

Federal Court



Cour fédérale

Date: 20120326

Docket: IMM-5777-11

Citation: 2012 FC 358

Ottawa, Ontario, March 26, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

MUHAMMED RABIU ABDUL RAHMANI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application brought forth under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], seeking judicial review of an Immigration Appeal Division [IAD] decision dated August 4, 2011. The IAD dismissed the Applicant's appeal of an immigration program manager's [the manager] ruling that his son, whom the Applicant had sponsored for permanent residency as a dependant child, was inadmissible to Canada under subsection 40(1) of the IRPA for having misrepresented his date of birth.

I. Background

[2] The Applicant, Mr. Muhammed Rabiul Abdul Rahmani, is a 56 year old Canadian citizen who fled Ghana as a refugee in 1987.

[3] In May of 2008, he filed a sponsorship application for his son, Abdul Kadiri Mohammed Abdul Rahman [Mr. Rahman], for permanent residence under the ‘family class’ category. To qualify, Mr. Rahman had to meet the definition of a ‘dependent child’ as set out in section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], and as he did not meet the other possible criteria of section 2, Mr. Rahman had to be less than 22 years old to qualify.

[4] Mr. Rahman indicated that he was born on October 10, 1986, a date that would have qualified him as a dependent child. This date of birth was also corroborated by his Certified Copy of Entry in Register Birth and his passport (Applicant’s Record [AR] at 45 and 53), both issued prior to the application for permanent residency, on April 18 and December 3, 2007 respectively. However, because the birth certificate was issued just over a month before the lock-in date of the application at CPC-Mississauga and because the date of birth in the passport was based on the same document, the immigration officer reviewing the file determined these were not conclusive evidence of the Applicant’s age.

[5] The officer interviewed Mr. Rahman on May 14, 2009 and questions arose surrounding his voter ID card. Because the applicant received his first voter ID card in 2003, the officer deduced that he would have been 18 at the time and consequently born in 1985. The officer pursued his investigation and made the following entry in the Computer Assisted Immigration Processing System notes [CAIPS notes] (Trial Record [TR] at 24): “Examined Independence Avenue ‘2’ JHS

Admission Register on 05 June 2009. Found record for Bashiru Kadiri with year of birth: 1985. File to KS, this date.”

[6] After reviewing the application and supporting documents, the officer informed Mr. Rahman and the Applicant through a concern letter of the following (AR at 42): “I have concern that you have submitted an improperly obtained birth certificate. The Voter’s ID and your WAEC statement of results has been verified as genuine. Your date of birth has been verified as January 16, 1985 and not October 10, 1986 as you claim.”

[7] Mr. Rahman was given the opportunity to respond within 30 days of receiving the letter, but did not avail himself of it. The Applicant responded by letter dated July 9, 2009 in which he wrote the following (AR at 41): “Please note that the birth date submitted by me as October 10th, 1986 is the correct birthdate. The error is my mistake.” Deeming this response did not adequately address his concerns and suspecting Mr. Rahman had engaged in misrepresentation, the officer forwarded the file to the manager to assess the application with respect to misrepresentation under section 40 of the IRPA.

[8] The manager examined the conflicting evidence and described the evidence Mr. Rahman was born in 1985 as follows in the CAIPS notes (TR at 25):

[Mr. Rahman] has presented a certificate from the Independence Avenue “2” Basic School for Basic Education Certificate Examination. This certificate contains an index number 10105824 and contains the applicant’s full name as Mohammed Rabiul Kadiri Abdul. This document was reviewed with the admission register of the institution on or about June 8, 2009 and the document’s authenticity was confirmed.

This document contains no further personal details but as it was presented by the applicant, I am satisfied that this document pertains

to him. The office of the registrar of this institution confirmed that their records showed that this applicant was born in 1985.

As a result, a fairness letter dated November 11, 2009 was sent informing Mr. Rahman that he had misrepresented his true date of birth and that on a balance of probabilities, he was actually born in 1985. It explained that this assessment was based on the contradictory information as identified in the excerpt from the CAIPS notes above. The fairness letter further explains that (AR at 39):

After considering this conflicting information, I am satisfied that you were born in 1985. I consider the birth registration so many years after your birth is self-serving and was done to give the appearance that you were under 22 years of age at the time of lock-in for your present sponsorship. Other supporting documents, such as your passport, were issued subsequent to this birth registration. You have not provided other satisfactory evidence predating your birth registration to support your claimed date of birth. I am satisfied that the school records contained in the register noted above are a true reflection of the year of your birth.

[9] Given a second chance to address this issue, Mr. Rahman responded in a letter dated January 6, 2010 (AR at 37). In it, Mr. Rahman explains the contradiction as follows: “[...] concerning doubt of my date of birth as your investigation has shown from my basic school as 1985, Sir/Madam, it was the mistake of my grandfather who was taking care of me who gave out that date as (1985) but my father has once told me that I was born on 1986 many years ago.” Mr. Rahman also attached a photocopy of an “original weighing card” which records his health history as a child after delivery (AR at 48-50). Mr. Rahman pointed out that this evidence, which predated the Entry in Register of Births issued on April 18, 2007, also indicates his date of birth as October 10, 1986.

[10] The manager indicates in the CAIPS notes that he carefully reviewed Mr. Rahman’s response and supporting evidence. With regard to the weighing card submitted, the manager notes that the ink used in the document is consistent over the whole document despite purporting to

having been completed over the course of a number of years. The manager also remarks that the chart skips the year 1988 and concludes that after careful consideration, he is not satisfied that the document was reliable evidence of Mr. Rahman's true age. As a result, after considering the information on file, he was satisfied that Mr. Rahman was born in 1985 and that he misrepresented material fact with respect to his date of birth (TR at 26). A corresponding refusal letter was sent on March 4, 2010. The Applicant appealed this decision to the IAD and a hearing was held on July 29, 2011, which the Applicant attended without counsel.

II. Impugned Decision

[11] In its reasons, the IAD acknowledges the Applicant's testimony at the hearing that his son was born on October 10, 1986. The Applicant had also intended to call four family members located in Ghana as witnesses. After reaching the Applicant's former sister-in-law and Mr. Rahman's maternal aunt, who testified that Mr. Rahman was born on October 10, 1986, the Minister's counsel was prepared to concede that all witnesses would testify that Mr. Rahman was born on that date. As a result, the IAD concluded it was not necessary to call the other witnesses.

[12] Regarding the original birth certificate, the Applicant explained that after his wife refused to follow him to Canada, they divorced and she later remarried and moved to Nigeria, leaving behind her son, but taking with her a number of important documents including her son's original birth certificate. Questioned whether he had attempted to contact his ex-wife to obtain the document, the Applicant "replied that he had not contacted his ex-wife in order to obtain these documents because as she had remarried and moved to another country, he did not want to bother her" (IAD Reasons at para 6). The transcript of the hearing reveals a clearly more nuanced answer (TR at 148): "That's another problem that I have with her, because she's kind of different, she became changed totally because of me and I did not want to disturb her, because where she is, she's married with another

man, somebody else [...] I don't get in contact with her since she left my son home with my family. I don't communicate with her.”

[13] The IAD also observed that when questioned by the Minister's counsel as to why he had applied for a new birth certificate rather than obtain a copy of the original, the Applicant explained that given the bureaucracy in Ghana, where such requests can take a long time to be acted upon, he felt it would be faster to request a new one.

[14] Proceeding with its five-paragraph analysis, the IAD concluded that the Applicant had maintained good relations with his ex-wife's family since he had been able to call her sister and sister's brother as witnesses. As a result, the IAD was puzzled that the Applicant did not try to contact his ex-wife in order to obtain the original birth certificate.

[15] The IAD also observed that the Applicant had filed his application for permanent residence on October 6, 2008 and that if the Applicant was indeed born on October 10, 1986, this application would have been filed just four days before his 22nd birthday. As a result, the IAD believed that the Applicant used a false date of birth for his son so as to be able to sponsor him as a dependent child within the legal age limit, explaining the submission of documentation indicating he was born on October 10, 1986. According to the IAD, this appeared to be a deliberate attempt to mislead the immigration authorities as opposed to a mistake as alleged by the Applicant.

[16] The IAD concluded that the Applicant had many years to obtain an original copy of the birth certificate, but failed to do so and that this could not be blamed on the illiteracy of his family in Ghana. The Applicant and Mr. Rahman had engaged in misrepresentation by using a false date of birth on the applications for permanent residence as a dependent child. Having considered all the

facts and evidence in the case, the IAD concluded that the refusal based on misrepresentation was valid in law and the Applicant had not met his burden of proof on the balance of probabilities.

III. Parties' Positions

[17] The Applicant attacks the IAD's decision on three separate grounds. First, he argues the IAD did not properly identify or evaluate the evidence that Mr. Rahman was born in 1985 while at the same time disregarding the testimony of witnesses and ignoring pieces of evidence which showed he was born in 1986. The second set of arguments highlights several erroneous findings of fact made by the IAD regarding the date of filing of the application, the date of issuance of the birth certificate, and questionable speculation as to the lack of the original birth certificate and current relationship with his ex-wife. Thirdly, the Applicant argues that the IAD failed to provide adequate reasons as they were not properly articulated, included several erroneous findings of fact, and failed to analyze relevant evidence.

[18] Explaining that it had access to the CAIPS notes and any relevant documentation considered by the visa officer, the Respondent rejects the notion that the IAD did not consider all of the evidence presented. The Respondent points to two sources of evidence on file which indicate Mr. Rahman was born in 1985 or earlier and questions the authenticity of all evidence submitted which shows 1986 as the year of birth. The Respondent also notes that Mr. Rahman and the Applicant had the opportunity to respond to the concerns of the visa officer and manager, but failed to provide sufficient documents and/or explanations. Instead, the Applicant is now asking this Court to evaluate the facts anew, but the Respondent stresses that it is not up to this Court to second guess the weight attributed to the various factors considered.

IV. Issues

1. Did the IAD commit a reviewable error? in its determination that the Applicant had misrepresented Mr. Rahman's date of birth?

V. Standard of Review

[19] The parties agree that determinations of misrepresentation are purely factual in nature and that the IAD must be afforded a high degree of deference. Accordingly, the applicable standard of review is that of reasonableness. This Court cannot substitute its own appreciation of the appropriate solution, but rather must determine if the outcome 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, [2008] 1 SCR 190 [*Dunsmuir*]). While there may be a more reasonable outcome, as long as this one fits comfortably with the principles of justification, transparency and intelligibility, it is not open to this Court to substitute its own view for a more preferable outcome (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339 [*Khosa*]).

[20] Before proceeding, I would reiterate that this Court is not tasked with re-weighing the facts or reviewing the officer or manager's decisions. Rather, keeping in mind the IAD's decision-making process and reasons, this Court must determine whether the outcome reached by the IAD respects the criteria set out by the Supreme Court in *Dunsmuir* and *Khosa* above.

VI. Analysis

[21] In its succinct five-page reasons, the IAD cites the decision taken by the manager, identifies the issue as whether the Applicant misrepresented Mr. Rahman's date of birth, summarizes the Applicant's testimony at the hearing and the submissions of both parties, and

then proceeds with its five-paragraph analysis before concluding that the refusal based on misrepresentation was valid in law.

[22] In the first paragraph of its analysis, the IAD makes the following observation (IAD Reasons at para 11):

According to the new birth certificate, [Mr. Rahman] was born on October 10, 2006. The visa officer noted that [Mr. Rahman's] school leaving certificate indicated that he was born in 1985. The [Applicant], who responded to the procedural fairness letter sent by the visa officer, explained that he had made a mistake and that the correct birth date is October 10, 2006 [emphasis added].

Clearly, this passage contains two blatant errors. According to his new birth certificate, Mr. Rahman was born in 1986 and not 2006 and this was the same date given by the Applicant in his response. In addition, the IAD refers to a "school leaving certificate" but there is no such document on record in the file nor is there any reference to such a certificate in the CAIPS notes. While the IAD may have meant to write 1986 and may have been referring to the "admission register" discussed by the officer in the CAIPS notes, such egregious errors concerning facts and evidence at the very heart of the issue raise serious doubts as to the quality of the IAD's analysis.

[23] In the following paragraph, the IAD questions why the Applicant had not obtained the original copy of his son's birth certificate from his ex-wife in Nigeria and speculates as to the quality of his relationship with his former in-laws. The IAD also notes that the Applicant sponsored his son in 2008, but only then "[...] realized that he did not have the proper documentation that was necessary to prove that his son was eligible to be sponsored [...]" and that is when he obtained a new birth certificate rather than ask his ex-wife for the original or obtain a certified copy of the original (IAD Reasons at para 12). Here the IAD commits another

serious error with regard to the timeline of events. The new birth certificate was issued on April 18, 2007, over a year before the application was filed, not after. This glaring factual error is clearly relevant to the issue in question.

[24] The next paragraph, arguably the ‘brunt’ of the IAD’s analysis, reads as follows (IAD Reasons at para 13):

With regards the grounds of refusal based on misrepresentation of material fact, documentary evidence in this file indicates that [Mr. Rahman] filed an application for permanent residence on October 6, 2008. If [Mr. Rahman] was indeed born on October 6, 1986, this application would have been filed just four days before his 22nd birthday. The Panel believes that the [Applicant] used a false date of birth for [Mr. Rahman] so as to be able to sponsor him as a dependant child within the age limit of 22 years. As such, documentation was submitted which attested that [Mr. Rahman] was born on October 10, 1986.

The near-extent of the IAD’s reasoning, on which it bases its overall conclusion, appears to be then that the documents indicating October 10, 1986 as a date of birth were submitted because the Applicant used a false date so that his son could qualify for residency. The IAD leaps to this conclusion based on the fact the application was filed on October 6, 2008, just four days before Mr. Rahman’s 22nd birthday.

[25] Putting aside even that the IAD again incorrectly identified the date of birth (getting it wrong in fact three out of four times over the course of its analysis), the IAD’s questionable reasoning is rendered even more doubtful by another erroneous finding of fact. While the Accra office may indeed have received the application from Mr. Rahman on October 6, 2008, the residency application does not actually hinge on this date. Rather, the Applicant had already filed the application in May of 2008 and the lock-in date was May 26, 2008, as indicated both in the

CAIPS notes (TR at 50) and in the fairness letter (AR at 24). The IAD therefore erred in finding the application was filed just four days before his birthday, creating an inaccurate sense of urgency to explain the alleged attempt to forge the date of birth. Based on its reasoning above, the IAD concluded that there appeared to be a deliberate attempt to mislead the immigration authorities and that the Applicant should have simply produced the original birth certificate, as if the entire decision rested on his failure to do so.

[26] Finally, I note that there was new evidence presented to the IAD. Four witnesses related to the Applicant were ready to testify to the effect that the Applicant was born in 1986. After the first call, the Minister's counsel admitted that the other witnesses would be saying the same. The IAD does not specifically comment on this new evidence. Since it is a *de novo* process and that this new evidence fully supports the Applicant's submissions, it should have been dealt with in the analysis.

[27] Pursuant to subsection 18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7, this Court has the power to set aside the IAD's decision and send it back for re-determination when it is satisfied under paragraph 18.1(4)(d) of the same legislation that the IAD has based its decision on an erroneous finding of fact that it made without regard for the material before it. To meet this requirement, the error must be truly erroneous, without regard to the evidence, and the decision must be based on the erroneous finding (*Rohm and Haas Canada Ltd v Canada (Anti-Dumping Tribunal)* (1978), 22 NR 175 at para 5, [1978] FCJ 522 (CA)). As the IAD's erroneous findings of fact were clearly made without regard to the evidence on record and relied on to reach the IAD's final conclusion, this Court finds that the requirement is met. Furthermore, as a result of the IAD's many glaring errors, this Court is unable to conclude that the outcome fits comfortably with the principle of justification (*Khosa*, above, at para 59) or that it falls within "a range of

possible, acceptable outcomes which are defensible in respect of the facts and law [emphasis added]” (*Dunsmuir*, above, at para 47).

[28] Finally, while the IAD noted in its reasons that the misrepresentation is limited to two years and thus does not constitute a permanent bar to the application, in reality the Applicant will obviously be prevented from applying again to sponsor his son as a ‘dependant child’ and hence as a family member under the ‘family class’ or ‘family reunification’ provisions of the IRPA. Concluding that the Applicant was born in 1985 thus has significant repercussions on the family’s ability to reunite and should not have been discarded so lightly by the IAD. The matter merits proper attention from the IAD, but its display of flawed reasoning and erroneous grasp of the facts makes clear that is not what occurred here.

[29] Counsel did not submit questions for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the file will be returned to a different IAD panel so that a new hearing can be held. No question will be certified.

“Simon Noël”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5777-11

STYLE OF CAUSE: MUHAMMED RABIU ABDUL RAHMANI
v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: March 22, 2012

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

DATED: March 26, 2012

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