Federal Court  Cour fédérale

Date: 20150515

Docket: IMM-6948-14

Citation: 2015 FC 638

Ottawa, Ontario, May 15, 2015

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

XUE FANG YANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is the judicial review of an Immigration Officer's [Officer] decision to deny an exemption to have the Applicant's permanent residence application processed from within Canada on humanitarian and compassionate [H&C] grounds.

The central issue was the "best interests of the child" [BIOC].

II. Background

[2] The Applicant, the mother of 9 year old Alex, is a citizen of China. She is divorced, and her ex-husband lives in China as does her 19 year old daughter. Alex was born and has lived his entire life in Canada.

The Applicant's refugee protection application was refused in October 2009. The inland permanent resident application was filed in May 2014.

[3] The Applicant based the H&C application on her establishment in Canada, the BIOC, and the harm and adverse country conditions in China.

[4] The Officer's decision on the three grounds advanced can be summarized as follows:

a) Country Conditions/Hardship

The Applicant had not raised any fear of practising her faith in China, nor was there sufficient evidence that authorities are concerned about her religious practices.

The Applicant would not be required to pay the social compensation fee, which arises from having a child outside the one-child policy.

b) BIOC

The child is a Canadian citizen, 8 years old at the time of the decision, who no longer requires the services reserved for younger children.

The child has grown up in a Cantonese culture through his grandparents' church, and in the Vancouver area of Chinatown/Strathcona. As such, he has been

exposed to the cultural and linguistic (his mother is most proficient in Cantonese) realities of his mother's home city.

The BIOC might be enhanced by having closer access to his father.

While there may be initial troubles adjusting, the Applicant could rely on support from family and friends.

c) Establishment

The Applicant had taken positive steps to integrate but in respect of employment, she had merely done what others in similar positions do.

[5] The Officer finally concluded that the Applicant had provided little evidence that the move to China would act against her son's interest or impede her ability to meet Alex's "basic needs".

III. Analysis

[6] The discretion under s 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, is to be reviewed on a standard of reasonableness (*Serrano Lemus v Canada (Citizenship and Immigration)*, 2012 FC 1274, 221 ACWS (3d) 966).

[7] Having said that, I reject the Respondent's argument that a wide discretion means that there is a wide variety of reasonably broad acceptable outcomes. The assessment of reasonableness is constrained by the facts and the circumstances not by the breadth of the discretion. Even with a broad discretion, the facts may leave open a narrow range of acceptable outcomes.

[8] In these circumstances, the Officer's assessment of BIOC is unreasonable.

[9] The Court of Appeal in *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360, held that the best interests of the child is an important factor but it is not *per se* determinative. However, if an officer does not perform a reasonable assessment of that factor, then the weighing of factors under s 25 becomes tilted and likely unreasonable.

[10] In suggesting that the Applicant's son had some form of cultural equivalence to China by virtue of his exposure to Cantonese, the Officer unreasonably discounts that the child has been educated and speaks only English. The reliance on attendance at a Chinese church ignores the fact that the child attended only the English part of that church. It was unreasonable to rely on this cultural equivalency as a positive factor for living in China.

[11] In concluding that the Applicant had provided little evidence that the move to China would act against her son's interest, the Officer ignores the evidence from a psychologist's office (prepared by a clinical worker). The Respondent suggests that the Court should be sceptical of that report. If the Officer was sceptical, he had an obligation to explain why he had reached that conclusion. If he was not sceptical, he had to explain why he disregarded the findings.

[12] The Officer's suggestion that being closer to the son's father had an ameliorating effect on the move to China ignores that the child has never met his father; his father is in another relationship and with a new family.

[13] As Justice Mactavish concluded in *Duhanaj v Canada (Citizenship and Immigration)*, 2015 FC 416 at paragraph 3, "the task of an immigration officer is to consider the benefit to the children if they were to stay in Canada against the consequences that the children will suffer if they are removed from this country".

This assessment must be "alert and alive to the child's circumstances". This, as Justice Rennie held in *Etienne v Canada (Citizenship and Immigration)*, 2014 FC 937, 245 ACWS (3d), is done from the child's perspective.

[14] The Officer never undertook the BIOC analysis from that perspective nor did he address key evidence that undercut his conclusion.

In all the circumstances, this decision requires Court intervention.

IV. Conclusion

[15] Therefore, this judicial review will be granted, the decision quashed and the matter sent back to be considered by a different immigration officer.

[16] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision is quashed and the matter is sent back to be considered by a different immigration officer.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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