

Federal Court



Cour fédérale

Date: 20120210

Docket: T-863-11

Citation: 2012 FC 201

Ottawa, Ontario, February 10, 2012

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

TRAN, TAM THANH

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction and Background

[1] The Applicant, Tam Thanh Tran, and his wife, Kim Nguyen were born in Vietnam and are Canadian citizens. By letter dated March 22, 2010, the Applicant was advised by Officer Patricia Brown (the Officer) at the Canadian High Commission in Singapore (CHCS) the application for Canadian citizenship he made for his adopted son, My, was refused. My was born deaf and mute in a refugee camp in Hong Kong in 1995. His father was killed in a motorcycle accident in 2007 in Vietnam; his birth mother, Kim Loan, lives in Vietnam. My was formally adopted in November 2008 upon receiving the consent of the Vietnamese authorities. My is now 17 years old and has

been living since late 2008 or early 2009 in an orphanage in Ho Chi Minh City (HCMC), formerly Saigon.

[2] The Officer gave the following reasons for the refusal:

Based on the results of our investigation, I have determined that Nguyen Quoc My does not meet the requirements of section 5.1(1)(d) of the *Citizenship Act* because:

- there are significant concerns over the credibility of information in your application, especially your explanation of the genesis of the relationship between yourself/your wife and the adopted child;
- the adoption process was begun in 2006 while the adopted child was living with his biological parents and his elder brother. Information on file shows he had always lived with his biological family without any evident problems; and,
- statements made by you and information on the file demonstrate that the primary reason for the adoption was to obtain a cochlear implant and other medical/social services in Canada for the adopted child.

[Emphasis added]

[3] Relying on section 5.1(1)(d) of the *Citizenship Act* (the Act), the Officer was not satisfied the adoption of My was not entered into primarily for the purpose of acquiring a status or privilege in relation to immigration or citizenship. Specifically, the Officer was of the view the status or privilege in Canada sought for My, is the benefit of medical and social services available in Canada and, in particular, to obtain a cochlear implant to give him a chance to be able to hear and speak and live a normal life.

[4] Section 5.1 of the *Citizenship Act*, RSC, 1985, c C-29 reads:

Adoptees — minors

Cas de personnes adoptées — mineurs

5.1 (1) Subject to subsection (3), the Minister shall on application grant citizenship to a person who was adopted by a citizen on or after January 1, 1947 while the person was a minor child if the adoption

5.1 (1) Sous réserve du paragraphe (3), le ministre attribue, sur demande, la citoyenneté à la personne adoptée par un citoyen le 1er janvier 1947 ou subséquemment lorsqu'elle était un enfant mineur. L'adoption doit par ailleurs satisfaire aux conditions suivantes :

(a) was in the best interests of the child;

a) elle a été faite dans l'intérêt supérieur de l'enfant;

(b) created a genuine relationship of parent and child;

b) elle a créé un véritable lien affectif parent-enfant entre l'adoptant et l'adopté;

(c) was in accordance with the laws of the place where the adoption took place and the laws of the country of residence of the adopting citizen; and

c) elle a été faite conformément au droit du lieu de l'adoption et du pays de résidence de l'adoptant;

(d) was not entered into primarily for the purpose of acquiring a status or privilege in relation to immigration or citizenship.

d) elle ne visait pas principalement l'acquisition d'un statut ou d'un privilège relatifs à l'immigration ou à la citoyenneté.

[5] The central question which arises in this judicial review application is how the Canadian officials at the CHCS and at the Canadian Consulate in HCMC (CCHCMC) carried out their investigation into the Applicant's application for My's Canadian Citizenship filed in December 2008 and, in particular, the fairness aspect of that investigation and the reasonableness of the findings of fact flowing from it.

II. Overview

[6] The documentary evidence in the Respondent's Record (RR) establishes the following facts:

- a. Between 1988 and 1993, Kim Nguyen, then a 15-year-old orphan, lived in a refugee camp in Hong Kong.
- b. It was there that she met My's future birth parents. They took care and looked after her. She felt indebted to them for what they did for her in the refugee camp.
- c. In 1993, Kim Nguyen left the camp in Hong Kong to live in a refugee camp in the Philippines for a year. In 1994, she immigrated to Canada with her husband whom she divorced in Canada a few years later. As noted, My was born in 1995 in the refugee camp in Hong Kong. Kim Nguyen married the Applicant in Canada in December 2002.
- d. The couple traveled to Vietnam in 2003 to celebrate their marriage. Kim Nguyen re-connected with My's birth parents. It was then that they met My for the first time. They thought about adopting him because there was no school for children with special needs in that area in the north of the country where the family lived.
- e. My's parents were not warm to the idea of My being adopted. Despite this fact, the Applicant and his wife, in 2006, retained the services of a duly accredited Canadian International Adoption Service. A Homestudy was prepared by Martha Maslen who met the couple on a number of occasions. That study was filed with authorities in Ontario (whose concurrence was required). As will be seen, the Homestudy contained a number of statements as to when Kim Nguyen first met My and whether she immigrate to Canada alone in 1994. The Homestudy states she met My at the

refugee camp and traveled to Canada alone. CHCS had on file a letter from a friend who also indicated Kim Nguyen cared for My at the refugee camp (the friend's letter). In any event, no formal steps were taken to adopt My in 2006 because of his family's opposition.

- f. Matters changed dramatically in 2007 when My's father was killed in a motorcycle accident leaving My's mother, Kim Loan, who was not working at the time, to look after My, his elder brother and her husband's elderly mother. Times were difficult. My was placed in a school for the deaf in Hanoi but traveled home on weekends. My's adoption was raised once again by the Applicant and his wife; Kim Loan agreed. Papers were processed in 2008. The Vietnamese authorities agreed to the adoption which was formalized in November 28, 2008 in a traditional ceremony of transfer at which My's mother and adoptive parents were present. My's application for Canadian citizenship was filed with Citizenship and Immigration Canada (CIC) shortly thereafter.
- g. Shortly after the adoption My was transferred to an orphanage in HCMC; he has been there ever since. That orphanage is operated by nuns, one of whom is Kim Nguyen's aunt.
- h. The record shows the Applicant and his wife have paid for all of My's expenses which now included, for the first time, a private tutor teaching him sign language enabling him to read and write. The Applicant and his wife are in constant communication with their adopted son. He has no contact with his birth mother. Kim Nguyen stayed a number of months with him in 2009 and recently 5 weeks in 2011.

III. CIC's Investigation

[7] The details of the investigation, which included a CBSA anti-fraud officer, are revealed in the Certified Tribunal Record (CTR) which essentially contains the CAIPS notes of officials at the CHCS and the CCHCMC.

[8] It also contains the interaction between those officials with the Applicant and also with Martha Maslen, the adoption facilitator and author of the Homestudy.

[9] The CTR shows:

- a. File opening in 2008 at CHCS followed up with a December 10, 2008 letter to the Applicant asking for background information including details on the parent-child relationship.
- b. The response from Mr. Tran, was summarized by CHCS as showing Kim Nguyen met My's parents at the refugee camp in Hong Kong; they found out in 2003 My was deaf and mute; their offer to adopt him was refused; learned that My's father was killed in an accident and felt strongly that they must care for him; stated that they want to provide him with the cochlear implant to enable him to hear and speak and live a normal life. The CAIPS notes also acknowledge having a copy of the Homestudy prepared by Martha Maslen.
- c. A preliminary analysis by the Officer, dated January 29, 2009, (see RR, p 8) says: “at this point am investigating the connection between the adoptive mother and subject. There is a letter on file from a friend that states the adoptive mother took

care of subject (My) in the refugee camp and became very attached to him.”

[Emphasis added] The Officer wrote after examining Kim Nguyen’s immigration file to Canada “This claim is untrue” noting that she had immigrated to Canada with her husband in 1994 from a refugee camp in the Philippines and was born in 1995 in Hong Kong. She said she asked the prospective parents “to provide full information on where and how they came to know the subject [My]”. [Emphasis added]

- d. The receipt by CHCS of an e-mail dated February 12, 2009, from Mr. Tran, the Applicant stating: (a) his wife met My's birth parents in 1989 at the refugee camp in Hong Kong; (b) that he and his wife first met My in June 2003 when he was 8 years old; (c) his wife entered Canada on March 5, 1994; (d) that his wife came to Canada alone.
- e. The Officer wrote that an interview is required to assess the parent-child relationship stating special arrangements need to be put in place because My is deaf and mute.
- f. Interview of My conducted on October 7, 2009 by Mr. Ford at CCHCMC. Interview aborted and inconclusive because My cannot communicate. He does not know enough sign language.
- g. Note to file by Mr. Ford dated December 14, 2009 indicates verifications by the Ministry Intelligence Unit (MIU) conclude that My is at the orphanage in HCMC full-time; he no longer has contact with his mother and brother; adoptive mother is calling frequently the orphanage to check on My's condition. Mr. Ford states: “There is no evidence of this adoption being undertaken for the purpose of gaining status in Canada or that there is any concern of undue gain.” ... “I have no further concerns

with this adoption. Everything seems to be in order.” He ends his note by making a reference to the letter of support. He indicates: “This letter is from a family friend and while specious, its veracity has not been upheld by adoptive parents so this is a non-issue.” [Emphasis added]

[10] That same day, however, upon a review of the Homestudy and before finalization Mr. Ford wrote: “it appears that contradictory information that was of concern before was also given to the social worker (Martha Maslen) by the adoptive parents, not by a friend. This warrants further examination.” [Emphasis added]

[11] Mr. Ford sent a note to Martha Maslen asking her specific questions:

- a. Can you confirm that the Applicant and his wife informed you that Ms. Nguyen cared for My when she was at the refugee camp?; and
- b. Can you confirm that they informed you that the child they intend to adopt lives with a family in Vietnam and whether she has details about what family he is living with?

[12] A few days later, Martha Maslen responded in writing to Mr. Ford's inquiry. She confirmed Kim Nguyen had told her she had taken care of My at a refugee camp in Hong Kong and that while she had no way to corroborate this information said that Kim Nguyen's emotional attachment to My was evident and it appeared to her this attachment began when she looked after him at the refugee camp. She also confirmed to Mr. Ford that at the time of her last assessment in 2008, My was living with a family in Vietnam, after his father's death in 2007, that his mother had made arrangements to have him attend a school for deaf in Hanoi and return to his home village on weekends. She noted

the mother was having an extremely difficult time in looking after him both financially and emotionally. She could not confirm if My's mother continued to care for him.

[13] In a note to file dated January 18, 2010, Mr. Ford, based on Martha Maslen's letter, noted: "appears prospective parents deliberately misrepresented information during Homestudy as prospective mother was landed before My was born and concerns remain valid." Mr. Ford also expressed a concern that all the information was now being channelled through the adoptive parents or from the orphanage from their relatives. He suggested as next steps; (1) a phone interview with adoptive parents; (2) a possible site visit to My's biological mother; and (3) a verification of My's father's death certificate.

[14] Mr. Ford then had a telephone interview on January 27, 2010, with the Applicant (see RR p 13). In summary, according to Mr. Ford, he put to Mr. Tran the friend's letter and that Mr. Tran told him that he was not sure his wife looked after My in the refugee camp "because the timing does not seem to work; the kid was born in 1995 right?" He told Mr. Ford, Dung Thi Pham (whose letter had been sent to CIC and had said Ms. Nguyen had taken care of My at the camp) was indeed a family friend of his wife but his letter may have been badly translated (the Court could not find in the CTR a copy of that letter).

[15] Mr. Ford expressed his concerns to Mr. Tran because he had confirmation from Martha Maslen she was told the Applicant's wife had taken care of My at the refugee camp. Mr. Ford also noted Mr. Tran told him My had been moved to the orphanage in HCMC because he was not accepted in his home village. Mr. Ford expressed concern about the lack of information on the biological mother and how My was moved to a new orphanage under the care of his aunt. He

remarked that at the time of the Homestudy My was at an orphanage near Halong Bay and traveled weekends to see his mother and this suddenly stopped.

[16] Mr. Ford records Mr. Tran's responses he does not know if his wife took care of My at the camp but she was close to his birth parents and that he was moved from Halong Bay because My was under his care and was not accepted in Halong Bay.

[17] Mr. Ford records the next steps as being confirmation from the Applicant's wife in a written statement explaining why she told Martha Maslen she had cared for My at the camp. He also recommended a site visit by MIU with My's biological mother.

[18] On February 11, 2010, Mr. Ford received another e-mail from Martha Maslen in which she apologized for the mistake she made in advising him that the Applicant's wife had taken care of My at the camp. This was not correct since she had left the camp before My was born. It was My's parents who took care of Kim Nguyen at the refugee camp. Mr. Ford notes that Martha Maslen's information was contradictory. He concluded her information was not credible because she had obviously been in touch with Mr. Tran and his wife.

[19] The CTR also contains a Site Visit Report from MIU Officer Jack Avery dated November 27, 2009 (RR p 76-77). On that date, he visited My's orphanage in HCMC and was greeted by two nuns. Sister Khiem told him that My was brought there by his adoptive mother in September/October of 2008. Note that the adoption approval from the Vietnam authorities is dated October 10, 2008, the start of the school year. Sister Khiem indicated his adoptive mother is caring

for him and that his biological mother never calls to check on him and that My always asked about his adoptive mother. He also met Sister Marie Ngoc Lan, Kim Nguyen's distant aunt.

[20] It should also be noted that Mr. Avery also stated that the letter from Dung Thi Phan made a false statement regarding Kim Nguyen's relationship with My stating that they met at the camp when My was young. Mr. Avery concluded: "This is not true."

[21] The investigation closes with a note from Jack Avery recorded on January 25, 2011 on his on-site visit on January 19, 2011 to Kim Loan's village to interview her. He was accompanied by a colleague who spoke Vietnamese. His report may be summarized as follows:

- a. Upon arrival, his colleague dialed Kim Loan's cell phone number which was answered by a person who denied she was Kim Loan saying Kim Loan had lent her the cell phone as well as the use of her house being away for a few months.
- b. They met a person at a café who was a good friend of Kim Loan's and knew the whole family's history particularly the fact My was in an orphanage in HCMC and the older sibling was studying at a university in Hanoi. Kim Loan had given this person a spare key to the house, had gone to Hanoi that day and would return the next day. This person provided directions to Kim's house.
- c. Kim Loan's house was seen and described as a two-story structure with a very nice garden on a good portion of land (by Vietnamese standards). He noted according to the woman at the café, Kim Loan receives rental income from either this property or another one.

[22] Mr. Avery concluded “from the history on file and Loan’s deceit in denying her identity, it seems apparent that she does not want to be interviewed.”

IV. The Officer's Detailed Reasons

[23] The Computer Assisted Immigration Processing System (CAIPS) notes (Respondent’s Record, page 12) contain the Officer’s detailed reasoning. She framed the issue as:

“The concerns on this file is whether the adoption was entered into primarily for the purpose of acquiring a status or privilege under the Act in Canada or whether the primary motivation of the adoption was to establish a parent-child relationship.”

[Emphasis added]

[24] She identified the issues of concern as:

- a. Lack of credibility of information provided by the adoptive mother (or adoptive parents) to the author of the Homestudy. The Homestudy indicated the proposed adopted mother cared for My since his birth in Hong Kong in 1995 whereas her immigration papers showed she had immigrated to Canada in 1994. Moreover, the fact Mr. Tran was not sure where his wife (whom he married in Canada in 2002) first met My was a matter of concern. She concluded on the point that “when/how the adoptive parents met My had never been answered in a credible way by the adoptive parents”. In addition, the Homestudy indicated the adoptive mother had only been married once while Kim Nguyen’s immigration papers showed she arrived in Canada in 1994 with her first husband. To compound matters, Mr. Tran, in an e-mail, advised the Canadian authorities in February 2009, that Kim Nguyen had come to Canada alone. The Officer asks the question “why is her previous

marriage being hidden?” In her view, there was no apparent reason for the author of the Homestudy to misrepresent such information. Acknowledging the information in the Homestudy was not verifiable by the Visa Officer she added “these two clear misrepresentations on easily verifiable issues lead me to believe there was a serious issue of the credibility of the information provided by the adoptive mother or father, in the Homestudy.”

- b. The circumstances of the adoption were a concern. The Officer noted My and his brother were living with their parents when the adoption began in 2006. She notes “the adoption was being discussed in 2006 while the child was still living with his entire biological family before the child's father was killed in a traffic accident in May 2007.” She concluded there was “no apparent reason for My to be adopted at the time except to gain status in Canada and then access to the Canadian medical system and social services available to the deaf.”
- c. From the information on file (Nov 08 forms), the Applicant always lived with his birth family and was enrolled at school. The Officer refers to an interview in October 2009 with a Sister Nqoc at the orphanage in HCMC who indicated My had come to the orphanage from another orphanage in February 2009. Yet, Sister Khiem, during a site visit in November 2009 stated My came to the orphanage in September 2008. The Officer noted the adoption documents show that My was living at the home address at the time the adoption was finalized on November 27, 2008 as do the school transcripts for 2007/08 also show his living with his birth mother.

- d. “An attempt to interview the birth mother Kim Loan was not successful.” Jack Avery from either CHCS or the CCHCMC accompanied by a colleague who spoke Vietnamese had gone to the birth mother’s village to interview her. The Applicant (the proposed adoptive father) had provided Kim Loan’s cell phone number. When her cell phone number was dialed, the person who answered claimed to be a friend who “had been given the phone and who provided incorrect information about the whereabouts of the mother.” Also, a visit to the home “revealed the family is comfortable economically by Vietnamese standards and the My’s brother is currently studying at the University in Hanoi.”
- e. There are several references on file regarding obtaining a cochlear implant and also a reference to a contact with the teacher of the deaf at the Ottawa Carleton District School with respect to support services for the hearing impaired once the child is in Canada. The Officer quotes an e-mail from the Applicant to her on December 19, 2008 stating: “Whether My becomes my son or not is secondary. The only thing I care about is to use the cochlear implant to give him a chance to be able to hear and speak and live a normal life.” The Officer concludes this “does not indicate *bona fide* adoption.” It indicates that the goal is to come to Canada to obtain a cochlear implant and other services. The Officer then adds that “the adoptive parents could obtain a cochlear implant plus the device from within the region (the Bangkok Hospital) for approximately \$44,000.00 CAD and, in particular, since 2009 at the HCMC Ear, Nose and Throat Hospital.” [Emphasis added]

[25] The Officer concludes by stating:

Given the information from our review interviews and investigations above, it is my reasonable belief that this adoption was entered into primarily for the purpose of acquiring status under the *Citizenship Act*. Therefore, I must refuse the application per section 5.1(1)(d) of the *Citizenship Act*. Refusal letter issued today.

[Emphasis added]

V. Analysis

[26] This decision raises a number of important issues. Section 5.1 of the Act is new legislation in force on August 17, 2009. It provides a new direct route to adopted children acquiring Canadian Citizenship. The jurisprudence is limited; Justice Richard Mosley's decision in *Jardine v Canada (Citizenship and Immigration)*, 2011 FC 565 (*Jardine*) makes the following points:

- a. A decision under section 5.1 of the Act is largely fact-driven and, therefore, reviewed on a standard of reasonableness as explained by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.
- b. Section 5.1 of the Act sets out four criteria. Those criteria are conjunctive, that is, all of them must be met in order for an adoption to qualify under the Act.
- c. The determining factor in the case before him was an evidentiary one; whether the officer, who had refused the citizenship application, properly considered the evidence submitted by the applicants. Justice Mosley so found and the judicial review application was granted.

VI. The Argument

(a) For the Applicant

[27] In the case before me, counsel for Mr. Tran raises issues related to ignoring the evidence and drawing unreasonable inferences from the evidence. Moreover, he says the Officer failed to consider and properly apply the previous jurisprudence on adoptions of convenience under the previous regime which were “codified” in Citizenship and Immigration Canada’s Operating Guidelines (CIC – CP 14 Adoption) (the Guidelines) for use by decision makers. During oral argument counsel for the Applicant raised issues of fairness in the conduct of the investigation and, in particular, the failure to confront Kim Nguyen on information she was said to have provided or obtained during the investigation from external sources.

[28] Counsel for the Applicant’s submissions were:

- a. The Officer’s finding that there were significant concerns about the credibility of the application is flawed because it was based on the following errors: (i) ignoring the evidence, particularly from the author of the Homestudy, who admitted, because of the language barrier with Kim Nguyen, she misunderstood who took care of who at the refugee camp. My’s parents took care of Kim Nguyen at the camp and Kim helped take care of My’s brother who was a baby when she arrived at the camp; (ii) the fact that Jack Avery in a note to file found as a fact that the adoptive parents first met My in 2003 all of which was corroborated by evidence from Children’s Bridge, the adoptive agency (see RR p 63); (iii) the fact the Applicant stated the timing of information that triggered the Officer to doubt did not fit. The burden of this evidence was that Kim did not take care of My in 1995 because she was not in the

camp at that time and My was not born when she left the camp. All of the substantial evidence is to this effect. Moreover, the friend's letter was discredited.

- b. The investigation was based on incomplete information derived extraneously and never put to the Applicant or his wife, for example, inferences from the visit to Kim Loan's village by Jack Avery and the research concluded by the Officer on the availability of a cochlear implant in the Region.
- c. It was Kim Nguyen's information which was at issue but she was never questioned herself.
- d. The Officer's conclusion the adoption process began in 2006 while My was living with his parents (which is true) ignores the change in circumstances i.e. the fact My's father died in 2007. It also ignores the fact in 2006 My's parents had refused to put My for adoption with the result that these efforts were discontinued and only re-started after 2007 when conditions were such Kim Loan consented to My's adoption, which was consummated in November 2008.

[29] More important, counsel for the Applicant argues the Officer failed to follow the Guidelines by not considering My's best interests and the genuineness of the parent-child relationship, particularly the fact that his relationship with Kim Loan has been completely severed since the adoption. It was conceded My's adoption was authorized by the authorities in Vietnam.

[30] Finally, counsel for the Applicant argued the Officer made no analysis of why she came to the view that the adoption was entered into primarily for convenience over all other factors.

(b) For the Respondent

[31] Counsel for the Respondent made these points:

- a. He recognized the Officer had made no determination that the adoption was in My's best interest or that the parent-child relationship was considered.
- b. He also recognized the sole determination the Officer made was on section 5.1(1)(d) of the *Act* and was based on the evidence which was reasonably considered, and was sufficient to support the decision she made, particularly, if proper account is taken of the reasons expressed by the Applicant himself that what was important was for My to obtain a cochlear implant in order to enable My to hear and communicate better through sign language.
- c. He argued the other points raised by counsel for the Applicant were either irrelevant or not determinative.

VII. Standard of Review

[32] Both counsel agreed that decisions of this nature must be reviewed on a standard of reasonableness because such decision is fact driven. What that means was explained by the Supreme Court of Canada decision in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 47:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is

concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[33] Reference should also be made that the Court's decision in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 where attention was drawn by Justice Binnie at paragraphs 3 and 46 to section 18.1(4)(d) of the *Federal Courts Act* (R.S.C., 1985, c. F-7) which reads:

18.1

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

...

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

...

18.1

Motifs

(4) Les mesures prévues au paragraphe;

...

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

...

[34] Ignoring the evidence or misunderstanding that evidence is a ground for review.

VIII. Conclusions

[35] This judicial review application must be allowed for the following reasons.

[36] First and foremost, the Officer failed to follow the Minister's Guidelines in assessing the application. These Guidelines are set out in Chapter 14 of the CIC's Operations Manual. I

appreciate the Guidelines are not regulations and are not binding but their importance was signalled in the Supreme Court of Canada's decision in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (*Baker*) where Justice L'Heureux-Dubé wrote at paragraph 22 the following about Ministerial guidelines:

...The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

[Emphasis added]

[37] *Baker* was commented upon by that Court in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 at paragraph 36 where the guidelines were referred to as “a set of published instructions to immigration officers.”

[38] The Guidelines in this case are clear; (i) they identify the program objectives for the adoption of minors (which is the case here) wherein the adoption must be carried out respecting the best interest of the child; (ii) the adoption must have a genuine parent-child relationship that permanently severs the legal ties with the child's biological parents; (iii) the adoption must be in accordance with the laws where the adoption took place and the laws of the adoptive parents' place of residence; and (iv) must not be an adoption of convenience.

[39] The Guidelines spell out indicators to be considered for the four criteria in section 5.1 of the Act with particular attention to be focused on the best interest of the child, recognizing that there may be a “multitude of factors that may infringe on the child's best interest”.

[40] In terms of a genuine parent-child relationship the Guidelines emphasize the purpose of the adoption should be to establish such relationship and not for the purpose of assisting that child to gain admission to Canada or to Canadian Citizenship. This factor of the Guidelines say this assessment should be “in conjunction with the criteria governing the assessment of adoptions of convenience”.

[41] The Guidelines also spell out the factors which identify an adoption of convenience. They are:

- the circumstances of the adoption;
- the whereabouts of the child's biological parents and the nature of their personal circumstances;
- who was included in the child's household before and after the adoption (e.g. did the child continue to live in the same household as the biological parents even after the adoption);
- Whether the adoptive parents are supplying financial and emotional support;
- the motivation or reasons for the adoption of the child that the biological parents and the adopting parents give;
- the authority and suasion of the adopting parent(s) over the adopted child;
- arrangements and actions taken by the adoptive parent(s) as it relates to caring, providing, and planning for the adopted child;

- supplanting of the authority of the child's biological parent(s) by that of the adopting parent(s);
- the relationship between the adopted child and the biological parent(s) before the adoption;
- the relationship between the adopted child and the biological parent(s) after the adoption;
- the treatment of the adopted child versus that of biological children by the adopting parent(s);
- the prevailing social and legal practices governing adoption in the child's home country;
- in a case where the adoption took place a long time ago, evidence that the child has lived with the adoptive parents and that they cared for the child.

[42] Moreover, paragraph 11 of the Guidelines say the following:

Factors to be considered

Sections 5.1, 5.2, and 5.3 of the Citizenship Regulations provide a non-exhaustive list of factors to be considered in determining whether the requirements of subsections 5.1(1) and 5.1(2) of the Act have been met. These factors are not requirements; therefore, the presence or absence of any one or more of the factors would not automatically result in the acceptance/refusal of a particular application for a grant of citizenship under section 5.1 of the Act. Rather, these factors are to be considered and weighed in each individual case, in order to assist officers in deciding whether or not the requirements of subsection 5.1(1) and 5.1(2) of the Act have been met for the purpose of granting or refusing an application for Canadian citizenship.

The factors set out in Regulations are sufficiently precise so as to inform citizens who are contemplating adopting a child from another country of the considerations which will guide an officer's decision-making when assessing an application for citizenship made under section 5.1 of the Act.

The list of non-compulsory factors also allows officers the necessary flexibility to make appropriate decisions in a wide range of cases under subsections 5.1(1) and 5.1(2) of the Act. Cases will range from an adult who applies for citizenship after having been adopted at birth to an infant who was recently adopted abroad by a Canadian citizen.

[Emphasis added]

[43] It is clear from the RR that the Officer did not follow the Guidelines. Counsel for the Respondent acknowledged this fact. The Court must intervene because the approach taken by the Officer led her not to weigh all of the evidence before her but to concentrate on only one, thus failing to consider the evidence as a whole.

[44] In my view the error identified above is determinative.

[45] Having said this, I agree with counsel for the Applicant the Officer ignored the evidence or refused to take into account uncontroverted evidence which showed it was impossible for My to have been cared for at the refugee camp in Hong Kong. She also misconstrued the evidence in terms of when My's adoption was in play; she failed to assess the genuineness of the parent-child relationship and she was unfair to the adoptive parents by taking into account external facts derived from her research or that of other officials of CIC. As such, the investigation was not a reasonable one in the circumstances. It is true the Applicant may have said he wanted to have My fitted with a cochlear implant. That single factor, in isolation, is not sufficient, in the circumstances of this case, to enable the Officer to come to the conclusion she did. Again it is an example of what is the fundamental problem in this case, namely, concentration solely on the adoption of convenience

factor in isolation to the other relevant factors and failing to weigh them together to achieve what Parliament intended.

JUDGMENT

THIS COURT’S JUDGMENT is that this judicial review application is granted with costs. The Officer’s decision under review is quashed and the application for My’s citizenship is returned for reconsideration as soon as practicable by a different officer in accordance with these reasons.

“François Lemieux”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-863-11

STYLE OF CAUSE: TRAN, TAM THANH v MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: December 14, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** Lemieux J.

DATED: February 10, 2012

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