Federal Court  Cour fédérale

Date: 20171221

Docket: IMM-2510-17

Citation: 2017 FC 1186

Ottawa, Ontario, December 21, 2017

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

ZUOWEN GAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Mr. Lin Gan and his wife Ms. Xiaowen Chen consider themselves the *de facto* parents of Zuowen Gan [Zuowen or the Applicant]. Although they tried to legally adopt her in China, they were unable to due to Mr. Gan's Canadian citizenship even though they resided in China. So Ms. Chen's parents adopted her instead and then the Gan's obtained falsified birth documentation.

[2] On behalf of the Applicant, Mr. Gan applied for, among other things, a temporary resident permit [TRP] under section 24(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The application was denied for reasons including lack of credibility. The Applicant applied for judicial review of that decision, and the Respondent consented to reopen the TRP application.

[3] In a decision dated May 29, 2017, the First Secretary (Immigration) refused the second TRP application, again for reasons that included lack of credibility. The Applicant now asks this Court to judicially review the May 29, 2017 decision, which she says is unreasonable and breached her right to procedural fairness.

[4] I am dismissing this judicial review for the reasons that follow.

II. Background

[5] In 2008, Mr. Gan and Ms. Chen wanted to adopt a baby girl in Foshan, Guangdong. Even though they resided in China, at the time they were unable to do so legally because Mr. Gan is not a Chinese citizen and is a naturalized citizen of Canada. Ms. Chen's parents, understanding that Mr. Gan and Ms. Chen would raise the baby as the *de facto* parents, completed the adoption process instead and the baby's name was changed to Zuowen Gan.

[6] According to Mr. Gan and Ms. Chen, the Chinese civil authorities knew about their situation and the adoption "arrangement". In support of this submission, Ms. Liuhua Tang (the Director of the Children Welfare Institute of Nanhai from 2003-2013) submitted a sworn

statutory declaration saying she understood the situation. In addition, Mr. Gan provided a statutory declaration that on May 25, 2009, the Ministry of Health of the Public's Republic of China provided the *de facto* parents with a new birth certificate for Zuowen. This new falsified birth certificate showed Mr. Gan and Ms. Chen as Zuowen's birth parents. The birth certificate also gave Zuowen a new birth date and birth place.

[7] In 2014, the family decided to return to Canada. Mr. Gan left China first and arrived in Canada on October 30, 2014. While in Canada, he was diagnosed with stage IV advanced extensive incurable mantle cell lymphoma. At the time of this judicial review, there was evidence he has less than 22 months to live.

[8] Mr. Gan applied for a Canadian citizenship on behalf of Zuowen. He says that at the time he applied, he didn't know she needed to be his biological or adopted daughter. He found this out in April 2015, when he was asked to provide a DNA sample for Zuowen's proof of citizenship.

[9] Ms. Chen then applied on behalf of Zuowen for a temporary resident visa [TRV]. This application was denied on May 27, 2015 because it failed to disclose the full details of Zuowen's adoption. Mr. Gan made a second TRV application on behalf of Zuowen and this time disclosed the background facts. He also requested a TRP in the event the TRV was refused again. Both of these applications were refused. The second TRV application was denied on May 3, 2016, and the TRP application was denied on May 23, 2016.

[10] When the Applicant applied for judicial review of the May 23, 2016 TRP refusal, by consent, the TRP application was sent back to be re-determined. On March 15, 2017, the Applicant submitted more evidence in this second TRP application, including a psychological report, a timeline of events, an explanation about the fake birth certificate, and more details about Zuowen's adoption.

[11] In a decision dated May 29, 2017, the First Secretary denied the Applicant's TRP application because of the lack of credibility. The reasons for the denial included prior fraudulent statements, prior violation of international, Chinese and Canadian laws, and belief that the Applicant is unlikely to depart Canada when the permit expires due to her Canadian ties and stated intent to relocate to Canada. This is the decision that is subject to review.

III. Issues

1. Did the First Secretary breach a duty of fairness:
    a. by failing to provide the Applicant with an opportunity to address the credibility concerns?
    b. by relying on extrinsic knowledge?
2. Was the decision unreasonable because of an inadequate best interests of the child assessment?

IV. Relevant Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

Temporary resident	**Résident temporaire**
22 (1) A foreign national	22 (1) Devient résident

becomes a temporary resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(b), is not inadmissible and is not the subject of a declaration made under subsection 22.1(1).

Dual intent

(2) An intention by a foreign national to become a permanent resident does not preclude them from becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay.

…

Temporary resident permit

24 (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.

…

Right of temporary residents

29 (1) A temporary resident is, subject to the other provisions of this Act, authorized to enter and remain in Canada on a temporary basis as a visitor or as a holder of a temporary

temporaire l'étranger dont l'agent constate qu'il a demandé ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)b), n'est pas interdit de territoire et ne fait pas l'objet d'une déclaration visée au paragraphe 22.1(1).

Double intention

(2) L'intention qu'il a de s'établir au Canada n'empêche pas l'étranger de devenir résident temporaire sur preuve qu'il aura quitté le Canada à la fin de la période de séjour autorisée.

…

Permis de séjour temporaire

24 (1) Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.

…

Droit du résident temporaire

29 (1) Le résident temporaire a, sous réserve des autres dispositions de la présente loi, l'autorisation d'entrer au Canada et d'y séjourner à titre temporaire comme visiteur ou

resident permit.	titulaire d’un permis de séjour temporaire.
Obligation — temporary resident	**Obligation du résident temporaire**
(2) A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.	(2) Le résident temporaire est assujetti aux conditions imposées par les règlements et doit se conformer à la présente loi et avoir quitté le pays à la fin de la période de séjour autorisée. Il ne peut y rentrer que si l’autorisation le prévoit.

Immigration and Refugee Protection Regulations, SOR/2002-227

Member	**Regroupement familial**
117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	117 (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu’ils ont avec le répondant les étrangers suivants :
(a) the sponsor’s spouse, common-law partner or conjugal partner;	a) son époux, conjoint de fait ou partenaire conjugal;
(b) a dependent child of the sponsor;	b) ses enfants à charge;
(c) the sponsor’s mother or father;	c) ses parents;
(d) the mother or father of the sponsor’s mother or father;	d) les parents de l’un ou l’autre de ses parents;
…	…

V. Standard of Review

[12] The correctness standard applies to issues of procedural fairness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]). Because the decision to issue a TRP application is highly discretionary, the content of the duty of fairness is at the lower end of the spectrum (*Wu v Canada (Minister of Citizenship and Immigration*), 2016 FC 621 at para 24).

[13] Decisions involving TRP applications are reviewed using the reasonableness standard (*Vaguedano Alvarez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 667 at para 18; *Ali v Canada (Minister of Citizenship and Immigration)*, 2008 FC 784 at para 9 [*Ali*]).

VI. Analysis

A. *Did the First Secretary breach a duty of fairness by failing to provide the Applicant with an opportunity to address the credibility concerns?*

[14] The Applicant submits the duty of fairness established by the jurisprudence requires an interview whenever an applicant's credibility is in question. The Applicant says her credibility was in question because the issue is discussed throughout the First Secretary's decision and notes. For instance, the notes explicitly say "the credibility concerns are too many and too strong for me to be satisfied that any imposed conditions would be complied with." In addition, the First Secretary did not believe the statements in the sworn statutory declarations. Therefore, the Applicant submits that consistent with the case law, an interview was required.

[15] Foreign nationals who are inadmissible or fail to meet IRPA requirements can apply for a TRP. A TRP is issued under section 24 of the IRPA, and only in exceptional cases. In *Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at para 22 [*Farhat*], Justice Shore explained the purpose of TRPs is to "allow officers to respond to exceptional circumstances while meeting Canada's social, humanitarian, and economic commitments." Accordingly, the decision to award a TRP is highly discretionary.

[16] The Applicant has cited to *César Nguesso v Canada (Minister of Citizenship and Immigration)*, 2015 FC 880 [*César*] for the proposition that the duty of procedural fairness requires an interview in her TRP application.

[17] *César* illustrates there is no duty to provide applicants with an interview or a "running score" in all circumstances. As Justice Bédard explained at para 62:

> I find that the case law applicable to visas, which clearly recognizes that the onus is on applicants to file sufficient evidence in support of their applications, is equally applicable to TRPs. This case law establishes that **it is not for the officer to inform the applicant that the evidence is inadequate or provide him or her with an opportunity to respond to concerns arising from an application that is unclear, incomplete or lacking sufficient evidence.** The duty of fairness may require that officers disclose their concerns to applicants and provide them with an opportunity to respond when they relate to the credibility, veracity or authenticity of the evidence submitted by the applicant or to information of which the applicant could not have been aware. The duty of fairness does not, however, require that the applicant be provided with a running score or an opportunity to add to an incomplete or inadequately supported application.
>
> [Emphasis added.]

[18] Nor is there is a duty to provide an interview for insufficient evidence. In this case, the Applicant knew that there were credibility concerns as credibility was the reason for the prior TRP refusal. The previous decision also contained notes about the adoption being noncompliant with the Hague Convention and notes regarding the circumvention of adoption law in China. As well, the decision notes that:

> It appears clear from submissions that the intention is the applicant (PA) to remain in Canada on a permanent basis (notwithstanding the assertion that she will "be traveling back and forth")… However, given the child's age, family ties to Canada and to China, and all other circumstances (including the facts that the parents sought to obtain Canadian citizenship for her in an effort to relocate her to Canada, and the fact that they have more than once misrepresented material facts on previous application).

[19] An interview would not add to the understanding of the evidence. There was insufficient credible evidence and the duty of fairness did not require an interview. The onus is on an applicant, if they are inadmissible or have not complied with IRPA, to provide compelling reasons to be allowed to enter Canada under section 24(1), and the Applicant did not meet that onus.

[20] An interview would add nothing as the Applicant could only readmit what we already know; they circumvented international, Chinese and Canadian law and submitted fraudulent documents. Justice Roy discussed an applicant's duty to prove they will return after their permit or visa is expired in *De La Cruz Garcia v Canada (Minister of Citizenship and Immigration),* 2016 FC 784 at para 9: "there is no legal duty to speak with an applicant to suggest additional elements of evidence." Nor does the decision maker need to provide a running score when issues arise. The Applicant's right to procedural fairness was not breached by failing to provide her

with an opportunity to respond to the credibility issues. She was aware that credibility was an issue as the decision maker did not believe the Applicant would leave when her visa expired in her prior application. The onus was on her to put her best evidence forward and make a convincing case that she would leave Canada at the end of her authorized stay.

B. *Did the First Secretary breach a duty of fairness by relying on extrinsic evidence?*

[21] The Applicant submits if a decision maker relies on extrinsic evidence, the duty of fairness requires disclosure of this so that an applicant can respond to it. In support of this proposition, the Applicant relies on *Dasent v Canada (Minister of Citizenship and Immigration*, [1995] 1 FC 720 (FC), and *Level v Canada (Minister of Public Safety and Emergency Preparedness*), 2008 FC 227 at para 19.

[22] In this case, the Applicant says the First Secretary's own knowledge about the adoption process available in China is extrinsic evidence. As the Applicant understands it, the reasons appear to say the family could legally adopt under this new process, so she doesn't need a TRP. The Applicant also argues the duty of fairness requires an opportunity to be able to research the accuracy of this statement and provide a response especially as there was no citation given. The Applicant submits that her right to procedural fairness was breached because of this.

[23] The Applicant did agree that the First Secretary may use "expertise and general knowledge" to form a decision, but distinguished her situation from the cases relied on by the Respondent. The Applicant submits that those cases are different because information about the new adoption laws is not publically available and the Applicant could not have known about it.

[24] Since a TRP operates at the low end of the fairness spectrum, decision makers can use their own experience and expertise to form a conclusion. In this situation, the First Secretary's expertise is informed by the statutory duty under section 117 of the IRPA to know about adoption laws. For instance, according to section 117(3), the First Secretary must consider specific criteria such as whether the adoption was legal, and whether it complied with the Hague Convention. The First Secretary's duty is to know about the local adoption laws, and this did not breach the Applicant's right to procedural fairness as this is not extrinsic evidence as the Applicant asserts. Rather, it forms part of the First Secretary's expertise.

[25] Furthermore, the First Secretary's reasons do state it is the China Center for Children's Welfare and Adoption Act [CCCWA] that is moving to modify the adoption process. The reasons also state: "After being told about the proof rejection [*sic*] the applicant's de facto parents did not appear to reach out to the [CCCWA] for any guidance." Ms. Chen and Zuowen reside in China and family reunification has been the family's goal. It is not unreasonable to assume that the family, who says the Chinese government authorities assisted them in the fictitious adoption, would seek out and know any and all ways to adopt the child, including contacting the CCCWA. The notes mention that a doctor said the *de facto* parents may not have had any dialogue with the Ministry of Children and Family Development or the Chinese or Canadian authorities because of a cognitive disorder. The First Secretary said that the doctor had not examined the parents during that time frame and found it not definitive or helpful in one way or another. There is evidence that the First Secretary considered all the evidence that was put before them.

[26] I do not agree that in this case the Applicant's ability to meaningfully participate was affected by the First Secretary's knowledge of the CCCWA adoption process. The First Secretary said "[g]iven the concerns above, this application is refused" (emphasis added). The decision as a whole illustrates that the adoption law information was a statement, not a concern. As it was not a concern, it was not included in the balancing process. Since the adoption law was not part of the decision making process, nor is it extrinsic evidence, the Applicant's right to procedural fairness was not breached.

[27] Even if I am wrong, the Applicant in this situation lives in China and has an obligation to know about Chinese adoption laws and modifications and cannot use ignorance as an excuse for not regularizing the fictitious adoption as soon as it is legally possible.

C. *Best Interests of the Child*

[28] The Applicant submits the best interests of the child [BIOC] is a paramount issue as the Supreme Court of Canada [SCC] stated in *Kanthasamy v Canada (Citizenship and Immigration*) 2015 SCC 61 at paras 36-37, 41. The Applicant also submits that for a decision to be reasonable, it must treat BIOC as an important factor, as stated by the SCC in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75.

[29] According to the Applicant, the First Secretary inadequately assessed her BIOC factors. The Applicant submits a proper BIOC analysis requires the decision maker to identify and define the BIOC, and assess how the child will be impacted. The Applicant says according to the case

law this generally includes: 1) the age of the child; 2) the dependence level; 3) medical or special needs.

[30] The Applicant argues that the First Secretary only listed BIOC factors, and says a list is not a sufficient substitute for the SCC's requirement for a well-identified and defined BIOC analysis. Additionally, the Applicant says that a BIOC analysis should at least assess the relationship, her age, her level of dependency and future in China.

[31] Section 24(1) of the IRPA, unlike section 25(1), does not contain an express statutory requirement to include BIOC factors. Instead, an application for a TRP under section 24(1) requires an applicant's circumstances justify issuing a TRP. These circumstances can include BIOC factors if they are relevant (see *Ali*). In this case, the Applicant is a 9 year old child and the First Secretary rightly considered the compelling BIOC factors submitted by the Applicant.

[32] The onus is on an applicant to establish their claim and to establish humanitarian and compassionate considerations, including BIOC factors, under section 25(1) of the IRPA (*Owusu v Canada (Minister of Citizenship and Immigration*), 2004 FCA 38 at para 5; *Persaud v Canada (Minister of Citizenship and Immigration*), 2012 FC 1133 at para 62). Regarding TRP applications, in *Farhat*, Justice Shore explained that applicants have the onus of establishing the compelling reasons of their case (at para 32). When the compelling reasons include BIOC factors, it is the applicant who holds the knowledge about their circumstances. Just as Justice Shore found, I find that the onus to establish the BIOC factors under section 24(1) of the IRPA is on the applicant.

[33] In this case, the First Secretary's reasons identified and analysed all the BIOC factors submitted by the Applicant, such as the Applicant's age, and the importance of reunification of family, the fact that the Applicant resides with her grandparents and her mother is at the same address, and that her father was able to remain in China long term despite not being a Chinese citizen. And although the reasons do not explicitly say the Applicant is 9 years old, the First Secretary recognized her youth and describes the Applicant as a "minor child." Though her age is noted in the detailed computerized notes regarding this situation. The reasons describe the positive factors in detail including Mr. Gan's medical condition, employment, his mental state, previous travel to China and Seattle, medical reports filed, and the Applicant's relationship with her *de facto* parents. However, the reasons also describe negative factors, including the fraudulent actions, attempts to violate international, and Canadian immigration law and the need to keep the integrity of the Canadian Immigration program intact.

[34] Based on the information provided to the First Secretary, this BIOC analysis is reasonable. The BIOC factors are compelling, but the First Secretary exercised considerable discretion and reasonably found the positive factors are outweighed by the negative factors.

[35] The Applicant did not meet her onus and this Court cannot now reweigh the First Secretary's decision on the evidence in the Certified Tribunal Record. The Applicant's disagreement with the First Secretary's decision and exercise of discretion is not a basis that this Court can interfere with in this case.

[36] Though I may not have come to the same decision, reasonableness requires the decision to exhibit justification, transparency, and intelligibility within the decision making process and the decision must be within the range of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Khosa*). The First Secretary's decision fits within the spectrum of reasonableness and therefore I will dismiss this application.

[37] No questions were presented for certification and none arose from the hearing. I will not certify a question.

JUDGMENT in IMM-2510-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No Certified Question is granted.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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