Federal Court  Cour fédérale

Date: 20180227

Docket: IMM-1533-17

Citation: 2018 FC 220

Ottawa, Ontario, February 27, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

YONAS KIDANE BRHANE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant challenges the decision of a visa officer stationed at the Canadian Embassy in Rome, Italy [Officer], who, on March 22, 2017, rejected his sponsored application for a permanent residence visa as a member of the Family Class on the basis that it does not meet the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act]. The Officer's concerns were related to the Applicant's age and relationship with his sponsor, Nebiat Weldeghiorghis Zeru, his alleged mother.

[2] The relevant facts can be summarized as follows. The Applicant claims he was born on February 2, 1996, in Eritrea. His main connection to Canada is Ms. Zeru, who entered the country on August 23, 2013, on a visitor's visa. Shortly after entering Canada, Ms. Zeru filed for refugee protection, claiming that she feared persecution from the Eritrean authorities because two of her children had evaded military service. Her claim was granted. Upon being granted refugee protection, Ms. Zeru filed an in-Canada application for permanent residence. She included the Applicant as an overseas dependent child on her application.

[3] On April 10, 2015, Ms. Zeru was required by Citizenship and Immigration Canada [CIC] to provide the Applicant's birth registration/certificate, photographs of her and the Applicant as well as proof that she financially supported him and that they correspond. In response to that request, she provided CIC with the Applicant's birth certificate and three photographs, including two where the Applicant and Ms. Zeru appear at a younger age.

[4] On April 9, 2016, Ms. Zeru informed CIC that the Applicant had fled Eritrea and was now living in a refugee camp in Sudan. On November 30, 2016, the Applicant was asked to attend an interview at the Canadian Embassy in Khartoum. He was required to bring with him identity documents as well as updated photographs. The interview was held on January 25, 2017.

[5] On March 22, 2017, the Officer rejected the Applicant's application. The Officer was not satisfied that the Applicant was under the age of 22, finding that he looked "substantially older than a 20 year old." The birth certificate provided by the Applicant, issued in 2012, was not verifiable according to the Officer, and no other documentation supporting his age was provided.

He was not satisfied either that Ms. Zeru was in fact his mother, noting that the Applicant did not submit any photos or examples of communication, cohabitation or monetary support from Ms. Zeru. As for the photos provided by Ms. Zeru, the Officer found that they did not identify either the Applicant or Ms. Zeru, noting that the boy in the photo did not bear any resemblance with the person who appeared at the interview.

[6] The Officer also noted that the Applicant was not listed as a family member in any of Ms. Zeru's immigration forms. The Officer concluded that the Applicant was unable to allay any of the concerns about his age and relationship with Ms. Zeru.

[7] The Applicant claims that the Officer's decision is flawed in three respects. First, he contends that the Officer violated his rights to procedural fairness by not providing him with an opportunity to undergo DNA testing after advising him that DNA testing would take place. He says that he had a legitimate expectation that such testing would be conducted. Second, the Applicant claims that the Officer further violated his rights to procedural fairness by not providing him with an opportunity to disabuse the Officer's concerns regarding his age and relationship with Ms. Zeru. Finally, he submits that the Officer made a number of unreasonable findings of facts, in particular with respect to the weight to be accorded to his birth certificate and to the fact that he was not mentioned in the immigration documentation previously signed by Ms. Zeru.

[8] There is no dispute between the parties as to the standard of review applicable to each issue. As is well settled, issues of procedural fairness are subject to the correctness standard of

review (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). It is also well settled that a visa officer's findings of fact and of mixed fact and law are reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Sivakumaran v Canada (Citizenship and Immigration)*, 2011 FC 590 at para 19).

[9] When applying for permanent residence, an applicant such as Ms. Zeru may, pursuant to section 176 of the Act, include any of their family members in their application, including dependent children. Family members who are outside of Canada at the time of the application for permanent residence will be issued a permanent resident visa if they make an application from outside Canada within the prescribed time.

[10] For the purpose of the Act, the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] define a "dependent child" as the biological or adopted child of the applicant parent, and in the version of the Regulations applicable to the Applicant, one who is less than 22 years of age (Regulations, section 2 as it appeared 2 April 2014).

[11] In my view, there are a number of issues with the Officer's decision.

[12] First, contrary to the Respondent's contention, age was not the only factor forming the basis of the Officer's decision. When that decision is read as a whole, together with the notes entered by the Officer in the Global Case Management System [GCMS Notes], it is clear that the Applicant's relationship with Ms. Zeru was very much part of the Officer's concerns regarding his application for permanent residence. The non-contradicted evidence before me is that at the

end of the interview with the Applicant, the Officer told him that given that his birth certificate was not "verifiable," he would be given the opportunity to undergo DNA testing to prove his parentage with Ms. Zeru.

[13] Ideally, the Applicant's statement with regard to the DNA testing would be easily supported by the GCMS Notes, but these notes are sparse (Certified Tribunal Record [CTR], at 6). They consist of brief statements made by the Applicant regarding his identity, his family, what he did after Ms. Zeru left Eritrea, and why he has no official documents listing her, followed by the statement "Not satisfied that he is 20 years old." They do not confirm the Applicant's assertion that he was informed that he would be given the opportunity to undergo a DNA test. However, the sparseness of the GCMS Notes does not permit me to exclude the possibility that it was mentioned but not noted, especially given the fact that the Respondent did not file any evidence contradicting the Applicant's assertions on this point.

[14] Furthermore, as noted by the Applicant, CIC's overseas processing manual [Guidelines] provides that visa applicants have the option to undergo DNA testing where they cannot provide satisfactory documentary evidence. It appears from the Guidelines that the option of DNA testing should have been provided to the Applicant. Nothing in the CTR indicates that this was the case.

[15] I therefore agree with the Applicant that in these particular circumstances the doctrine of legitimate expectations, through the combined effect of the representations made by the Officer at the interview and the Guidelines on DNA testing, is triggered. That doctrine stands for the proposition that "when a public authority has promised to follow a certain procedure, it is in the

interest of good administration that it should act fairly and implement its promise, as long as implementation does not interfere with its statutory duty" (*Bendahmane v Canada (Minister of Employment and Immigration)*, [1989] 3 FC 16 at para 37, citing *Attorney General of Hong Kong v Ng Yuen Shiu*, [1983] 2 AC 629).

[16] Hence, by not providing the Applicant with the opportunity to address the concerns regarding parentage between him and Ms. Zeru through the DNA testing he was promised and which is very much part of the procedure set out in the Guidelines, the Officer, in my view, breached the Applicant's rights to procedural fairness.

[17] More broadly, I am also of the view that the Officer deprived the Applicant of a meaningful opportunity to respond to his concerns. The CTR shows that the concerns regarding the Applicant's identity existed before the Applicant was invited to the interview on November 30, 2016. In particular, the GCMS Notes entered on August 22, 2016 indicate that the file was reviewed and that there were concerns about: (i) eligibility, identity and credibility, mostly concerning a lack of information concerning the Applicant's relationship with Ms. Zeru, (ii) the birth certificate having been issued in 2012 and being nearly impossible to verify, and (iii) one photo on file showing a man who appears a decade or so older than the Applicant claimed he was (CTR at 6).

[18] The March 22, 2017 GCMS Notes about the interview are contradicted by other evidence. In those notes, the Officer indicated that "multiple concerns rest even after interviewing [the Applicant]" and that the Applicant "was asked to bring proof of

communication with him and sponsor; old family photos; proof of any financial support; education documents" (CTR at 5). Though documents of that sort were requested from Ms. Zeru in a letter dated April 10, 2015, this was not the letter inviting the Applicant to the interview. Oddly enough, there is no copy of the Applicant's invitation to the interview in the CTR, however, the Applicant included in his Application Record a copy of an email inviting him to the interview at the Canadian embassy in Khartoum. In the email, the Applicant was informed that he must bring: (i) "identity document" and (ii) "updated photographs (4 each) for each applicant" (Applicant's Record at 16-17).

[19] It is trite law that the duty of procedural fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and of the rights affected (*Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21). Although, as determined by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Khan*, 2001 FCA 345 at para 3, it is also well settled that the duty of fairness owed to a foreign national whose application for permanent residence submitted abroad has been rejected is at the low end of the spectrum, this requires, at a minimum, that the foreign national be informed of any specific concerns and granted sufficient opportunity to respond to the concerns in a meaningful way (see also: *Khwaja v Canada (Citizenship and Immigration)*, 2006 FC 522). Here, the Officer did not inform the Applicant of his concerns about his age and his relationship with Ms. Zeru before the interview, nor did he give the Applicant the opportunity to provide further submissions after the interview, thereby breaching his right to procedural fairness, especially in light of the fact there would be no DNA testing to disabuse the concern that Ms. Zeru was not the Applicant's mother.

[20] Based on the evidence filed in support of the present judicial review application, the Applicant could have come up with an explanation regarding some of the Officer's concerns, especially those regarding the lack of documentation relating to his relationship with Ms. Zeru, if he had been given a meaningful opportunity to do so.

[21] Finally, the Officer's finding that the Applicant had never been listed as one of Ms. Zeru's children in any of her immigration forms is simply not supported by the evidence as the Applicant was listed as a dependant in Ms. Zeru's refugee application in 2013 and as her son on her Basis of Claim form (Applicant's Record at 56 and 76). This finding is therefore unreasonable. To the extent that it tainted the whole analysis, the Officer's decision must also be set aside on that basis.

[22] The Applicant's judicial review application will therefore be allowed and the matter remitted back to a different visa officer for reconsideration. The Applicant is seeking costs at a fixed amount of $3000. He claims that the Officer's decision being so obviously and seriously flawed, there are special reasons justifying the Court to depart from the rule set out in section 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, that no costs shall be awarded to or payable by any party in respect of an application for judicial review.

[23] Although the Officer's decision is flawed in a number of respects, I am not satisfied that this is a case that warrants the special measure of an award of costs.

[24] Neither party proposed a question for certification.

JUDGMENT IN IMM-1533-17

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted;
2. The decision of the Officer, dated March 22, 2017, dismissing the Applicant's application for permanent residence, is set aside and the matter is remitted back to a different visa officer for reconsideration;
3. No question is certified;
4. No costs are awarded.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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