Federal Court  Cour fédérale

Date: 20130611

Docket: IMM-2124-12

Citation: 2013 FC 637

Ottawa, Ontario, June 11, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

RAISAHMED MUSA INTWALA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of a Visa Officer (Officer) of the Canadian High Commission, New Delhi, dated 13 December 2011 (Decision), which found that the Applicant is ineligible to be granted a permanent residence visa on the basis that he is inadmissible to Canada under paragraph 40(1)(*a*) of the Act.

BACKGROUND

[2] The Applicant is a citizen of India. His son lives in Canada, and in August, 2003 sponsored the Applicant to come to Canada as a permanent resident in the family class category. In his application, the Applicant did not list one of his children by birth, Rizvan (sometimes spelled "Rizwan"). As the Applicant's son outlines in his affidavit, this is because Rizvan was adopted by his uncle, the Applicant's brother, in 1983 when Rizvan was an infant.

[3] The Applicant's son in Canada first submitted the sponsorship application in 2006. The Applicant, his wife, and his children (not including Rizvan) were interviewed in 2008. During that interview, the Applicant and his family were asked a number of questions with respect to Rizvan. The officer who conducted that interview ultimately concluded that the adoption appeared genuine, and the family could be processed further. The Applicant also provided two school certificates that contained Rizvan's adoptive father's name as his father. The transcript of this interview is attached as Exhibit B to the Affidavit of Imran Raiahmed Intwala.

[4] On 25 July 2008, the Applicant's family was refused immigration to Canada on financial grounds. The Applicant appealed based on humanitarian and compassionate (H&C) factors, and the appeal was allowed in September, 2010. The file was returned to the Canadian High Commission in New Delhi and processing recommenced.

[5] In preparing the new application the Applicant relied upon the officer's decision in 2008 that Rizvan was not a member of his family. Along with the application the Applicant also submitted an affidavit, dated 27 December 2010, outlining all the natural born members of his family, including Rizvan.

[6] By letter dated 24 May 2011, the Officer requested an explanation from the Applicant as to why Rizwan was not listed as his biological son in his new application. The Applicant replied by letter in June, 2011 (Applicant's Record, page 32) stating that his brother adopted Rizwan because he had no male children and that customary adoption is recognized by law in his state. The Applicant enclosed a text on the relevant customary law, as well as a ration card issued in 1996 showing Patel Ishtak as Rizvan's father. The Applicant goes on to say that customary adoption does not require any court orders or paper work and is based on conduct. The Applicant does not consider Rizvan as one of his family members, so he was not listed as one.

[7] By letter dated 13 December 2011, the Officer informed the Applicant that he was inadmissible to Canada under paragraph 40(1)(a) of the Act for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of the Act. For this reason, the Applicant's application for permanent residence was refused.

DECISION UNDER REVIEW

[8] The Decision consists of the Exclusion Letter dated 13 December 2011 and the Officer's Global Case Management Systems notes (Notes).

[9] By entry dated 7 December 2011 in the Notes, the Officer points out that in 2006 when the Applicant was first examined, he was asked why Rizwan was not listed as his son. The Applicant replied that he would "have to check." Two days later he provided a notarized adoption deed signed by the birth and adoptive parents, but no court order. The Officer notes that after the appeal the

Applicant had still not listed Rizwan as his son, and that the Applicant did not present Rizwan for an interview.

[10] The Notes from 7 December 2011 go on to discuss the Hindu Adoptions and Maintenance Act. Based on this act, the Officer found that the Applicant would not be able to legally give up Rizwan for adoption. The Applicant's counsel argued that the adoption was under customary law, but the Officer stated that the Applicant had not provided any documentation to support this proposition. The Officer was also concerned that the Applicant said Rizwan was adopted at 6 months, his wife said 5 months, and his counsel said 2.5 months. The Officer found on a balance of probabilities that the Applicant had tried to conceal his relationship with Rizwan, and had then tried to show that an adoption took place.

[11] The Exclusion Letter states that the Applicant was found inadmissible under paragraph 40(1)(*a*) of the Act because he failed to list his son Rizwan on his application, although Rizwan was listed as a brother by his sponsor, the son in Canada. The letter goes on to say:

> We advised you of this discrepancy and you subsequently provided a recently acquired adoption deed. Adoption among Muslims is prohibited under Indian law therefore the adoption is not legally recognized. Accordingly, you were obligated to declare Rizwan as your son and have him examined as he was under the age of 22 at the time of your sponsorship. You were provided with an opportunity to respond to these concerns.

[12] As such, the Applicant was deemed ineligible to come to Canada.

ISSUES

[13] The Applicant raises the following issues in this application:

a. Whether the Officer erred by coming to unreasonable conclusions with respect to paragraph 40(1)(*a*) of the Act;

b. Whether the Officer erred by finding that a misrepresentation was made pursuant to paragraph 40(1)(*a*) by the Applicant failing to include Rizvan in his resubmitted application forms in January, 2011;

c. Whether the Officer erred by ignoring the decision of a prior immigration officer made in February, 2008, who found that Rizvan was not part of the Applicant's family and that the adoption was genuine;

d. Whether the Officer erred by ignoring the affidavit of the Applicant, dated 27 December 2010, which identifies all the Applicant's natural born children, including Rizvan.

STANDARD OF REVIEW

[14] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[15] All of the issues raised by the Applicant involve a review of fact or mixed fact and law with respect to the Officer's finding of inadmissibility. Previous decisions of this Court have recognized that the standard of review applicable to finding of inadmissibility under paragraph 40(1)(*a*) is

reasonableness (*Kumar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 781 at paragraph 21; *Karami v Canada (Minister of Citizenship and Immigration)*, 2009 FC 788 at paragraph 14). Thus, contrary to the Applicant's Reply submissions, all the issues will be reviewed on a standard of reasonableness.

[16] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISONS

[17] The following provisions of the Act are applicable in this proceeding:

Misrepresentation	**Fausses déclarations**
40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40.** (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans

	l'application de la présente loi;
(b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;	b) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;
(c) on a final determination to vacate a decision to allow their claim for refugee protection or application for protection; or	c) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile ou de protection;
(d) on ceasing to be a citizen under paragraph 10(1)(a) of the *Citizenship Act*, in the circumstances set out in subsection 10(2) of that Act.	d) la perte de la citoyenneté au titre de l'alinéa 10(1)a) de la *Loi sur la citoyenneté* dans le cas visé au paragraphe 10(2) de cette loi.

ARGUMENTS

The Applicant

[18] The Applicant submits that it is clear from the transcript of the first interview in 2008 that the family was questioned separately and extensively as to the history of the adoption of Rizvan. On 3 March 2008, the first officer decided that the adoption of Rizvan was genuine and he was no longer a member of the Applicant's family. Given the fact that the Applicant was aware of this decision, it would have made no sense for the Applicant to include Rizvan as his son in his new application forms submitted on 11 January 2011.

[19] The Applicant submits that he had every right to rely on the decision made in 2008, but notwithstanding that decision, he points out that when he submitted his application in 2011 he included an affidavit that listed all his natural born children, including Rizvan (Affidavit of Imran Intwala, Exhibit C). In the Decision, the Officer states "subsequent to the appeal, the PA still does not declare Rizwan as his son." This is incorrect, as the Applicant does declare Rizwan as his son in

his affidavit. Not only did the Applicant follow the written decision of the first officer, he also declared in his affidavit that Rizvan is his natural born son.

[20] All the members of the family were consistent in their statements about Rizvan's adoption, and the only minor discrepancy related to Rizvan's age at the time of adoption which varied from 3 to 6 months, and the exact day and month of his birth in 1983. To clarify these matters, two affidavits were submitted to the Canadian High Commission, one dated 6 April 2011 and the other dated 7 April 2011. The Applicant points out that the adoption took place in 1983, and the dates given by family members are consistent given the passage of time. The Applicant's son in Canada states in his affidavit that the adoption was not something that the family dwelled upon, and it has been nearly 30 years since then.

[21] The Applicant further submits that had the issue in this application had to do with the validity of the adoption, the Applicant would have filed an appeal to the Immigration and Refugee Board of Canada. As to misrepresentation, the Applicant submits that the Officer's Decision was unreasonable.

The Respondent

[22] The Respondent points out that the Applicant failed to declare Rizwan as his son, but on his sponsor son's initial immigration application his son in Canada declared Rizwan as a brother. When the Applicant's son immigrated to Canada in 2000 he declared Rizwan as his brother, and indicated that Rizwan would be accompanying him to Canada. Twice the son wrote that his relationship to Rizwan was "brother," and there was no explanation given that Rizwan had been adopted and that the Applicant's family no longer considered part of the immediate family.

[23] The Respondent points out that there is no error in the Officer's statement that the Applicant did not declare Rizwan as his son. Rizwan was not listed as his son under either "Details of Family Members" or "Additional Family Information." On redetermination, there is no obligation on the Officer to agree with positive findings made by the initial visa officer. When the IAD allowed the appeal, it put no restrictions on the Officer's jurisdiction to consider the matter afresh. In fact, when the Applicant sought an appeal at the IAD against the within decision (denied for want of jurisdiction), the IAD made the following statement:

> In my view, once the appellant's case went back to the visa officer, it was open for a visa officer to make an additional finding of inadmissibility. Misrepresentation was not raised as a basis of refusal in the first refusal and IAD appeal. Even though the visa officer has considered Rizwan's adoption and the visa officer stated that it "appears genuine," there was no detailed analysis.

[24] The Officer noted that the H&C grounds had been dealt with on appeal, but that the issue of Rizwan's adoption had not been conclusively resolved or reviewed by the first officer. The Officer states in the Notes dated 7 December 2011:

> The case was allowed by IAD on H&C for the MNI not met. Subsequent to the appeal, PA still does not declare Rizwan as his son. Since the relationship, this lack of declaration and the adoption was not fully examined in the pre-appeal file, it was examined now in order to assess admissibility… As IAD has allowed on H&C the fact that the sponsor did not meet MNI so I am not assessing that.

[25] Prior to making the Decision, the Officer clearly informed the Applicant and his family that the issue of Rizvan had not been resolved. Shortly after the IAD decision, the visa officer requested Rizvan's birth certificate for further inquiry on the issue of possible misrepresentation. When it had not been received two months later, immigration officials again asked for a copy of the birth certificate. The Applicant sent some materials, including two affidavits from Rizwan which sought

to explain inconsistencies amongst documents presented. Rizwan's birth date on his school records was 8 July 1983 and the date on his birth certificate was 14 October 1983. The affidavit purported that the birth certificate was correct. However, the Respondent points out that when the Applicant's son initially declared Rizwan as his brother he listed Rizwan's birth date as 8 July 1983 on his immigration forms.

[26] On 24 May 2011, immigration officials sent a procedural fairness letter in which the Officer's specific concerns about Rizwan were outlined. The Applicant responded, stating that the adoption was permissible under customary law and that the first visa officer had been satisfied with the genuineness of the adoption.

[27] In the Notes dated 7 December 2011, the Officer states:

> I have reviewed the counsel's submissions and find that while they have provided statements, they have not provided any evidence of any of the claims. The onus was on the applicant to provide evidence to overcome the concern that they are not legally free to adopt. They did not provide any documentary evidence to substantiate the statements made by counsel. The crux of counsel's argument is that adoption is allowed customary law in India but they have not provided evidence that this particular adoption was recognized by Indian court system (in the form of a court order). Overall, I have reviewed the entire case and the submission from counsel and find that the concerns are not overcome.

[28] The Respondent submits that the Officer was accurate in saying that counsel did not provide evidence for the assertions put forward. Counsel submitted that "several experts" were consulted on Indian adoption law, but none of these "several experts" were named; nor was any explanation given as to who these individuals were, and if they were knowledgeable about adoptions customs. Counsel also submitted that Sharia law can be legally binding on Muslims in India, but there were

no authorities cited for this proposition. There was also no explanation for what custom was entered into for the adoption of Rizwan, or what efforts were made to legalize the adoption.

[29] The Officer also noted that on 4 September 2006, when asked why Rizwan was listed as a sibling by his sponsor and was not declared as a son by the Applicant, the Applicant did not say that Rizwan was adopted but stated "I will check." Two days later, on 6 September 2006, an adoption certificate was issued. The Respondent submits that it was reasonable for the Officer to conclude that these events indicated that it was probable that the Applicant was trying to conceal his relationship with Rizwan.

[30] The Officer also noted that there were inconsistencies in when the Applicant, his wife, and his counsel said that Rizwan was adopted. The Officer stated in the Notes from 07 December 2012, "I do not find it credible that biological parents cannot recall the difference between giving up their baby at 2.5 months vs 5 or 6 months."

[31] The Officer also placed weight on the fact that the Applicant was given the opportunity to present Rizwan for an interview, but declined. Rizwan very well could have provided convincing testimony that he was raised in another city by his aunt and uncle, as the Applicant claims. There is no indication that Rizwan is unavailable for questioning, and in fact he provided two affidavits seeking to explain inconsistencies between his birth certificates and his school records.

[32] In sum, the Respondent concludes that the Officer's determination that the Applicant was inadmissible due to a material misrepresentation was a reasonable conclusion in light of all the evidence presented by the Applicant.

The Applicant's Reply

[33] The Applicant submits that this Court only has jurisdiction to deal with the issue of misrepresentation as outlined in the Refusal Letter, and not the issue of the validity of Rizvan's adoption. If the issue were the adoption, then it would properly be before the IAD.

[34] As to the issue raised in paragraph 12 of the Respondent's Memorandum as to why the Applicant's son listed Rizwan as his brother on his application form in 2000, the Applicant points out that he and his son were asked about this on multiple occasions by immigration officers. At the 26 February 2008 interview, the Applicant said that he did not know why his son listed Rizwan as a brother. The Applicant submits that this is a completely logical answer; there is no evidence that the Applicant had anything to do with the preparation of his son's application to immigrate to Canada in 2000. When his son was asked at the interview why Rizvan was included in his application he said "It was a mistake, I did not know I should not write. Actually we feared that if we don't declare him that it could create a problem in my papers as he is biologically my brother." The Applicant submits there is no reason not to accept the explanations offered by the Applicant and his son, when they individually and years apart completed their respective application forms.

[35] The Applicant points out that the Respondent argues there is no error in the Officer stating that the Applicant did not declare his son, yet goes on to say that the Applicant included in his application an affidavit attesting to all his children. This is a contradiction. The Applicant submits that the affidavit is part of the application for permanent residence in Canada and that it clearly discloses Rizvan as the Applicant's biological son. The Applicant further submits that this is clear evidence that he did not commit a misrepresentation pursuant to subsection 40(1)(*a*) of the Act by failing to disclose Rizvan in his application.

[36] The Applicant agrees with the Respondent that the Officer was free to come to his or her own conclusions with respect to inadmissibility, but submits that this freedom does not mean that the Officer can simply ignore the notes from the first immigration officer's interview with the Applicant's family in 2008, especially given the fact that the Officer did not personally interview the Applicant or his family.

[37] The Respondent says that the Applicant was "clearing informed… that the issue of Rizvan had not been resolved." The Applicant has not been able to locate any communication to the Applicant that states that the issue of Rizvan had not been resolved. A procedural fairness letter dated 24 May 2011 was sent to the Applicant, which primarily raised issues to do with the validity of the adoption. It also said that the Officer was of the opinion that Rizvan should have been included in the Applicant's application, and that failure to do so may constitute a misrepresentation.

[38] The Respondent also emphasizes that the Applicant was given an opportunity to present Rizvan for an interview but declined. The Applicant points out, however, that nowhere in the correspondence by either the first or second officer is there a request to present Rizvan for an interview. At the first interview, the Officer asked the Applicant if he brought Rizvan along. The Applicant simply replied "no," and the interview carried on. At the conclusion of the first interview the Applicant was asked to supply further documentation, which he did. The Applicant submits that the officer could have requested an interview with Rizvan, but did not. With respect to the Officer who made the Decision, he or she pointed out that Rizvan was not interviewed, notwithstanding the fact that no one in the family was interviewed.

ANALYSIS

[39] The Officer finds that the Applicant did not provide sufficient evidence to establish Rizwan's adoption as a legal fact. A few "other concerns" are mentioned, and then the Officer proceeds to find that

> Overall, I find, on the balance of probabilities that the Applicant initially with information pertaining to his dependent son Rizwan and then, once advised of our concern, tried to show that an adoption took place.

This finding is the basis for the Officer's conclusion that a misrepresentation has taken place. In my view, the Officer's conclusions on this point lacks justification, transparency and intelligibility, and are unreasonable.

[40] The record shows that the Applicant did not withhold information about Rizwan and he did not initially conceal his relationship with Rizwan. The record shows (CTR page 102) that, in conjunction with his initial application, the Applicant provided an affidavit in which he explained how Rizwan, his biological child, had been adopted by his brother, Ishak Patel, who had no male child. He explained that Rizwan had been living with his brother as his brother's child for many years, that Rizwan is known as his brother's son, and is no longer regarded as his son.

[41] The Applicant was entirely candid about his relationship with Rizwan and explained the adoption issue upfront. The officer who considered the Applicant's first application interviewed the whole immediate family separately and, based upon the evidence presented, accepted the adoption as genuine.

[42] The Applicant concedes that the Officer who considered his second application did not have to accept the first officer's findings on the legalities of the adoption. However, the Applicant in completing the forms for his second application would obviously not list Rizwan as his son when the first officer had accepted the adoption as genuine. The Applicant had to respond to the second Officer's concerns about the legality of the adoption, but he did not, as the Officer found, attempt to conceal his relationship with Rizwan. He had explained the situation in full to the first officer who had accepted the adoption as genuine. His actions in relation to the second Officer were simply an attempt to respond to that Officer's concerns about whether an adoption had, legally speaking, taken place.

[43] The second officer's conclusion is that, because the Applicant could not satisfy her as to the legalities of the adoption, then, on a balance of probabilities, the Applicant must have initially concealed his relationship with Rizwan. The record shows, however, that the Applicant explained his relationship with Rizwan fully. Whether or not there was an adoption, legally speaking, was not the issue for purposes of misrepresentation. The Applicant placed the issue fully before the first officer and that officer accepted the adoption as genuine. When he made his second application, it is obvious that the Applicant would not, therefore, identify Rizwan as his son. The second Officer says she has "reviewed the entire case…," but she never mentions the affidavit in question and the Applicant's placing the adoption situation before the first officer, or the fact that the first officer interviewed the immediate family separately on this point, and was satisfied overall that the adoption was genuine. There is no evidence of any withholding of information by the Applicant before the first officer. This finding is pure speculation and appears to be based, for the most part, upon the Officer's conclusion that the Applicant was not able to satisfy her that a legal adoption had occurred.

[44] The Officer also mentions "some other concerns," but a reading of the Decision as a whole reveals that these concerns would have looked entirely different if the Officer had not come to the conclusion that her failure to be satisfied as to the legality of the adoption was a basis for finding misrepresentation, given what had taken place before the first officer.

[45] The Applicant's saying "I will check" instead of saying that Rizwan was given up for adoption is entirely consistent with the question of why Rizwan was listed on the sponsor's application and not the Applicant's. Also, the discrepancy over the precise age (5, 6 or 2.5 months) is peripheral, especially when people are being asked to recall with precision something that happened 25 years ago.

[46] As for the sponsor listing Rizwan as his brother, I have examined the documents, and it is not entirely clear why Imran did this, but it looks like a case of confusion to me. Biologically, Rizwan is Imran's brother, and Imran, aware of the consequences of misrepresentation, is probably trying to cover all his bases. In any event, this discrepancy cannot, in my view, support a finding that the Applicant was "initially trying to conceal his relationship with Rizwan," when reviewed in conjunction with the Applicant's dealings with the first officer on the adoption issue.

[47] The Decision is unreasonable, and it needs to be reconsidered. Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The decision is quashed and the matter returned back to a different officer for reconsideration.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-2124-12
STYLE OF CAUSE:	**RAISAHMED MUSA INTWALA**
	- and -
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 30, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	June 11, 2013

APPEARANCES:

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