Federal Court  Cour fédérale

Date: 20120522

Docket: T-927-11

Citation: 2012 FC 619

Ottawa, Ontario, May 22, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

UCHENNA HYACINTH EZEMENARI
CHUKWUEBUKA HYACINTH EZEMENARI (MINOR)
CHIKA VERONICA EZEMENARI (MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal pursuant to subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 and section 21 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision of an Immigration Counsellor who refused to grant Canadian Citizenship to Chukwuebuka Hyacinth Ezemenari and Chika Veronica Ezemenari (the Nigerian Children) both of whom are six years of age and live in Nigeria. Mr. Ezemenari and his wife purport to have lawfully adopted the children in Nigeria; the Counsellor held that he had reasonable grounds to believe that the adoption order they submitted was a fraudulent document.

[2] On the unique facts of this case, I find that the appeal must be allowed, the decision set aside, and the application returned for a new decision by another Counsellor.

BACKGROUND

[3] Mr. and Ms. Ezemenari were both born in Nigeria and are Canadian citizens. After having raised two sons who are now in their late twenties and early thirties, they decided to adopt the Nigerian Children.

[4] Their first application for the Nigerian Children's citizenship was filed on October 9, 2007. It was not in compliance with Ontario law and lacked the required homestudy report. The officer at the time noted this and was not satisfied that the adoption was in the best interests of the children. Additionally, he was not satisfied that the adoption was in accordance with Nigerian laws since no social services report from Nigeria was received. By decision dated January 23, 2009, the application was refused.

[5] On November 5, 2009, Mr. and Ms. Ezemenari filed a second application which resulted in the decision under review. On July 29, 2010, a judicial fairness letter was sent advising that the application did not meet the requirements of the *Citizenship Act* because, as was stated in the letter, "it appears that your adoption does not comply with the applicable laws in the jurisdiction where the adoption took place." Specifically, the Counsellor pointed out the following three concerns: (1) that the relevant Act applicable to the adoption of children in Imo State requires that at least one of the adoptive patents must be resident in the state for at least three months, but

the adoptive parents' family home is in Enugu State, (2) that the adoptees must be in the care of the adoptive parents for at least three months whereas Mr. and Ms. Ezemenari were residing in Canada and had provided for a nanny and other family members in Nigeria to care for these children, and (3) the adoption order references legislation that has not been in effect since 2004 when the current Act came into effect.

[6] In response to the fairness letter, Mr. and Ms. Ezemenari obtained a legal opinion from a lawyer in Nigeria which they believed responded to these concerns. Whether it did or did not is not the real issue of concern for this Court. That opinion was transmitted with a cover letter from their Canadian lawyers which also attempted to respond to the stated concern that the "adoption does not comply with the applicable laws in the jurisdiction where the adoption took place." Critically, for the purposes of this application, in that correspondence the Canadian solicitors stated as follows:

> It is trite law that the decisions of foreign courts, especially with regards to adoption matters must be respected unless there are allegations of fraud. Your referenced letter did not raise any issue of fraud with this matter [emphasis added].

[7] On March 28, 2011, after having reviewed the applicants' response to the fairness letter, the Counsellor rejected the citizenship request. The Counsellor noted the previous concerns set out in the fairness letter and concluded as follows:

> After careful consideration, there are reasonable grounds to believe that this adoption order, indicated to have been issued in the Magistrates Court of Imo state on 22 June 2006 (suit no. MOR/MIAC/14/2006) is fraudulent. I am persuaded that these discrepancies are of a serious and fundamental nature and that this document was not issued by the relevant court [emphasis added].

ISSUE

[8] The underlying issue is this appeal is whether the applicants were denied the right to procedural fairness due to the Counsellor's failure to express concerns in the fairness letter relating to the authenticity of the Nigerian adoption order.

[9] It is common ground that the duty of fairness requires that visa applicants be given a reasonable opportunity to respond to visa officers' concerns before their application is denied: *Khan v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345 at para 18 [*Khan*].

[10] In that decision at para 29, the Court of Appeal in the context of medical inadmissibility stated:

> [W]here an applicant is clearly advised of the medical diagnosis and prognosis, and of the services likely to be required, he or she effectively knows the grounds for the potential refusal and has the knowledge necessary to pursue the matter further. In these circumstances, the Minister is not normally obliged to disclose in the fairness letter the detail supporting the conclusion that a visa could be refused because admission of the person concerned is likely to cause excessive demands on medical or social services [emphasis added].

At paragraph 36, the Court of Appeal concluded:

> In short, the omission of further detail from the fairness letter did not prevent Mr. Khan from understanding the reason for the rejection of his visa application or from making further inquiries. Consequently, he was not denied the reasonable opportunity to respond to the visa officer's concerns about the admissibility of Abdullah to which the duty of fairness entitled him [emphasis added].

[11] In *Khan*, therefore, the Court of Appeal indicated that a fairness letter must provide a reasonable understanding of why the officer is inclined to deny an application. Although this

application deals with an application for citizenship and not a resident visa, I can see no principles basis for a suggestion that different considerations should apply. In the present matter, the Counsellor made no allegation of fraud in the fairness letter; the fairness letter merely noted three inconsistencies and stated that the adoption order does not seem to comply with the applicable laws in the jurisdiction where the adoption took place.

[12] It is submitted by the respondent that the inconsistencies cited by the Counsellor may be understood to be the basis of an allegation of fraud; however, similar inconsistencies have also been understood to be the basis of an allegation that the order lacks jurisdiction and is not binding: see for example *Boachie v Canada (Minister of Citizenship and Immigration)*, 2010 FC 672 and *Sinniah v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 822.

[13] In the present matter, the applicants' solicitor merely understood the issue to be a lack of jurisdiction and binding effect. As a result, a Nigerian lawyer was contacted by the applicants and that concern was that which he addressed. It is clear from the portion of the response letter dated November 30, 2010, reproduced at paragraph 6 of these Reasons, that the applicants' solicitor did not understand that Counsellor to be alleging fraud. In my opinion, he cannot be faulted for that assumption. At best, the fairness letter read as a whole was ambiguous as to the true nature of the Counsellor's concerns. What was not ambiguous is what the applicants understood those concerns to be.

[14] In my view, if a fairness letter is sent because of an allegation that a document submitted in an application is not genuine, then that concern must be stated with some directness in order

that there is no ambiguity and in order that the recipient can respond directly to that concern. That was not done in this case. While the Court recognizes that the concerns raised by the Counsellor reasonably may result in a finding that the document was not genuine, the applicants must be given an opportunity to address that issue before a decision that the document is not *bona fide* is made.

[15] This appeal must be allowed.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-927-11
STYLE OF CAUSE:	UCHENNA HYACINTH EZEMENARI ET AL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 15, 2012
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APPEARANCES:

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