Federal Court  Cour fédérale

Date: 20160818

Dockets: IMM-180-16
IMM-181-16

Citation: 2016 FC 948

Ottawa, Ontario, August 18, 2016

PRESENT: The Honourable Mr. Justice Zinn

Docket: IMM-180-16

BETWEEN:

BACARY TRAORE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-181-16

ISSA TRAORE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] These two applications involve related parties, identical decisions, and were heard together. Accordingly, one set of reasons is being provided to be filed in each file.

[2] The Applicants are siblings living in Mali. They applied for permanent residence as sponsored through a family class application as provided for in paragraph 117(1)(f) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[3] In order to meet the requirements of the Regulations, each child had to be a "person whose parents are deceased." The Respondent advised the Applicants that "the officer was not satisfied that the death certificates presented … were authentic." They were asked for additional documents, some of which could be provided and some of which could not. In any event, additional documentation was provided to the Respondent to establish that the Applicants were orphans. One such document was a Court Order dated June 27, 2013 from a Mali Court [the Court Order].

[4] In rendering negative decisions, the decision-maker concluded that the Applicants were inadmissible for misrepresentation pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 "for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act." Consequently, the Applicants' right of appeal to the Immigration Appeal Division is precluded by virtue of section 64(3) of the Act.

[5] The Applicants submit that there was no misrepresentation. They acknowledge that the death certificates may have been questionable, but point out that the decision-maker never made a finding of fact that they were fraudulent documents – only that he was not satisfied that they were authentic. They submit that they provided sufficient other evidence to establish that they were orphans.

[6] The Applicants further submit that even if the death certificates were fraudulent documents, no breach of paragraph 40(1)(a) of the Act can reasonably be said to have occurred because they were not misrepresenting a "material" fact since they reflected the true state of affairs that their parents were deceased. Accordingly, they submit that the officer ought to have denied the applications without invoking paragraph 40(1)(a) of the Act thus denying them a right to appeal.

[7] In my view, the Applicants must succeed in their applications. In order to invoke paragraph 40(1)(a) of the Act, the decision-maker had to determine that in submitting the death certificates, the applicants were "directly or indirectly misrepresenting … facts relating to a relevant matter that … could induce an error in the administration of the Act."

[8] I agree with the Respondent that the death certificates relate to facts relevant to the matter as the Applicants had to establish that their parents were deceased. But that is only one part of the test – the decision-maker also had to determine that this "misrepresentation" could induce an error in the administration of the Act.

[9] Counsel for the Respondent agreed that if the Applicants' parents are in fact deceased and they are orphans, then even if the death certificates are outright fraudulent creations, they could not have induced an error in the administration of the Act if the application had been accepted, because the Applicants as orphans were entitled to be accepted as permanent residents.

[10] As such the decision-maker had to reach a decision that the Applicants were not orphans. No such decision was made. Moreover, in my view, no such decision could have been made on the record.

[11] Included as a document provided by the Applicants is the Court Order which granted the petition of the Applicants' Canadian sponsor to an order of adoption-protection of the Applicants on the basis that their parents are deceased. In addition to the sponsor, the Public Prosecution Office and the Regional Directorate for the Promotion of Women, Children and Families, were present before the Court. The decision-maker never engaged with this evidence.

[12] In my view, the Court Order is *prima faci*e evidence that the Applicants are orphans. In order to support the misrepresentation finding the decision-maker would have had to find that this Court Order was also a fraudulent document, or did not support the obvious – that the Applicants are orphans. For this reason the decisions are not reasonable and are set aside.

[13] Neither party proposed a question to be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that these applications are allowed, the decisions are set aside, and the Applicants' applications are to be considered afresh by a new decision-maker, with the Applicants being granted a right to file further evidence should they wish.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-180-16
STYLE OF CAUSE:	BACARY TRAORE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
DOCKET:	IMM-181-16
STYLE OF CAUSE:	ISSA TRAORE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 16, 2016
JUDGMENT AND REASONS:	ZINN J.
DATED:	AUGUST 18, 2016

APPEARANCES:

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