultimately denied based on a lack of credibility. After various proceedings, on November 21, 2008, her H&C application was approved in principle.

[3] The Respondent was landed on June 23, 2010. In her claim she declared that she had three sons and one daughter. On June 25, 2010, the Respondent signed an application to sponsor a further son, Kenneth Aburime Ukhuegbe, whom she claimed to be her eldest child. Between 2000 and 2008, she had failed to declare the existence of Kenneth on at least six occasions.

[4] When first disclosed on November 13, 2008, as part of her H&C application as a dependent child on her H&C application, she gave his date of birth as November 30, 1988. According to the information provided by the Respondent, this would have meant that Kenneth was born only two months before his younger brother, described in the reasons as "L.". This discrepancy was brought to the Respondent's attention, where after she corrected Kenneth's date of birth by phone to be June 30, 1988.

[5] On December 20, 2010, the Respondent's permanent resident sponsor application was refused for a number of reasons leading the immigration officer to conclude that Kenneth was

not likely the Respondent's biological child or his declared age and therefore, not a dependent child or a member of the family class.

[6] It turned out that DNA testing established that Kenneth is the Respondent's biological son. In the appeal before the IAD, the Member concluded that the Respondent established that Kenneth was a member of the family class based on the corroborative evidence after rejecting that of the Respondent and Kenneth.

[7] For the reasons that follow, I conclude that the IAD decision, measured against the reasonableness standard of review does not fall within the reasonable range of possible outcomes, or is intelligible in its justification and must be set aside to be re-determined by another member of IAD: *Nawful v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 464 at para 13-15.

[8] While the parties raised a number of issues, it is sufficient to dispose of this matter by focusing on the Member's reasoning in rejecting, or better stated ignoring, the irreconcilable birth date of Kenneth's younger brother in concluding that Kenneth was less than 22 at the application date of June 29, 2010. I cite the Member's decision at paragraph 19, where the problem of the closeness of the birthdates of the two children is considered:

> [19] Although it is not common for a woman to give birth to two children (the applicant and his brother L.) only a little more than five months apart, which is the case if the applicant's date of birth is correct, it is biologically possible, although not very likely in the case of a country such as Nigeria. I consider it more plausible than that the appellant gave birth at the age of 10 years old. I note also that the accuracy of the date of birth of the applicant's younger brother L. was not questioned as it might have been, to account for

> the months between births, especially since the appellant testified to not keeping a calendar or registering the births until much later.

[9] In paragraph 19 of her reasons, the Member concludes that it was "not very likely" that the Applicant would give birth to two children only little more than five months apart. The term "likely", of course, is the same as that for a finding of fact as a probability. This which would make sense based on the objective presumptions concerning premature childbirth. It would also be a reasonable conclusion, not only because the highly premature birth occurred in Nigeria, but also because it means that the conception of L. occurred shortly after the birth of Kenneth.

[10] To support her conclusion that the premature birth was unlikely, the Member proceeded first to speculate that it was "more plausible that the appellant (the Respondent) gave birth at the age of 10 years old" in 1978, rather than when she was 20 in 1988, as claimed throughout the proceedings by the Respondent. If this was in fact the case, it would mean that Kenneth was much older than 21 on the application date of June 29, 2010.

[11] More significantly, the Member attempted to explain away the close birthdates of the two children by speculating that the age difference might be accounted for due to the inaccuracy of L.'s date of birth on the basis that the Respondent did not keep a register of births until much later. In other words, Kenneth's birth date of June 30, 1988 should be accepted based upon an error in the birth date of the younger son. I can find no basis for this highly speculative conclusion which contradicts the evidence of the Respondent on L.'s date of birth and which was never raised or considered as an issue.

[12] The lack of any evidentiary basis, or even any serious consideration of L.'s birthdate, other than the Member's speculative musing that it must be wrong, remains the fundamental stumbling block to finding that Kenneth's birthdate was June 30, 1998. It is already problematic that evidence intended to corroborate Kenneth's birthdate becomes the basis for a conclusion when the principal witnesses are found not to be reliable. More to the point however, even if this evidence was highly probative, it cannot serve to make an after-the-fact implied conclusion on L's inaccurate birthdate, when this contradicts a fact apparently agreed upon by the parties and which was never argued or vetted by them.

[13] I conclude that in accepting the June 30, 1998 date for Kenneth's birthday, the Member does so without any rational explanation why L.'s birth date should also be rejected, although recognizing that that the alleged birthdates of the two children cannot be reconciled.

[14] As said, I also have considerable difficulty with the Member transforming the out-of-court corroborative affidavit evidence into the principal evidence upon which the decision was founded. Normally corroborative out-of-court evidence would not form the basis for decision after a negative reliability finding of the principal witnesses, who in this case normally should be the most knowledgeable persons regarding Kenneth's date of birth.

[15] In addition, the Member did not consider any of factors which undermine the weight of the corroborative evidence relied upon. The affidavit evidence of family members regarding Kenneth's birth was obtained over the telephone from a relative of the Respondent's husband described only as a Joshua. He apparently was present at Kenneth's birth and provided his

birthdate based on his calculations using the Nigerian Edo calendar. Besides this evidence being double hearsay, no details are provided on the Edo calendar and how the calculation of equivalent dates was made or why the IAD should rely upon him the gentleman in question.

[16] There are similar problems with respect to the information on Kenneth's birthdate obtained from the school in a form of a letter. The Respondent was requested to provide Kenneth's school leaving certificate, which would objectively confirm his birth date. It was not provided. Instead the Respondent filed a Nigerian police crime report dated December 13, 2010 which reported that Kenneth's school leaving certificate went missing on March 28, 2009. No explanation was provided from the school why such an unusual crime would have occurred.

[17] Ultimately, I cannot find any reasonable basis in the evidence or the Member's reasons that would sustain the conclusion that the Respondent discharged her obligation to demonstrate on a balance of probabilities that Kenneth was under 22 years of age on the application date.

[18] Accordingly, the application is allowed. The matter is returned for reconsideration by another member of the IAD. No questions are certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that application is allowed and the matter referred back for reconsideration by another member of the IAD, with no questions being certified for appeal.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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