Federal Court  Cour fédérale

Date: 20190304

Docket: IMM-3293-18

Citation: 2019 FC 265

Ottawa, Ontario, March 4, 2019

PRESENT: THE CHIEF JUSTICE

BETWEEN:

WENJIE HUANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] An important issue raised in this proceeding is whether it is reasonable for an Immigration Officer to reject an application for permanent residence in Canada on humanitarian and compassionate [**H&C**] grounds, after second guessing a mature minor applicant's views regarding her own best interests.

[2] In my view, the Officer's second-guessing of Ms. Huang's views in this regard was unreasonable, as it was based on speculation and went to the core of her application.

[3] The officer also erred by failing to take several significant forward-looking H&C considerations into account.

[4] Accordingly, the Officer's decision rejecting Ms. Huang's H&C application will be set aside and remitted to another officer for reconsideration.

II. **Background**

[5] Ms. Huang is a 19 year old Chinese citizen who lives in China. She was abandoned when she was only a few days old and was subsequently found in the street by Ms. Yuling Luo, who raised her as if she were her own child.

[6] Ms. Luo never formally adopted Ms. Huang, because she did not meet the legal requirement that an adopting parent be at least 30 years old at the time when she began to care for the child.

[7] In 2007, when Ms. Huang was 10 years old, Ms. Luo immigrated to Canada with her ex-husband and her daughter from that relationship. Based on her ex-husband's advice, Ms. Luo did not declare Ms. Huang in her immigration application.

[8] In 2010, Ms. Luo divorced her ex-husband. Two years later, she began a new relationship with Mr. Anthony Wang, with whom she has had two children who are now five and three years old, respectively. Ms. Luo's daughter from her first marriage, who is 12 years old, also lives with them.

[9] After Ms. Luo departed for Canada, Ms. Huang was placed in the care of Ms. Luo's remaining family in China for a number of years, before she moved in with one of Ms. Luo's friends and eventually moved into an apartment purchased by Ms. Luo, where she has lived on her own since 2014.

[10] In 2013, Ms. Huang unsuccessfully applied for a study visa in this country.

[11] In 2016, approximately two months before she turned 18 years old, Ms. Huang applied for permanent residence in this country as a member of the family class. That application was sponsored by Ms. Luo. At the same time, Ms. Huang also requested permanent residence on H&C grounds, pursuant to s. 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 **[IRPA**]. It appears that she made the latter request in recognition of the fact that she could not meet the definition of "dependent child" set forth in s. 2 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227), as required for her to be considered to be a member of the family class.

III. **The Decision Under Review [the Decision]**

[12] At the outset of the Decision, the Officer found that Ms. Huang was neither Ms. Luo's biological child nor was ever formally adopted by Ms. Luo. Accordingly, the Officer rejected Ms. Huang's family class application. Ms. Huang does not contest that decision or the findings upon which it was based.

[13] Turning to Ms. Huang's H&C request, the Officer considered her relationship with Ms. Luo to be "a strong positive factor." However, the Officer proceeded to reject the request based on the following "negative factors:"

i. Ms. Huang's need for formal English language training would cause an interruption in her studies;

ii. It appeared that Ms. Luo and Mr. Wang were not adequately prepared to provide the degree of support that Ms. Huang would require to continue her studies and to integrate in Canada, in part because they are raising three young children and in part because Mr. Wang works full time;

iii. Ms. Huang may face social isolation in Canada, especially given her lack of English or French language skills;

iv. Given the foregoing, Ms. Huang's problems with depression, sleeping and possible alcohol abuse may get worse, rather than better, if she moves to Canada; and

v. It was not in the best interests of Ms. Luo's three young children to bring a person who is suffering from depression, has difficulty sleeping, and has a potential alcohol abuse problem into their household.

IV. **Issue and Standard of Review**

[14] The sole issue raised in this Application is whether the Decision was reasonable.

[15] In assessing whether a decision is reasonable, the focus of the Court is generally upon whether the decision is appropriately intelligible, transparent and justified. In this regard, the Court's task will be to assess whether it is able to understand why the decision was made and to ascertain whether the decision falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 16. A decision that is "rationally supported" will generally fall within this range: *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, at para 47.

[16] Given the "highly discretionary and fact based nature" of decisions made under s. 25 of the IRPA, immigration officers ordinarily will have a broad range of acceptable and defensible outcomes available to them: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 61 [***Baker***]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113, at para 84.

V. **Analysis**

A. *The test for H&C relief*

[17] Section 25 of the IRPA provides exceptional relief from what would otherwise be the ordinary operation of the IRPA. To obtain such relief, an applicant bears the onus of establishing circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, at para 21 [***Kanthasamy***], quoting from *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970) 4 IAC 338, at 350.

[18] To meet this test, it is not sufficient to simply establish the existence or likely existence of misfortunes, relative to Canadian citizens and permanent residents of Canada. This is something that one would expect could be readily established by most persons facing removal to, or currently living in, a country where living standards are significantly below those in Canada. As the Supreme Court of Canada has recognized, "[t]here will inevitably be some hardship associated with being required to leave Canada": *Kanthasamy*, above, at para 23. Similarly, there

will inevitably be some hardship associated with being an unsuccessful applicant for H&C relief from outside Canada.

[19] Section 25 was enacted to address situations in which the consequences of deportation "might fall *with much more force on some persons … than on others,* because of their particular circumstances …": *Kanthasamy*, above, at para 15 (emphasis added), quoting the *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Immigration Policy*, Issue No. 49, 1st Sess., 30th Parl., September 23, 1975, at p. 12. Accordingly, an applicant for the exceptional H&C relief provided by the IRPA must demonstrate the existence or likely existence of misfortunes or other H&C considerations *that are greater than those typically faced by others who apply for permanent residence in Canada*.

[20] Put differently, applicants for H&C relief must "establish exceptional reasons as to why they should be allowed to remain in Canada" or allowed to obtain H&C relief from abroad: *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, at para 90. This is simply another way of saying that applicants for such relief must demonstrate the existence of misfortunes or other circumstances that are exceptional, *relative to other applicants who apply for permanent residence from within Canada or abroad*: *Jesuthasan, v Canada (Citizenship and Immigration)*, 2018 FC 142, at paras 49 and 57; *Kanguatjivi v Canada (Citizenship and Immigration)*, 2018 FC 327, at para 67.

[21] I recognize that in *Apura v Canada (Citizenship and Immigration)*, 2018 FC 762, at para 23, this Court suggested that it would be an error to deny an H&C application based on the

absence of “exceptional” or “extraordinary” circumstances. To the extent that this statement is inconsistent or in tension with the principles quoted in paragraphs 19 and 20 above, and with other jurisprudence that can be fairly read as having adopted a similar approach, I consider that it does not accurately reflect the existing state of the law: see, e.g., *Li v Canada (Citizenship and Immigration)*, 2018 FC 187 at paras 25-26; *L. E. v Canada (Citizenship and Immigration)*, 2018 FC 930, at paras 37-38; *Yu v Canada (Citizenship and Immigration)*, 2018 FC 1281, at para 31; *Brambilla v Canada (Citizenship and Immigration)*, 2018 FC 1137, at paras 14-15; *Sibanda v Canada (Citizenship and Immigration*, 2018 FC 806, at paras 19-20; *Jani v Canada* (*Citizenship and Immigration*), 2018 FC 1229, at para 25; *Ngyuen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 29.

[22] In the absence of any requirement to demonstrate the existence or likely existence of misfortunes or other H&C considerations that are greater or more significant in nature than those typically faced by persons who apply for permanent resident status in this country, s. 25 would risk becoming the alternative immigration scheme that the Supreme Court of Canada explicitly sought to avoid: *Kanthasamy*, above, at para 23. To the extent that this would also increase both the degree of subjectivity in the application of s. 25 and the divergence across decision-makers, it could also be expected to reduce certainty, predictability, and eventually public confidence in the IRPA.

[23] In assessing whether an applicant has established sufficient H&C considerations to warrant a favourable exercise of discretion under s. 25 of the IRPA, *all* of the relevant facts and factors advanced by the applicant must be considered and weighed: *Kanthasamy*, above, at para

25. In this regard, the words “unusual and undeserved or disproportionate hardship” should be seen as instructive, but not determinative: *Kanthasamy*, above, at para 33.

[24] However, “since ‘children will rarely, if ever, be deserving of any hardship,’ the concept of ‘unusual and undeserved hardship’ is presumptively inapplicable to the assessment of the hardship invoked by a child to support his or her application for [H&C] relief”: *Kanthasamy*, above, at para 41, quoting *Hawthorne v Canada (Citizenship and Immigration)*, 2002 FCA 475, at para 9 [***Hawthorne***]. Instead, the assessment of the best interests of such an applicant, and of other directly affected children, must be highly contextual and must be responsive to each child’s particular age, capacity, needs and maturity. While a child’s best interests must be “well identified” and given “substantial weight,” they are not necessarily determinative, and can therefore be outweighed by other considerations: *Kanthasamy*, above, at paras 35, and 38-39.

[25] In determining their best interests, the views of the child should be “given due weight in accordance with the age and maturity of the child”: *Hawthorne*, above, at para 48; *Convention on the Rights of the Child*, 20 November 1989, Can TS 1992 No 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991), at Article 12.

B. *Assessment*

[26] Ms. Huang submits that the Decision is unreasonable because the Officer engaged in speculation regarding her best interests and failed to address the benefits that would result from her reunification with her *de facto* mother in Canada. I agree.

[27] In the Decision, the only factor that the Officer identified as being "positive" in the assessment of Ms. Huang's application was her relationship with Ms. Luo. In this regard, the Officer's notes, which form part of the Decision, recognized the close relationship between Ms. Luo and Ms. Huang and the fact that Ms. Huang was a *de facto* member of Ms. Luo's family when Ms. Luo immigrated to Canada in 2007. Those notes also recognize that Ms. Luo has done her best to support Ms. Huang from a distance and that Ms. Luo's extended family and friends in China have offered support for Ms. Huang. In addition, the notes state that Ms. Huang has faced the loss of Ms. Luo's presence since 2007, and that she and Ms. Luo have been impacted by their prolonged separation, including by experiencing hurt and sadness which "cannot be undone."

[28] However, the Officer failed to assess a number of other factors that, taken together with the other circumstances faced by Ms. Huang and Ms. Luo, may well be expected to "excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Kanthasamy*, above, at para 44. These include:

i. The *ongoing* suffering and grief that Ms. Huang and Ms. Luo both identified in some detail, in their interviews with the Officer and in the materials provided in support of the H&C application, and that they described as being attributable to their separation;

ii. Ms. Huang's sense of alienation as someone who was abandoned in a box as a newborn baby and is now separated from "the only person in the world that [she] can rely on;" and

iii. The fact that Ms. Huang would "regain the family she has lost," if granted permanent residence in Canada.

[29] In addition, the Officer summarily dismissed evidence that Ms. Huang suffers from depression and insomnia, and that this is attributable to her separation from her mother. The Officer did so after noting that no evidence had been provided to demonstrate that these conditions could be expected to improve in Canada. Taken alone, this was not necessarily unreasonable. However, in the broader context described above and below, the Officer's treatment of this evidence contributed to an analysis that failed to reflect the type of global and cumulative assessment that was required: *Kanthasamy*, above, at para 28.

[30] Most importantly, the Officer appeared to place significant weight on what he or she speculated to be in Ms. Huang's best interests, notwithstanding that Ms. Huang had made it very clear that she considered those best interests were in being reunited with Ms. Luo in Canada. In this regard, the Officer speculated that Ms. Huang's inability to speak English or French, her "potential social isolation," and the interruption of her studies "will make things worse, not better" for her, and that therefore it would therefore not be in *her* best interests to grant her H&C application. Given that Ms. Huang was approximately two months shy of being 18 years old at the time of her application, and was almost 19 at the time of the Officer's assessment, I consider this to have been an unreasonable second guessing of a mature person's position regarding her own best interests. While it is entirely understandable that an Immigration Officer may in certain circumstances take a different view than a young child or the child's parent/sponsor regarding

the child's best interest, this is less so when the child was almost 18 at the time of her application. On the very particular facts of this case, this was unreasonable.

[31] In my view, to be appropriately "alert, alive and sensitive" to the best interests of an H&C applicant who is months shy of being an adult (*Kanthasamy*, above, at para 38), one must give significant weight to that individual's own views about his or her best interests. This does not mean that an officer must defer to a mature minor person's views in this regard. However, it is unreasonable for an officer to substitute his or her speculative and unsupported views for those of a mature applicant.

[32] I pause to observe with respect to Ms. Huang's language abilities that although she chose to be interviewed by the Officer with the assistance of an interpreter, the certified tribunal record contains evidence of academic records indicating that Ms. Huang has some proficiency in English.

[33] The Respondent submits that it was reasonably open to the Officer to find that (i) Ms. Luo and Mr. Wang would only be able to provide limited support to Ms. Huang, and (ii) that her move into their home in Canada would not be in the best interests of their three young children. I agree. Indeed, had the Officer's analysis been otherwise reasonable, it would not necessarily have been unreasonable for the Officer to base the Decision on these two findings. However, the Officer's decision was not otherwise reasonable.

VI. **Conclusion**

[34] For the reasons set forth above, this application is allowed.

[35] At the end of the hearing of this Application the parties stated that no serious question of general importance arises from the facts and issues in this case. I agree. Accordingly, no question will be certified pursuant to paragraph 74(d) of the IRPA.

JUDGMENT in IMM-3293-18

THIS COURT'S JUDGMENT is that:

1. This application is allowed.

2. There is no question for certification pursuant to paragraph 74(d) of the IRPA.

"Paul S. Crampton"
Chief Justice

APPENDIX 1 — Relevant Legislation

Immigration and Refugee Protection Act, S.C. 2001, c. 27:

Family reunification	*Regroupement familial*
12 (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	12 (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

Immigration and Refugee Protection Regulations (SOR/2002-227):

Interpretation	*Définitions*
2 The definitions in this section apply in these Regulations.	2 Les définitions qui suivent s'appliquent au présent règlement.
[…]	[…]
dependent child, in respect of a parent, means a child who	enfant à charge L'enfant qui :
(a) has one of the following relationships with the parent, namely,	a) d'une part, par rapport à l'un de ses parents :
(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or	(i) soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait,
(ii) is the adopted child of the parent; and	(ii) soit en est l'enfant adoptif;
(b) is in one of the following situations of dependency, namely,	b) d'autre part, remplit l'une des conditions suivantes :
(i) is less than 22 years of age and is not a spouse or common-law partner, or	(i) il est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait,
(ii) is 22 years of age or older and has depended substantially on the financial support of the parent since before attaining the age of 22 years and is unable to be financially self-supporting due to a physical	(ii) il est âgé de vingt-deux ans ou plus et n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents depuis le moment où il a atteint l'âge de vingt-deux ans, et ne peut subvenir à ses

or mental condition. (enfant à charge)	besoins du fait de son état physique ou mental. (dependent child)

FEDERAL COURT

SOLICITORS OF RECORD

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