Federal Court  Cour fédérale

Date: 20211006

Docket: IMM-5968-19

Citation: 2021 FC 1041

Ottawa, Ontario, October 6, 2021

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

XUE YUN CHEN & QIONG QIAN CHEN THROUGH HER LITIGATION GUARDIAN XUE YUN CHEN

Applicants

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Xue Yun Chen, and her daughter, the minor Applicant, seek judicial review of a decision rendered on July 10, 2019 by a case-processing officer [Officer] refusing their application for permanent residence on humanitarian and compassionate [H&C] grounds.

[2] The Applicants are citizens of the People's Republic of China [China]. They came to Canada in October 2008 and claimed refugee protection. The Refugee Protection Division dismissed their claim for protection in March 2010. Leave was denied in March 2011.

[3] In February 2011, the Applicant married her husband and submitted an application for permanent residence under the spouse or common-law partner in Canada class in April 2011. In October 2012, the Applicant submitted an application for a pre-removal risk assessment [PRRA]. The PRRA application was dismissed in September 2013, resulting in a removal order against the Applicants.

[4] In March 2014, the Applicant's husband passed away following a brief illness.

[5] In November 2018, the Applicant attended an interview with regard to her application for permanent residence. She informed the immigration officer that her spouse had died four (4) years earlier. The Applicant was later notified that she no longer met the requirements under the spouse or common-law partner in Canada class. Her application was converted to an application for permanent residence based on H&C grounds on behalf of herself and the minor Applicant. To support their application for H&C relief, the Applicants relied on the loss of the Applicant's husband, their establishment in Canada, country conditions in China and the best interests of the minor Applicant.

[6] On July 10, 2019, the Officer denied their application for permanent residence from within Canada after determining there were insufficient H&C grounds to justify an exemption

under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Officer noted the following :

a) The Applicant failed to declare her marriage to her husband in 2011 in her PRRA application submitted in 2012;

b) Little evidence of efforts to obtain valid passports was provided by the Applicant;

c) There was insufficient evidence that the Applicants' stay in Canada after their removal orders came into force was beyond the Applicant's control;

d) Leaving Canada would likely cause some emotional difficulties for the Applicants, having experienced the loss of a husband and stepfather;

e) A positive aspect of the Applicant's establishment in Canada included the relatively lengthy period of time she had lived in Canada, her periods of employment in Canada, her ability to financially support herself and her daughter as well as her social ties;

f) There was little evidence that the Applicant had made efforts to improve her English or French language skills, or that the Applicant is involved in a church or in the community;

g) There were mitigating factors that might assist the Applicants in returning to China as all of their family members, with whom they lived prior to coming to Canada, continue to live in China, and may be able to provide the Applicants with emotional support;

h) The Applicant speaks Mandarin and her late husband's insurance payments may assist the Applicants in re-establishing themselves in China;

i) The Applicants did not provide any supporting evidence with regard to country conditions in China to demonstrate that they would be unable to experience real freedom and dignity;

j) The minor Applicant has been living in Canada for over ten (10) years, has spent most of her formative years in Canada and has likely developed friendships with classmates;

k) The minor Applicant's primary caregiver is the Applicant as the minor Applicant has never had any sort of relationship with her biological father and, while she enjoyed a loving and supporting relationship with her stepfather, he regrettably passed away four (4) years ago;

l) While it is in the minor Applicant's best interests to remain in Canada in the care of her mother, at the same time, the minor Applicant would also likely continue to do well in the care of her mother if they were to return to China;

m) The minor Applicant may need to spend time improving her writing and reading ability in Mandarin, but she was successfully able to adapt to a new country, language and culture when she came to Canada and she is likely to be able to adapt to her new life in China as well;

n) The presence of her grandparents, uncle and cousin in China would also likely be beneficial for the minor Applicant.

[7] Overall, the Officer found that, based on a cumulative assessment of the evidence presented and after considering the circumstances of the Applicants, the H&C considerations did not justify an exemption from the requirement of having to apply from outside of Canada for permanent residence.

[8] The Applicants seek judicial review of the Officer's decision. They submit that the Officer erred in assessing their establishment in Canada and the best interests of the minor Applicant.

II. Analysis

[9] The decision to grant or refuse an exemption on H&C considerations is reviewable on a standard of reasonableness (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16, 17 [*Vavilov*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 10, 44 [*Kanthasamy*]. The Court's focus is on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). It must ask itself "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). Also, the "burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para 100).

[10] Regarding their establishment, the Applicants argue that the Officer failed to consider that they were unable to leave Canada due to circumstances beyond their control, such as the death of the Applicant's spouse and the seven (7) years the Respondent took to contact the

Applicant with respect to her spousal sponsorship and to enforce the removal of the Applicants. They contend that the Officer erred by considering the immigration violations as being a strong negative factor that outweighed their establishment without meaningfully considering the circumstances that led them to request an exemption on H&C grounds.

[11] I am not persuaded that the Officer engaged in a flawed analysis of the Applicants' circumstances when noting that it was within their control to leave Canada. The Officer reasonably observed that the Applicants were subject to enforceable removal orders when their PRRA application was refused in 2013. The Applicant's spouse died a few months later, and there was no evidence in the record that the Applicant had made any efforts since 2014 to leave Canada as ordered, or to inform the Respondent that her husband had passed away prior to her interview in 2018.

[12] As for the alleged delay in processing the spousal sponsorship application, the delay in processing immigration proceedings does not constitute a circumstance beyond the Applicants' control (*Diabate v Canada (Citizenship and Immigration)*, 2013 FC 129 at para 30; *Qiu v Canada (Citizenship and Immigration)*, 2012 FC 859 at para 13 [*Qiu*]). Equally, it "cannot serve as the sole basis to demonstrate establishment as it would promote 'backdoor' immigration" (*Qiu* at para 13). The Officer could reasonably find that the Applicants' decision to remain in Canada without status was not beyond the Applicant's control.

[13] The Applicants' reliance on *Dowers v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 593 is of limited use to them. The Officer here fully engaged with the Applicant's

limited evidence of establishment and connection with the community and weighed her negative immigration history against all the positive factors identified. When the decision is read as a whole, I am satisfied that the Officer applied an empathetic approach in assessing all of the Applicants' evidence and the hardship that they would face if required to apply for permanent residence from outside Canada.

[14] The Applicants' arguments regarding the Officer's assessment of the best interests of the child are equally unpersuasive. The Officer did not limit his or her consideration to potential educational barriers as the only hardship the minor Applicant may face if required to apply for permanent residence from outside Canada. On the contrary, the Officer was sympathetic to the minor Applicant's circumstances and took the time to consider her situation in Canada and the potential impact of her return to China with her mother. However, in the context of the limited evidence and submissions presented, the Officer could reasonably conclude that the minor Applicant would likely continue to do well in China in the care of her mother, her primary caregiver, notwithstanding a period of adjustment.

[15] The Applicants argue that there was no evidence in the record to indicate the Applicants' extended family members were willing or able to assist them in adapting to life in China or that they would be able to care for the minor Applicant or her emotional needs.

[16] I find that the Applicants are misconstruing the Officer's reasons. The Officer did not conclude that the Applicants' extended family members would assist or provide financial and emotional support to the Applicants. The Officer reasonably noted that the Applicants were

living with these family members prior to coming to Canada and found that there was little evidence they would be unable to offer the Applicants a place to stay, if only temporarily. The Officer uses the words “may” and “likely” when referring to their ability to provide emotional support to the Applicants and the benefit of their presence for the minor Applicant.

[17] An H&C exemption under subsection 25(1) of the IRPA is an exceptional and discretionary remedy (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15) and the onus of establishing that such exemption is warranted lies with the applicant (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45 [*Kisana*]). If an applicant fails to adduce sufficient relevant information and evidence in support of an H&C application, he or she does so at his own peril (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at paras 5, 8). H&C relief is not intended to be an alternative immigration scheme (*Kanthasamy* at para 23).

[18] I am satisfied that, in the circumstances of this case, the Officer considered and weighed all the factors raised by the Applicants, including their particular circumstances. In light of the evidence and submissions presented, the Officer could reasonably find that they did not justify an exemption from the requirement of having to apply for permanent residence from outside Canada. While the Applicants may disagree with the Officer’s overall assessment of the evidence and the weight given to each H&C factor, it is not open to this Court to reweigh the evidence and attribute a different level of importance to the relevant H&C factors in this application (*Kisana* at para 24).

[19] To conclude, the Applicants have failed to demonstrate a reviewable error in the Officer's decision. When read holistically and contextually, I am satisfied that the Officer's decision meets the reasonableness standard set out in *Vavilov*.

[20] Accordingly, the application for judicial review is dismissed. No questions of general importance were proposed for certification and I agree that none arise.

JUDGMENT in IMM-5968-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5968-19
STYLE OF CAUSE:	XUE YUN CHEN ET AL v THE MINISTER OF CITIZENSHIP & IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	AUGUST 31, 2021
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	OCTOBER 6, 2021

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