Federal Court  Cour fédérale

Date: 20180309

Docket: IMM-3404-16

Citation: 2018 FC 278

Ottawa, Ontario, March 9, 2018

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

**ZHANLIN HE, YUEYAN DENG,
JIANBING HE AND JUNYANG HE**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of the decision of a Senior Immigration Officer [the Officer] who refused their application for permanent residence on humanitarian and compassionate grounds [H&C Application].

[2] The Applicants argue that the Officer failed to assess their H&C Application cumulatively and with compassion, improperly dismissed the effect of not being able to practice Falun Gong and made a "superficial" assessment of the rights of the children and establishment in Canada. The Applicants ask that the Officer's decision [Decision] be quashed and the matter returned for re-determination by a different officer.

[3] For the reasons that follow, this application is dismissed.

II. **The RPD decision**

[4] The Applicants are nationals of China. Zhanlin He was 39 years old at the time of the Decision. His wife was 41 years old, and their children were 16 and 12 years old.

[5] The Applicants entered Canada on or around August 28, 2014, crossing illegally by foot near Vancouver from the United States. They made a refugee claim on November 17, 2014, which was denied by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada on March 27, 2015. The Applicants appealed to the Refugee Appeal Division [RAD], which denied their appeal on June 29, 2015.

[6] The Applicants' refugee claim was made on the basis that Zhanlin He [Mr. He] was a Falun Gong practitioner in China, who had been persecuted by the authorities. On this basis it was stated that the children had been expelled from school. Mr. He alleged that he had been a chef in China, and began participating in a Falun Gong group with his wife acting as a lookout. Mr. He alleges that at one point, the Public Security Bureau [PSB] raided a Falun Gong meeting and then the PSB began investigating the Applicants.

[7] The RPD rejected the Applicants' claim on the basis of credibility. The RPD found that the Applicants received a visitor visa to the United States, which said that Mr. He was an electrical technician. The Applicants maintained that the visa application was fraudulent, but the RPD found that the United States would have verified the submitted information and it was more likely that the visa application was true while the testimony before the RPD was untrue.

[8] The RPD found that the PSB was not looking for the Applicants. No summons had been issued for any of the Applicants, even though country condition documents indicated such summonses were issued when someone was wanted for questioning. The Applicants also left China on their real passports. Given the surveillance tools available to the PSB and China's strict exit controls, the RPD found that the Applicants would have been detained on attempting to leave China if the PSB had actually been looking for them.

[9] The RPD found the Applicants' reasons for leaving the United States and crossing illegally into Canada lacked credibility. The Applicants testified that they did not want to be detained in the United States pending their refugee determination. However, they also testified that they did not know what the effect would be of crossing into Canada illegally. Given Mr. He's sophistication (he had previously applied for a visa to Japan and retained counsel on arrival in Canada), the RPD found it implausible that the family would cross illegally into Canada without knowing whether it would jeopardize their refugee claim and thereby abandon their legal status in the United States, when they could have made an asylum claim in the United States.

[10] The RPD concluded that the Applicants had lied about practicing Falun Gong in China and about the PSB pursuing them in China. As a result, the RPD found that Mr. He's

participation with a Falun Gong group in Canada was not as a genuine practitioner, and lead to the RPD questioning Mr. He's motives in participating with Falun Gong in Canada.

[11] The RPD also found that the Applicants were not *sur place* refugees as there was no evidence that the PSB was aware of Mr. He's Falun Gong activities in Canada.

III. **The Decision under review**

[12] The H&C Application was based on the hardship the Applicants would experience based on Mr. He's Falun Gong practice, their establishment in Canada and the best interests of the children [BIOC].

[13] The Officer noted the negative credibility and *sur place* findings of the RPD. Based on the RPD findings, the Officer decided to place little weight on any hardships based on risks deemed non-credible by the RPD. This included any hardship from the children allegedly having been expelled from school in China or being sought by the authorities in China.

[14] Regarding establishment in Canada, the Officer placed some negative weight on the Applicants' choice to circumvent Canadian immigration law by crossing the border illegally rather than reporting at a port of entry. Noting that the Applicants were temporarily receiving financial assistance, the Officer found it commendable that Mr. He found work as a dough chef in Canada and there was some evidence that his wife had begun working too. However, the Officer found no strong pattern of financial independence had been established.

[15] While there were some friends and community support, the Officer found little evidence of family in Canada (who could support them physically, emotionally and financially) or participation in the community beyond some attendance at Falun Gong. While there was some

establishment, the Officer found that it was not significant when looked at globally. The Applicants had only been in Canada for a little over a year while going through the refugee process.

[16] Turning to the BIOC, the Officer found that the children were succeeding in school in Canada, but had spent the first ten and fourteen years of their lives in the Chinese school system. At that time they had only been in Canada for just over one year and the Officer felt that they would still be familiar with China and would receive the support of family there to help them to re-integrate.

[17] The Officer identified that there would be some hardships involved in leaving Canada. If they stayed in Canada, the children would remain with their friends and supporters and would be taken care of by their parents. However, the Officer found that they would still have friends, supporters and immediate family in China and that those relationships had been forged over their entire lives.

[18] The Officer weighed the positive establishment factors against the relatively short stay in Canada which was noted to be within their control. The Officer was not satisfied that the evidence submitted and their circumstances, which included findings by both the RPD and the RAD that there was no hardship from their past or present Falun Gong association warranting a grant of refugee status, would present any significant difficulty in the Applicants re-establishing themselves in China. After considering the children's best interest, the Officer determined that relocation to China would not have a significant negative impact on those interests.

[19] The Officer concluded that the humanitarian and compassionate considerations that were before the Officer did not justify an exemption under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

IV. **Analysis**

A. *Issue and Standard of Review*

[20] The only issue is whether the Decision was reasonable. As there are mixed questions of fact and law the Decision is reviewable on a standard of reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53, [2008] 1 SCR 190 [*Dunsmuir*].

[21] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir* at para 47. If the reasons, when read as a whole, "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": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708.

B. *Was the Decision reasonable?*

[22] The submissions of the Applicants set forth in detail extracts of various cases in which this Court, through to the Supreme Court of Canada have considered the application of humanitarian and compassionate factors under subsection 25(1) of the IRPA. After reviewing the substance of several cases, Counsel submits that the Decision is devoid of a sense of compassion

and that the Officer failed to appreciate the substance of the reasons behind the H&C Application and consider them as a whole.

[23] While the Applicants stressed that the Officer lacked appropriate compassion in arriving at the Decision they do not provide concrete examples of that allegation other than saying that while each item was considered individually, there was no global assessment as set out in Inland Processing Guidelines and confirmed in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 28, [2015] 3 SCR 909.

[24] The Applicants say that the Officer "misses the point" of their H&C Application. They refer to *Paul v Canada (Citizenship and Immigration)*, 2013 FC 1081, 235 ACWS (3d) 484 [*Paul*] and highlight the passage that refers to an empathetic approach being required in which the Officer should "step into the shoes of an applicant" and ask "how would I feel if I were her or him" noting that "[in] coming to the answer, the decision-maker's heart, as well as analytical mind, must be engaged": *Paul* at para 8 citing *Damte v Canada (Citizenship and Immigration)*, 2011 FC 1212 at paras 33-34, 5 Imm LR (4th) 175.

[25] The Applicants also refer to several other cases from this Court and cite at some length various passages from those cases in which the need for empathy, compassion and a holistic approach to the evidence is mentioned.

[26] The points of law to which the Applicants refer are valid. What the Applicants have not done though is show how, or where in the Decision, there was a failure by the Officer either to consider the evidence or to apply the law to the evidence.

[27] The submissions made to the Officer set out the background facts, including the practice of Falun Gong by Mr. He. The employment of Mr. He was noted. It was submitted that the family was hardworking and were building the foundations of a life in Canada. The Officer was asked to consider the H&C Application in light of the best interests of the two young children who were both in school with the eldest, a member of the school orchestra, set to graduate high school the following year. It was submitted that, if returned to China, there was a risk to the children of being separated from their parents as the parents would face possible detention for their association with Falun Gong.

[28] The submissions also set out subsection 25(1) of the *IRPA* and referred to case law interpreting it. One submission, quoting from *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 at 350, 1970WL96710 (WL Can) (IAB), was that the facts of the application "would excite in a reasonable man [sic] in a civilized community a desire to relieve the misfortunes of another".

[29] The submissions when advancing this quote do not particularise which facts should excite a desire to relieve misfortune. It would appear that the fact upon which the Applicants continued to rely as causing hardship, beyond the routine hardship of leaving Canada, was their contention that Mr. He was a Falun Gong practitioner and, as such, if returned to China he would not be able to freely practice that belief without risk to himself and his family.

[30] The Officer was aware that there were letters of support on file confirming that Mr. He practices Falun Gong in Canada. The Officer also noted that the RPD found that Mr. He was not a genuine Falun Gong practitioner and there was no evidence that his actions in Canada had come to the attention of Chinese authorities. The RPD, subsequently upheld by the RAD, did not

find the Applicants credible and did not believe their allegations of a possibility of persecution in China.

[31] The Officer reasonably concluded that little weight would be placed on the hardships of returning to China based on the same risks that were deemed by the RPD to not be credible.

[32] Counsel for the Applicants submits that the Officer failed to consider the issue that in China Mr. He could no longer practice Falun Gong. With respect, that argument is without merit. The Officer did consider the argument about Falun Gong but had found that because of the RPD credibility findings little weight could be placed on the hardships of returning to China with respect to those same risks. It was entirely reasonable for the Officer to accept the credibility findings made by the RPD particularly as the RAD had confirmed the RPD decision.

[33] Once the RPD determined that Mr. He was not a genuine Falun Gong practitioner in either China or Canada and that he had not come to the attention of Chinese authorities, there is no valid argument that he would suffer a hardship by not being able to practice Falun Gong in China if returned there.

[34] With respect to whether the Officer conducted a global assessment of the evidence, the Applicants are right that there is not to be a piecemeal analysis of the evidence but a weighing together of all the humanitarian and compassionate considerations put forward. Counsel says the Officer never took a holistic approach but instead focussed on each issue separately and made findings that were less than reasonable. No specific examples were put forward of which of the Officer’s conclusions were unreasonable, it is a bald allegation that each finding was unreasonable and missed the point.

[35] Having reviewed the Decision several times, it is my view that the Officer made reasonable findings and finally weighed the evidence as a whole rather than simply taking each individual finding. For example, the Officer considered the best interests of the children both in Canada and in China. It was noted that the vast majority of their lives and schooling had been spent in China, while just under two years had been spent in Canada. The Officer acknowledged that if the children remained in Canada they would be with friends and supporters and would be taken care of emotionally, financially and physically by their parents. On the other hand, weighed against that experience the Officer noted that in China the children would be returning to a country where they are familiar with the language and customs and still have recent experience with schooling.

[36] In my view a global assessment was conducted by the Officer. In finding there were not sufficient humanitarian and compassionate factors to justify an exemption under subsection 25(1) of the *IRPA*, the Officer weighed the relatively short stay of the Applicants in Canada and the lack of a negative impact on their return to China against the positive establishment factors of successful employment, schooling and housing as well as the presence of friends and supporters. That is a global assessment.

[37] While the Applicants would have preferred that the evidence had been weighed differently, there is no indication that the Officer either overlooked or misunderstood any of the evidence or that the Officer made findings that were contrary to the evidence.

[38] Given the deference owed to the Officer and in light of the clear reasons provided by the Officer that explain both how and why the Officer arrived at determining the evidence of the

Applicants did not justify an exemption under subsection 25(1) of the *IRPA*, the Decision meets the *Dunsmuir* criteria and is reasonable.

[39] The application is dismissed. There is no serious question of general importance for certification on these facts.

JUDGMENT IN IMM-3404-16

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no question for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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