Federal Court  Cour fédérale

Date: 20170920

Docket: IMM-496-17

Citation: 2017 FC 841

Ottawa, Ontario, September 20, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

WEN LI
ZHENGSHAN CHEN
ZHENGLIN CHEN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*] of the decision of a representative of the Minister of Citizenship and Immigration [Minister's representative], dated January 10, 2016, which rejected the applicants' application for permanent residence based on humanitarian and compassionate grounds [the Decision].

[2] The applicants include Ms. Wen Li (age 45) [the Principal Applicant] and her two daughters, ages 18 and 13), for whom Ms. Li holds sole custody [collectively referred to as the Applicants]. The Applicants are citizens of the People's Republic of China. When the Applicants arrived in Canada on October 23, 2013 as temporary residents, the Principal Applicant had a valid work permit pursuant to subsection 205(a) of the *Immigration and Refugee Protection Regulations* with an expiry date of April 30, 2014.

[3] The Principal Applicant obtained the work permit with the legitimate expectation that it could lead to permanent residence in Canada as an investor and entrepreneur. However, she did not know that those assisting her in this regard were running an immigration real estate investment fraud of massive proportions. Her money, some half a million dollars, was invested in passive real estate which was subsequently lost through foreclosure. Her lawyer described the fraud as follows, which is not disputed:

> […] she has been a victim of excessive fraud which includes 32 victims in a conspiracy […] to create a condominium project of a number of stores […] in Scarborough […]. My client entered into an agreement not represented by any solicitor. She ended up taking possession of one of the units. [The fraudsters under various corporate identities now known as Panasian Global Inc (PGI) and a numbered company, bought these properties for $5,000,000 and proposed to sell each of the stores somewhere in the vicinity of $400,000 to $500,000, therefore making a profit of 300%. The selling of the stores was made by a marketing plan in which they advertised under Ontario Provincial Nomination Program. The purchaser of the unit would become a permanent resident within 6 months and obtain a work permit.
>
> My client advanced $220,000 of the required $440,000 and an application was made under Section 205(a) of the Immigration Refugee and Protection Act (IRPA) which would allow her to run the store. This was in 2012. She came into Canada, continued to run the store under a numbered company, which was incorporated by a solicitor she never met. The solicitor made the application in her name although he never met her.

> When immigration ascertained that she did not file the documents, or create the documents she said she was going to create, they refused to extend her status. Her store was ultimately closed on October 9, 2014. The original vendor took action and sold the property to a power of sale to another purchaser.
>
> The fraud of which I speak is simply utilizing Section 205(a) to get the person into Canada and allowing him to believe it is for temporary resident status only. Specifically if the person is establishing permanent resident then this section is not to be used. There are provisions for early admission but it needs to apply when there was an entrepreneur provision. There is no longer such a provision.

[4] It is not disputed and her evidence was that she is the only witness that would testify against the perpetrators of this fraud against whom she had also started civil proceedings. While she did not mention this in her original application, in a subsequent letter, her counsel advised that she was under police protection, and that a police Detective told her that "it appears to him that the situation is close to organized crime as well as the *IRPA* offense of human trafficking." In the same subsequent letter, her lawyer also provided the business cards of two Toronto Police Service [TPS] officers and one Canada Border Services Agency [CBSA] officer. The letter said these officers offered to endorse her application and invited the Minister's representative to contact them for further details.

[5] Before her work permit expired, the Principal Applicant applied for an extension, which was refused. The Principal Applicant applied for restoration of her status, which was dismissed on June 27, 2014. She also applied for a temporary resident visa, which was dismissed on June 27, 2016.

[6] The Applicant claims that it was not until early 2015 that she realized she was the victim of the real estate and immigration fraud, when she was contacted by the TPS regarding an investigation they were conducting with CBSA.

[7] Given her unsuccessful applications for an extension and restoration of her work permit, the Principal Applicant applied for permanent residence based on humanitarian and compassionate grounds [the H&C] by letter dated August 20, 2015.

[8] On January 10, 2017, the Applicants' H&C was refused.

[9] The parties agree, as do I, that the test for this Court to apply on a judicial review such as this is reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. *Kanthasamy* also concluded that H&C is not a parallel or "alternative immigration scheme". Considerable deference should be given the Minister's representative exercising the powers of the Minister under the H&C provisions of *IRPA*: *Ogunyinka v Canada (Citizenship and Immigration)*, 2015 FC 595, at para 19, where Noël J. cited *Baker* at para 62:

> Considerable deference should be given to immigration officers exercising the powers conferred by legislation, given the fact specific nature of the inquiry, its role [subsection 25(1) of the IRPA] within the statutory scheme as an exception, the fact that the decision maker is the Minister, and the considerable discretion evidenced by the statutory language.

[10] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence

has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question."

[11] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> 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.

[12] The Supreme Court of Canada found that a decision maker was not required to make an explicit finding of each constituent element leading to a final conclusion in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses'*] at para 16:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, 1973 CanLII 191 (SCC), [1975] 1 SCR 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[13] The Federal Court of Appeal in *Canada v Akisq'nuk First Nations*, 2017 FCA 175 at para 20 provides the following:

> The concept of procedural fairness is eminently variable, and its content is to be decided in the context and circumstances of each case. The concept is animated by the desire to ensure fair play. The purpose of the participatory rights contained within the duty of fairness has been described to be:
>
> > …to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
>
> (*Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817, at paragraph 22).

[14] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland Nurses'*.

[15] In *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at paras 28-29 [*Nguyen*], I held that an application based on H&C is in the nature of extraordinary or special relief, and see *Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 at para 27 per Diner J. In *Nguyen*, I concluded at paras 2-3:

> [2] The Court is not asked to, nor may it, reweigh the evidence. Judicial review is not an opportunity to re-litigate the case below,

> nor is it in any way a trial *de novo*. The over-arching consideration is not whether the decision below is right or wrong, but whether it is reasonable or unreasonable. The key question is whether the Decision falls with the range of outcomes that is defensible on the facts and the law.
>
> [3] In enacting section 25 of the *IRPA*, Parliament gave the Minister of Citizenship and Immigration the authority and responsibility to apply the correct legal standard and to reach a decision in H&C matters that is reasonable, as defined by the Supreme Court of Canada in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9. The Minister has delegated this authority to H&C Officers so that they may make such decisions on his behalf. According to the jurisprudence, both the Minister and his delegated Officer(s) have an exceptional and highly discretionary authority in this regard. Their authority deserves considerable deference by the Court.

[16] The Applicants argue that the Decision of the Minister's representative is unreasonable overall, and is unreasonable in respect of its consideration of the Applicant's status in Canada, the fraud, establishment, and best interests of the children [BIOC] including consequences of returning to China.

[17] Regarding the Applicants' status in Canada, the Minister's representative correctly noted that they had been without status since the middle of 2014, which was, in fact, the case. *Kanthasamy* emphasizes that "*all*" [emphasis by the Supreme Court] factors are to be considered. The Minister's representative drew a negative inference from the Applicants' non-compliance with *IRPA* in that regard. In my view, he was entitled to draw that inference. While the Applicants argue it should have been assessed as neutral given their legal arrival, the fraud, and their unsuccessful efforts to regularize their status, in my view, the assessment of the evidence conducted was open to the Minister's representative, and did not constitute reviewable error. Of course it has to be balanced with other factors.

[18] Regarding the fraud, the Applicants make several points. First, they argue the focus of the H&C Decision was not on the fraud or its impact, but on their being without status; a point that was made twice in the Decision. In this respect, they argue they have been faulted for being victims of fraud. I am not persuaded on these points, which are contradicted by the statements of the Minister's representative on the subject. He accepted their evidence that the fraud was massive, and that the Principal Applicant would be the sole witness against the fraudsters. He is taken to have accepted their description of the fraud as set out above and made no finding otherwise. He expressed sympathy for them. Indeed, the Minister's representative applauded, *i.e.*, gave positive weight to, the Principal Applicant for her "willingness to assist in the investigation". However, the reality is, as found, the Applicants provided little evidence why they could not depart and apply to return from China as *IRPA* requires. In my view, this was a fair assessment. The Applicants provided no evidence on this point, notwithstanding it was their application and therefore, their onus. In my respectful view, the Applicants, in effect, seek to turn the fact of the fraud into permanent resident status through the H&C process. I do not see any issue of the Minister's representative ignoring evidence in this case. The Minister's representative cannot be faulted for declining to see the Applicants' H&C in the way they preferred.

[19] The issue before the Minister's representative was how to accommodate the fact that the Principal Applicant was the victim of fraud and as such, needs to return to Canada to be a witness in various criminal, civil and/or *IRPA* proceedings, with the fact the Applicants over-stayed and remained in Canada without status for several years thereafter. The Minister's representative suggests the Applicants apply for a temporary resident visa (under section 22 of

IRPA) on that basis. In argument, both counsel also referred to the fact that the Principal Applicant may seek temporary resident permit under subsection 24(1) of *IRPA*. These approaches are open to the Applicants, and given the record before me, I am hard-pressed to see how some other Minister's representative could reasonably refuse a request by the Principal Applicant to return to testify in criminal and or *IRPA* proceedings, particularly given the Minister's responsibilities in relation to the investigation and prosecution of offences under the statute for which he is responsible and related crimes. The Minister's representative already noted that with the appropriate supporting documents, a return to Canada for the two lawsuits would be possible.

[20] The Applicants also say that the Minister's representative acted unreasonably in not contacting the police and/or CBSA officers whose business cards were supplied. In many respects, this was central to the Applicants' argument. With respect, I am not persuaded on this point. The Applicants have the onus to make their case. Generally, there is no duty on the Minister's representative to make additional inquiries where invited by applicants to do so as confirmed in *Kisana v MCI*, 2009 FCA 189 [*Kisana*]. There, the Federal Court of Appeal upheld a decision of Justice Mosley, *Kisana v Canada (Citizenship and Immigration)*, 2008 FC 307, who certified the following question:

> Does fairness require that an officer conducting an interview and assessment of an application by a child for landing in Canada to join her parents be under a duty to obtain further information concerning the best interests of the child if the officer believes the evidence presented in insufficient?

[21] Mosley, J. was of the view that it was not an immigration officer's duty to make further inquiries so as to discover evidence that might be favorable to the case put forward by the

appellant. The Federal Court of Appeal agreed and answered the certified question in the negative. It went further at para 56 noting: "[…] the officer could have asked more questions in order to obtain additional information with regard to the twins' situation in India, but, as well shall see, she was under no duty to do so in this case." At para 62, the Federal Court of Appeal concluded: "[h]owever, I do not rule out the possibility that there may be occasions where fairness may or will require an officer to obtain further and better information. Whether fairness so requires will therefore depend on the facts of each case."

[22] Based on the facts of this case, there is no reason why the Minister's representative ought to have made the suggested inquiries, *i.e.*, the conclusion on this point is reasonable. He accepted the Applicant's core evidence of the massive fraud, and of the Principal Applicant's key role in providing evidence and testimony, in addition to the description of the fraud as outlined above. In my view, this is not the sort of exceptional case where fairness put the Minister's representative under a positive duty to make calls to the officers. The Minister's representative had enough evidence before him; his decision not to make further calls to confirm facts he had accepted was open to him.

[23] The Applicants also fault the Minister's representative for excluding from his reasons two sentences from the lawyer's second letter: the first indicating the officers had offered to endorse the Applicant's request, and the second inviting him to contact the officers. I agree that the reasons would be more fulsome had these submissions been included, but the Minister's representative was not under a duty to do so, particularly because he did not make the calls he

was invited to make. Importantly, as found already, there was no reason to make such calls. There is no merit to the Applicants' argument that material evidence was ignored.

[24] Upon my review, I am also unable to accept the Applicants' arguments respecting establishment and BIOC.

[25] In terms of establishment, he fairly noted that the Applicants had not been in Canada for a considerable period of time; this was not objectionable in as much as they arrived in October 2013 and the Decision was made in January 2017.

[26] In terms of BIOC, this was assessed separately by the Minister's representative. It may not be said he was not alert and alive to the best interests of the children. He determined what was in the best interests of the children, and determined that that was met if they were returned to China. This involved being with their parents and having all the basics of life, food, shelter, clothing, as well as education and medical systems to support their lives, and social support from families and friends, all of which would be available in China. He noted the Principal Applicant had sole custody of both children, and that there was little evidence of breakdown between the two parents. Further, the children would be closer to their father in China. The Minister's representative, again fairly in my respectful view, found there was little evidence of negative effects of returning to China. While the children would have an adjustment period initially that would not compromise their best interests; they had shown the ability to adapt to Canada and there was little evidence they could not adjust to a return. These conclusions were open to be made. Most importantly, the Minister's representative considered that the children would be

staying with their mother on their return to China. In my respectful view, the BIOC analysis was fair, comprehensive and reasonable. The Applicants' disagreement with the result is insufficient to disturb the findings of the Minister's Representative.

[27] Stepping back, I am required to determine the reasonableness of the Decision taken as an organic whole. Having considered the written and oral arguments, and the record and applicable law including the discretion and deference afforded to the Minister's representative on an H&C application, it is my view that the Decision falls within a range of possible, acceptable outcomes which are defensible on the facts and law. In addition, the Decision is justified, transparent and intelligible. Therefore, this judicial review must be dismissed.

[28] Neither party proposed a question to certify, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-496-17
STYLE OF CAUSE:	WEN LI, ZHENGHAN CHEN ZHENGLIN CHEN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 13, 2017
REASONS FOR JUDGMENT AND JUDGMENT:	BROWN J.
DATED:	SEPTEMBER 20, 2017

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