Federal Court  Cour fédérale

Date: 20190724

Docket: IMM-5179-18

Citation: 2019 FC 988

Ottawa, Ontario, July 24, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

YANFANG CHEN
ZHENYANG CHEN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Yanfang Chen is a citizen of Canada originally from the People's Republic of China. She married a Canadian citizen in October 2006 and shortly after the marriage her husband sponsored her to Canada. Her husband completed the forms for her permanent residence application. Because she had not told her husband about her son, Zhenyang (she felt ashamed to bring up the subject since he had been born out of wedlock), he was not shown as a dependent in the application. As such, Zhenyang was excluded from the family class for sponsorship to Canada by

virtue of paragraph 117(9) (d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

[2] Ms. Chen therefore applied for an exemption under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], to sponsor her son to Canada based on humanitarian and compassionate [H&C] grounds. An Officer at the Consulate General of Canada in Hong Kong refused the application in a decision dated August 30, 2018. Ms. Chen and her son have now applied under subsection 72(1) of the *IRPA* for judicial review of the Officer's decision. They ask the Court to set aside the decision and return the matter for redetermination by a different officer.

I. The Officer's Decision

[3] In the Global Case Management System [GCMS] notes the Officer noted that Zhenyang had obtained resident status in Hong Kong in July 2014 through his father who had married a Hong Kong woman. This resulted in Zhenyang's *hukou* in China being cancelled. The Officer observed that, despite having resident status in Hong Kong, Zhenyang continued to reside and study in China.

[4] The Officer then found that because Ms. Chen's son had not been disclosed in her permanent residence application, this omission could have induced an error in the administration of the *IRPA* and the *IRPR*.

[5] The Officer next assessed the strength of the relationship between Ms. Chen and her son. The Officer noted that Zhenyang had lived with his mother until age 3 and had spent the majority of his childhood without his mother. The Officer found the evidence of Ms. Chen's financial and emotional support amounted to only what she stated, and this was insufficient. In the Officer's view, Ms. Chen did not attempt to bring Zhenyang into her life and it was her decision to leave him with his paternal grandparents when she left Fujian and moved to Guangdong to pursue her career. The Officer noted that she felt too ashamed to disclose Zhenyang to her husband, and she hid her other son, Shuo (who had also been born out of wedlock), from her family. In the Officer's mind, it appeared that Ms. Chen always considered her two illegitimate sons as burdens and considered them a shame.

[6] The Officer remarked that, even after she got divorced in 2011, Ms. Chen did not attempt to sponsor Zhenyang. For the Officer, this suggested that Ms. Chen valued her career and dignity as more important than her children. The Officer noted that only four pages of WeChat communication between Ms. Chen and Zhenyang had been submitted, and that Ms. Chen had visited Zhenyang only once in 2012 for 2 months. The Officer stated that even if Ms. Chen's support to Zhenyang was accepted, given their long-term physical separation there was insufficient evidence they had a close relationship. The Officer concluded the assessment of the relationship between Ms. Chen and Zhenyang by stating that there was no evidence of barriers to prevent her from continuing to provide support remotely or to visit him in China.

[7] The Officer then assessed the best interests of Zhenyang and his half-brother, Shuo. The Officer began by stating that Zhenyang would become an adult in less than two months and that

he was able to register in his father's *hukou* and receive formal education. The Officer noted Ms. Chen's statement that Zhenyang had a stable home with his grandparents and had lived with them until he was admitted to a vocational school in September 2016.

[8] Although the Officer acknowledged that Zhenyang's grandfather had died in May 2018 and his grandmother had medical issues, the Officer found his level of dependency on adults was diminishing and the critical period of dependency on adult care and parental bonding had passed. The Officer observed that since Zhenyang had been residing at a school dormitory for the last two years, his dependency on his grandparents had become less significant.

[9] The Officer found there was insufficient evidence to support Ms. Chen's claim that Zhenyang had developed some behavioural problems due to separation from her. The Officer accepted that, while family separation could create stress, it was the extent that mattered and the stress experienced by Zhenyang due to separation from his mother may have been significant when he was 3, but it was not expected to be the same now. Given the long-term separation, the Officer stated it was unclear how Zhenyang perceived his relationship with his mother and whether reunification with her in a different country with a different culture would create other stress on him or cause other behaviour problems.

[10] The Officer remarked that, while Zhenyang had obtained resident status in Hong Kong in July 2014, he still lived and studied in China. The Officer stated Zhenyang had an additional option to live in Hong Kong. The Officer noted Ms. Chen's claim that Zhenyang could not establish himself in Hong Kong due to abandonment by his father. The Officer found that since

Zhenyang's father also had resident status in Hong Kong and had a legal responsibility for Zhenyang according to Hong Kong law, his well-being as a minor was protected by Hong Kong law. The Officer noted that Zhenyang's resident status in Hong Kong would not expire on his eighteenth birthday, and that his current Hong Kong identity card was valid until he turned 18 and he just had to renew for an adult identity card.

[11] In response to Ms. Chen's statements that Zhenyang did not speak English or Cantonese, had never lived in Hong Kong, and the chances of him successfully establishing himself there were minimal, the Officer observed that Zhenyang never attempted to live in Hong Kong and that Mandarin, the official language in China, was getting more important and widely used in Hong Kong. The Officer found that, if Zhenyang's inability to speak English would affect his successful establishment in Hong Kong, that inability would likewise affect his ability to successfully establish himself in Canada.

[12] Although Ms. Chen informed the Officer that Zhenyang's father was in Hong Kong and had little contact with him and refused to take him in, the Officer noted that his father resided in the same city as Zhenyang and was willing to include Zhenyang as his dependant when applying for resident status in Hong Kong. The Officer observed that Zhenyang or his family had chosen a vocational school located in that city instead of other schools in his hometown or Fujian province where he could be closer to his grandparents. It was reasonable, the Officer stated, to interpret that such decision was to allow Zhenyang to be closer to his father. The Officer was not satisfied that Zhenyang's father had little contact with him or refused to care for him.

[13] The Officer determined that Zhenyang's opportunity to pursue university studies in China had not been infringed due to the loss of his *hukou*. Even though access to certain jobs in China was restricted without a *hukou*, the Officer found Zhenyang's career development would not be impeded and there was no prohibition from him pursuing other jobs in China. The Officer noted that Zhenyang also had the legal right to work and pursue his career in Hong Kong.

[14] The Officer noted that economic development in Hong Kong was similar to that in Canada and Zhenyang would not face barriers to his economic, social and cultural rights if he stayed in Hong Kong. As a resident of Hong Kong, the Officer believed Zhenyang would enjoy access to social services, health care and education. In the Officer's mind, by staying in China and Hong Kong where Zhenyang was more familiar with both the environment and culture than in Canada, he would have better access to his own Chinese culture.

[15] The Officer then assessed the best interests of Shuo. The Officer noted that Ms. Chen had intentionally hid Zhenyang from Shuo and it was unclear when he learned about Zhenyang. The Officer concluded it was likely that Shuo came to know about Zhenyang in or after 2010.

[16] The Officer further noted that Shuo had only visited Zhenyang once in 2012, and there was little evidence he was close to Zhenyang or was psychologically attached to him. The Officer stated that there was no evidence of any negative impact or hardship on Shuo's upbringing or well-being by having been separated from Zhenyang, and there was insufficient evidence of a negative impact on the best interest of Shuo if Zhenyang is not present in Canada.

II. Preliminary Issue

[17] Ms. Chen has filed an additional affidavit. For the most part, this affidavit contains information that was not before the Officer and constitutes an attempt to bolster the H&C application and respond to the Officer's decision.

[18] The Applicants have also filed an affidavit sworn to by Neerja Saini. This affidavit shows that Hong Kong residency does not automatically renew after a person turns 18, nor is it easy to restore a *hukou*. It also shows that, according to a 2016 census by the Hong Kong government, Mandarin is spoken by only 1.9% of Hong Kong's population.

[19] The Respondent has filed an affidavit sworn to by the Officer at the Consulate in Hong Kong who refused the H&C application. This affidavit states, in relevant part:

> As a Locally Engaged Staff officer born and raised in Hong Kong, the facts relating to the renewal of Hong Kong Identity Card, language spoken in the city, education system in Hong Kong/China, Hong Kong residents' eligibility to social/health/education benefits, etc., are derived from my local knowledge.

[20] As a general rule, the record for judicial review is usually limited to that which was before the decision-maker; otherwise, an application for judicial review would risk being transformed into a trial on the merits, when a judicial review is actually about assessing whether the administrative action was lawful (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 14 to 20

[*Association of Universities*]; *Bernard v Canada (National Revenue)*, 2015 FCA 263 at paras 13 to 28).

[21] Ms. Chen's affidavit will not be considered because it does not fall within any of the recognized exceptions (as stated in *Association of Universities* at para 20). It does not offer evidence as to whether the decision under review was rendered in a procedurally unfair manner. It does not highlight a complete absence of evidence before the decision-maker in making a finding. And it does not provide general background information in circumstances where such information might assist the Court in understanding the issues relevant to the judicial review.

[22] The Officer's affidavit confirms that in making the decision under review she relied on her own local knowledge and not on objective or secondary sources about the prevalence of Mandarin in Hong Kong or Zhenyang's ability to renew his juvenile Hong Kong identity card with an adult one. As it provides general background and assists the Court's understanding of the issues relevant to this judicial review, it will be considered.

[23] Ms. Saini's affidavit highlights a complete absence of evidence before the Officer in making her finding that Zhenyang could renew his juvenile Hong Kong identity card with an adult one and the benefits that would go along with it. The information contained in this affidavit has not been rebutted by the Respondent. As it brings to the Court's attention procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, namely that the Officer's assumptions may have been rebutted if an opportunity was given, this affidavit will be considered.

III. Standard of Review

[24] An immigration officer's decision to deny relief under subsection 25(1) of the *IRPA* is reviewed on the reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44). An officer's decision under subsection 25(1) is highly discretionary, and this provision "provides a mechanism to deal with exceptional circumstances" and the officer "must be accorded a considerable degree of deference" by the Court (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15).

[25] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Those criteria are met 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" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[26] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the

circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115).

[27] An issue of procedural fairness "requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation" (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74). As the Federal Court of Appeal recently observed: "even though there is awkwardness in the use of the terminology, this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

IV. Was the Officer's Decision reasonable?

[28] It is evident from Ms. Saini's affidavit that the Officer erred with respect to key points such as whether Zhenyang could renew his Hong Kong residency and whether Mandarin was widely spoken in Hong Kong. Ms. Saini's affidavit shows that Hong Kong residency does not automatically renew after a person turns 18 and Mandarin is spoken by only a small portion of Hong Kong's population. The Officer's assumptions in this regard were unfounded and unreasonable.

[29] In my view, without Hong Kong residency and support to become established in Hong Kong (including learning new languages), it was not reasonable for the Officer to consider Hong Kong as an alternative to China or Canada for Zhenyang, or that he would have access to certain

benefits in China through his Hong Kong residency. The Officer's reliance upon her personal knowledge and beliefs was unreasonable because these were not in accord with Hong Kong residency requirements.

[30] It is clear from the Court's jurisprudence that an officer who relies on his or her own assumptions has a duty to provide an applicant with an opportunity to respond. The principle of *audi alteram partem* or "hear the other side" mandates that an opportunity to address views that are prejudicial to the application be given (*Nguyen v Canada (Citizenship and Immigration)* 2019 FC 439 at para 28; *Mohamed v Canada (Minister of Citizenship and Immigration)* 2001 FCT 983 at para 14; *Mittal (Litigation Guardian of) v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 727 at para 12; and *Muliadi v Canada (Minister of Employment and Immigration)*, [1986] 2 FC 205 at para 16).

[31] In this case, the Officer should have afforded the Applicants an opportunity to respond to her beliefs and assumptions about renewal of a Hong Kong identity card, the language spoken in the city, the education system in Hong Kong and China, and Hong Kong residents' eligibility to obtain social, health, and education benefits. By not providing the Applicants with such an opportunity, the Officer breached her duty of procedural fairness.

V. Conclusion

[32] The Officer's decision was unreasonable and rendered in a procedurally unfair manner. The decision must be set aside and the matter returned for redetermination by a different officer.

[33] The parties did not propose a serious question of general importance to be certified under paragraph 74(d) of the *IRPA*.

JUDGMENT in IMM-5179-18

THIS COURT'S JUDGMENT is that: the application for judicial review is granted; the decision of the Consular Officer dated August 30, 2018, is set aside; the matter is returned for redetermination by a different officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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