Federal Court  Cour fédérale

Date: 20180312

Docket: IMM-3802-17

Citation: 2018 FC 288

Ottawa, Ontario, March 12, 2018

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

PATRICE ESSINDI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. Patrice Essindi seeks judicial review of a decision of the Immigration Appeal Division [IAD] dismissing his appeal of an immigration officer's decision refusing a permanent resident visa to Alima Fanny Essindi [Fanny], whom he considers to be his daughter. The Applicant had sought to sponsor Fanny's application for permanent residence under the family class. The IAD found that Fanny does not meet the definition of "dependent child" in the

Immigration and Refugee Protection Regulations, SOR/2002-227 [Regulations] and thus cannot be considered a member of the family class.

II. Preliminary Question

[2] The Respondent argues that the Applicant's affidavit contains an exhibit and facts that were not before the IAD. Specifically, at paragraph 16 of his affidavit, paragraph 14 of his Memorandum of Argument and paragraph 40 of his Reply Memorandum, the Applicant states that he is not permitted to adopt Fanny under Cameroonian law, since Cameroon already recognizes the existence of a filial relationship between himself and Fanny. The Applicant supports this statement with a legal opinion from Me Wette Bontems, dated nearly a year after the IAD's decision.

[3] The Respondent argues that this information must be disregarded by the Court, since the general rule is that a reviewing court must only consider the evidence that was before the administrative decision-maker and none of the few exceptions to that rule apply in this case (*Henri v Canada (Attorney General)*, 2016 FCA 38 at paras 39-41; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20). Although I agree with the Respondent that this information and Me Bontems' letter are inadmissible, since they relate to the merits of the matter and do not fall within one of the recognized exceptions to the general rule, I do not believe that it has any impact on the outcome of this application for judicial review. As I told the parties during the hearing, I am willing to take for granted that the Applicant cannot legally adopt Fanny in Cameroon.

III. Facts

[4] The Applicant is a Canadian citizen who was born in Cameroon. He immigrated to Switzerland in 1994 where he resided until 2001. When he completed his application for permanent residence in Canada in 2001, he did not declare Fanny as a non-accompanying family member since he was not aware of her existence.

[5] In 2009, the Applicant visited Cameroon and met Ms. Mekui Koungou Josephine, an old acquaintance with whom he had a brief relationship in 1998. Ms. Mekui informed the Applicant that he was the biological father of her daughter Fanny, born on March 19, 1999.

[6] The Applicant met Fanny on his next visit to Cameroon in 2010 and since that time, he has maintained a relationship with her, travelling to see her at least once each year. His wife and sons frequently travel to Cameroon with him to visit with Fanny and spend time together. The Applicant often speaks on the phone with Fanny when he is in Canada. He provides financial assistance to Fanny and her mother, which covers her basic needs, schooling, and medical expenses. In January 2014, Ms. Mekui signed a notarized statement granting the Applicant and his spouse sole custody of Fanny, with exclusive decision-making authority and travel rights.

[7] On January 9, 2013, the Applicant applied to sponsor Fanny's application for permanent residence under the family class. During the course of the application process, the Applicant was asked to take a DNA test to confirm his status as Fanny's biological father. A DNA test was sought in this case because (i) the Applicant did not declare Fanny on his permanent residence

application in 2001; and (ii) while Fanny's birth certificate identifies the Applicant as her biological father, verification with the Cameroonian vital statistics authorities indicated that a valid birth certificate cannot have been issued based exclusively on the mother's declaration as to the father's identity. The DNA test came back negative.

[8] On April 7, 2016, an immigration officer at the Canadian Embassy in Dakar, Senegal denied Fanny's application for permanent residence and the Applicant's sponsorship application. The immigration officer summarized the applicable legislative provisions and explained that Fanny does not meet the conditions set out in the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA], and the Regulations to become a permanent resident under the family class. Paragraph 117(1)(b) of the Regulations specifies that a foreign national is a member of the family class if he or she is a "dependent child" of the sponsor. Section 2 of the Regulations defines "dependent child" as the biological or adopted child of the parent who is in a position of dependency with the parent. The relevant legislative provisions are reproduced in Annex A to these reasons.

[9] Since the DNA test established that Fanny is not the Applicant's biological child, the immigration officer found that Fanny does not meet the definition of "dependent child" in the Regulations, excluding her from consideration under the family class.

[10] The Applicant appealed the immigration officer's decision to the IAD, which dismissed his appeal on November 25, 2016.

IV. Impugned Decision

[11] The IAD concluded, as did the immigration officer, that Fanny does not meet the definition of "dependent child" since she is not the Applicant's biological or adopted child. This means that she cannot be sponsored by the Applicant for the purpose of becoming a Canadian permanent resident under the family class. Furthermore, the IAD noted that it is not permitted to consider humanitarian and compassionate [H&C] grounds at the appeal level, as specified in section 65 of the IRPA.

V. Issue and Standard of Review

[12] The Applicant submits that this application for judicial review raises numerous issues. However, his framing of the issues is a result of his misunderstanding that H&C considerations would apply to his and Fanny's applications. It bears mentioning that the matter before the Court is a judicial review of the IAD's decision and not that of the immigration officer. Keeping that in mind, I am of the view that this application raises a single issue:

> *Did the IAD err in finding that Fanny was not a "dependent child" as defined in the* Regulations*?*

[13] The IAD's analysis of whether Fanny is the Applicant's biological child or adopted child, according to the definition of "dependent child" in the Regulations, should be assessed on the reasonableness standard since it is a question of mixed fact and law (*Canada (Public Safety and Emergency Preparedness) v Martinez-Brito*, 2012 FC 438 at para 16; *Boachie v Canada (Citizenship and Immigration)*, 2010 FC 672 at para 21; *Azizi v Canada (Minister of Citizenship*

and Immigration), 2005 FC 354 at para 14, aff'd *Azizi v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 406).

[14] The reasonableness standard requires that this Court determine whether the IAD's decision falls within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VI. Analysis

[15] I am of the view that the IAD's decision is reasonable. The Applicant believes that his and Fanny's applications should have been considered by the immigration officer and the IAD on H&C grounds. I respectfully think that he is mistaken.

[16] H&C grounds may be considered by an immigration officer in his or her assessment of a foreign national's application for permanent residence in three ways: via subsections 25(1), 25.1(1) and 25.2(1) of the IRPA. Only the first two bear further examination in this case.

[17] Subsection 25(1) stipulates that the Minister may consider H&C grounds on the request of a foreign national outside Canada who applies for a permanent resident visa "and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act" on this basis.

[18] Subsection 25.1(1) provides that, "[t]he Minister may, on the Minister's own initiative, examine the circumstances of a foreign national who is inadmissible – other than under sections

34, 35 or 37 – or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act" on H&C grounds. The Minister is directed to consider the best interests of a child directly affected by its assessment in both subsections 25(1) and 25.1(1) of the IRPA.

[19] There is no evidence that Fanny requested that the immigration officer consider her application for permanent residence under subsection 25(1) of the IRPA.

[20] However, subsection 25.1(1) of the IRPA allows an immigration officer to consider H&C grounds on his or her own initiative, a fully discretionary power. Although the immigration officer's written decision denying Fanny's application for permanent residence does not mention H&C factors, the Global Case Management System [GCMS] notes indicate that such factors were taken into consideration. The immigration officer considered the relationship between the Applicant and Fanny and balanced it against Fanny's age (17 at the time) and the fact that she had always lived in Cameroon with her mother and siblings. Since those reasons did not find their way to the written decision that was sent to Fanny, they cannot be seen as the basis for the immigration officer's decision, nor did they have to be, given that the immigration officer was not obliged to consider H&C factors.

[21] I disagree with the Applicant's allegation that, "[t]his Court is left in a vacuum in reading the reasons of the IAD and the Immigration Officer" (Applicant's Further Memorandum at para 11). Rather, I believe that the IAD's decision clearly establishes the reasons for its dismissal of the Applicant's appeal.

[22] Section 65 of the IRPA stipulates that the IAD may not consider H&C considerations, "unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations." Once the IAD reasonably concluded that Fanny is not a member of the family class because she is not the Applicant's biological or adopted child, it was precluded from considering H&C factors.

[23] The Applicant understands the immigration officer's decision as having determined that Fanny "is not [his] daughter, *de facto* daughter or *de facto* adopted daughter". That is incorrect. The immigration officer determined that Fanny is not the Applicant's biological child.

[24] The immigration officer was not asked to consider whether Fanny may be a *de facto* daughter or a *de facto* adopted daughter.

[25] Furthermore, Fanny did not seek judicial review of the immigration officer's decision not to consider H&C factors, nor of the decision not to justify denying her application for permanent residence on H&C factors. In *Sultana v Canada (Citizenship and Immigration*), 2009 FC 533, this Court stated that :

> [15] It is worth mentioning that Mr. Arif appealed this decision to the Immigration Appeal Division of the Immigration and Refugee Board (the IAD). The appeal was dismissed without a hearing on February 4, 2009, on the ground that the IAD has no discretionary jurisdiction to consider humanitarian and compassionate considerations. Relying on section 65 of the IRPA and on the jurisprudence from this Court (most notably *Huang v Canada*, 2005 FC 1302), the IAD ruled that the proper forum in which to challenge a section 25 H&C decision by the Minister is to seek judicial review of that decision by the Federal Court. This was clearly the right decision to make.

[26] Rather, as Fanny's sponsor, the Applicant appealed the immigration officer's decision to the IAD (pursuant to subsection 63(1) of the IRPA) and is now seeking judicial review of the IAD's decision. The Applicant relies heavily on this Court's decision in *Zhong v Canada (Citizenship and Immigration)*, 2017 FC 223, to support his position. In that case, the applicant's permanent residence application as a member of the family class was initially denied. The applicant, by way of a representative retained by the applicant's parents, sought a reconsideration of the immigration officer's decision on H&C grounds, specifically requesting that the immigration officer consider the applicant as a *de facto* family member, taking into account the best interests of the child. The immigration officer denied that request on the basis that there was insufficient evidence to conclude that the applicant was a *de facto* family member. Justice Keith M. Boswell allowed the judicial review and sent the decision back for reconsideration. He was of the view that the immigration officer failed to reference key pieces of evidence that "strongly suggest that the Applicant is a *de facto* daughter of Mr. Zhong and Ms. Fan" (at para 30).

[27] Contrary to the Applicant's submissions, the *Zhong* case is not applicable here, since Fanny and the Applicant never sought to have Fanny's application considered or reconsidered on H&C grounds. On appeal, the IAD was statutorily precluded from doing so.

VII. Conclusion

[28] Since the IAD's decision to dismiss the Applicant's appeal was reasonable, and is defensible in respect of the facts and the law, this application for judicial review is dismissed. It remains open for Fanny to make another application for a permanent resident visa, accompanied

by written information in support of a request for H&C consideration under subsection 25(1) of the IRPA.

[29] The parties did not propose any question of general importance for certification and none arises from this case.

Annex A

Legislative provisions

Immigration and Refugee Protection Act
Loi sur l'immigration et la protection des réfugiés

Family reunification	**Regroupement familial**
12 (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	**2 (1)** La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.
[…]	[…]
Sponsorship of foreign nationals	**Parrainage de l'étranger**
13 (1) A Canadian citizen or permanent resident, or a group of Canadian citizens or permanent residents, a corporation incorporated under a law of Canada or of a province or an unincorporated organization or association under federal or provincial law — or any combination of them — may sponsor a foreign national, subject to the regulations.	**13 (1)** Tout citoyen canadien, résident permanent ou groupe de citoyens canadiens ou de résidents permanents ou toute personne morale ou association de régime fédéral ou provincial — ou tout groupe de telles de ces personnes ou associations — peut, sous réserve des règlements, parrainer un étranger.
[…]	[…]
Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**

25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[…]

[…]

Humanitarian and compassionate considerations — Minister's own initiative

Séjour pour motif d'ordre humanitaire à l'initiative du ministre

25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an

25.1 (1) Le ministre peut, de sa propre initiative, étudier le cas de l'étranger qui est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 — ou qui ne se conforme pas à la présente loi; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des

exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[…]

[…]

Right to appeal — visa refusal of family class

Droit d'appel : visa

63 (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

63 (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

[…]

[…]

Humanitarian and compassionate considerations

Motifs d'ordre humanitaires

65 In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

65 Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.

[…]

[…]

Appeal allowed	**Fondement de l'appel**
67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67 (1)** Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(a) the decision appealed is wrong in law or fact or mixed law and fact;	a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice has not been observed; or	b) il y a eu manquement à un principe de justice naturelle;
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

Immigration and Refugee Protection Regulation
Règlement sur l'immigration et la protection des réfugiés

Member	**Regroupement familial**
117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	117 (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :
(a) the sponsor's spouse, common-law partner or conjugal partner;	a) son époux, conjoint de fait ou partenaire conjugal;
(b) a dependent child of the sponsor;	b) ses enfants à charge;
[…]	[…]

Interpretation

2 The definitions in this section apply in these Regulations.

dependent child, in respect of a parent, means a child who

(a) has one of the following relationships with the parent, namely,

(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 is not a spouse or common-law partner, or

(ii) is 22 years of age or older and has depended substantially on the financial support of the parent since before attaining the age of 22 years and is unable to be financially self-supporting due to a physical or mental condition. (enfant à charge)

Interpretation — adoption

(2) For the purposes of these Regulations, ***adoption***, for greater certainty, means an adoption that creates a legal parent-child relationship and

Définitions

2 Les définitions qui suivent s'appliquent au présent règlement.

enfant à charge L'enfant qui :

a) d'une part, par rapport à l'un de ses parents :

(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 âgé de vingt-deux ans ou plus et n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents depuis le 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. (*dependent child*)

Interprétation : adoption

(2) Pour l'application du présent règlement, il est entendu que le terme ***adoption*** s'entend du lien de droit qui unit l'enfant à

severs the pre-existing legal parent-child relationship.

ses parents et qui rompt tout lien de filiation préexistant.

JUDGMENT in IMM-3802-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. No question of general importance is certified.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	PATRICE ESSINDI v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
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