Federal Court  Cour fédérale

Date: 20211221

Docket: IMM-4701-20

Citation: 2021 FC 1452

Ottawa, Ontario, December 21, 2021

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

PEIYI LIN
ZIXUAN WEN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Peiyi Lin and her son, Zixuan (Sam) Wen, seek judicial review of the September 17, 2020 decision of a senior immigration officer [the Officer], which refused their application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds, pursuant to section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For the reasons that follow, the Application for Judicial Review is allowed. The Officer's assessment of the best interests of Sam does not reflect the guidance of the jurisprudence and includes findings not supported by the evidence and based on speculation. While the assessment of the best interests of a child [BIOC] are not necessarily determinative of whether an H&C exemption is warranted in the overall circumstances, a flawed BIOC assessment cannot support the reasonableness of the overall decision.

I. Background

[3] The Applicants are citizens of China who arrived in Canada in 2011.

[4] Ms. Lin recounts in her affidavit that she had a troubled relationship with her ex-husband in China. Ms. Lin states that following her divorce in 2007, she faced discrimination as a single mother, resulting in depression and anxiety. She states that she took up the practice of Falun Gong in June 2010 in an effort to improve her mental health.

[5] On August 13, 2011, Ms. Lin and Sam came to Canada. Their claim for refugee protection on the basis of persecution of Falun Gong practitioners was refused in May 2013.

[6] Ms. Lin recounts that she reported to the Canada Border Services Agency in February 2014 to sign a voluntary departure form. However, after witnessing her son's distress at the prospect of leaving Canada, she decided not to appear for removal. A warrant was issued for her arrest in March 2014.

[7] The Applicants' first application for permanent residence on H&C grounds was refused in July 2017.

[8] The Applicants again applied for permanent residence from within Canada on H&C grounds on January 21, 2019. They relied on their establishment in Canada, the best interests of Sam, who was 16 at the time, mental health considerations, and adverse country conditions in China.

II. The Decision under Review

[9] The Officer found that while there were some factors weighing in favour of the Applicants, their circumstances did not warrant an exemption under section 25(1) of the Act.

[10] The Officer began by attributing "some positive weight" to the Applicants' establishment. The Officer acknowledged that Ms. Lin and Sam had been in Canada for nine years and that Ms. Lin had been employed and self-sufficient since January 2014. The Officer noted the letters of support from Ms. Lin's ESL teacher, the organization at which she volunteers, and an aunt, cousin, and friends in Canada. The Officer found that these relationships could be maintained from a distance. The Officer also found that the fact that the Applicants had remained in Canada without authorization and failed to report for a pre-removal interview mitigated the positive elements of their establishment. The Officer went on to note that their establishment is what would be expected of others in their circumstances. The Officer concluded that based on the evidence, "little weight" should be attributed to the establishment factor.

[11] The Officer gave “some weight” to Sam’s best interests. The Officer noted that by the time of the decision, Sam had successfully completed high school and planned to attend university in Canada. The Officer noted Sam’s active involvement in Scouts and his participation in volunteer events and commended Sam for his achievements. The Officer acknowledged the letters of support from Sam’s friends, fellow Scouts, and friends of his mother that spoke of how Sam was a mentor to their children. The Officer found that Sam would able to remain in contact with his friends remotely.

[12] The Officer did not agree that Sam would be unable to reintegrate into the Chinese education system due to his language level and the highly competitive university entrance examinations. The Officer found that Sam’s successful adaptation in Canada, at the age of nine, indicated that he would likely be able to adapt to life in China. The Officer also found that Sam would have the support of his mother, grandparents, and extended family. The Officer noted that Sam had tutored a friend in Chinese and concluded that his Chinese language skills were likely adequate. The Officer found that if Sam wanted to pursue post-secondary education, he would be able to update his language skills to take the entrance examinations, or he could study abroad.

[13] The Officer acknowledged the evidence that Sam did not have a relationship with his father in China. However, the Officer found that family reunification is a significant factor and that it would be in Sam’s best interests to have access to both parents, which could occur upon return to China.

[14] With respect to the Applicant's submissions regarding adverse country conditions, the Officer noted that there was little evidence to corroborate Ms. Lin's Falun Gong practice. The Officer acknowledged Ms. Lin's submission that she would have difficulty finding work in China, including because her nursing licence had expired, and acknowledged that women may face discrimination in employment in China, but found that recourse against discrimination would be available. The Officer referred to an article that described the anti-discrimination provisions of the Chinese constitution and noted that some women had successfully sued employers for discrimination in Chinese courts.

[15] In concluding that the adverse country conditions warranted "little weight," the Officer noted that H&C exemptions are not intended to remedy differences in the standard of living between Canada and other countries.

[16] The Officer also gave other relevant factors "little weight." With respect to the Applicants' submissions about their mental health, the Officer acknowledged the psychotherapist's opinion that the Applicants suffer from anxiety and depressive symptoms due to their fear of being forced to leave Canada. The Officer also noted Ms. Lin's account of her psychological state throughout and since her marriage. The Officer found that there was little evidence showing the Applicants had sought assistance for their mental health either in China or in Canada prior to their meeting with the psychotherapist for the purpose of their H&C application. The Officer also found that there was no evidence that treatment would be unavailable in China or that Ms. Lin would not be able to access such treatment discreetly.

[17] The Officer acknowledged that relocation to China might be challenging, but concluded that the Applicants are resourceful and well-educated individuals who could transfer their knowledge and skills obtained in Canada to the Chinese labour market and would likely be able to reintegrate and re-establish themselves in Chinese society. The Officer also acknowledged the letters from family members in China stating that the family could not financially assist the Applicants, but concluded that there was no evidence that their family members would not provide short-term support. The Officer noted that the Applicants could rely on their savings.

III. The Applicant's Submissions

[18] The Applicants submit that the decision is not reasonable because the Officer erred in the assessment of the BIOC, ignored relevant evidence, and more generally applied an overly stringent test in determining whether the H&C exemption was warranted which does not reflect the compassionate and empathetic approach guiding H&C determinations.

[19] With respect to the Officer's assessment of Sam's best interests, the Applicants argue that the Officer failed to meaningfully consider the psychological and emotional trauma that removal would impose on him given, among other things, his integration into his community and school, and his loss of access to education in China. The Applicants argue that maintaining relationships from a distance is not a substitute for in-person contact, particularly for family and young persons. The Applicants further submit that the Officer turned Sam's attributes and resourcefulness against him in finding that he could easily readapt in China.

[20] The Applicants argue the Officer ignored evidence and made findings that contradict the evidence provided. For example, they challenge the Officer's finding that Sam would be able to overcome his lack of proficiency in Mandarin and enroll in university in China. The Applicants point to a letter from the local middle school where they formerly lived, which explains that Sam would not be able to pursue his high school education in China due to missed examinations and elements of the curriculum. The Applicants also point to the evidence of the difficulty of the college entry exams and the extreme pressure of the educational system generally.

[21] The Applicants also submit that it was perverse for the Officer to find it would be in Sam's best interests to be reunited with his father, given that both Ms. Lin and Sam stated that he was abusive.

[22] With respect to their establishment in Canada, the Applicants argue that the Officer erred in comparing their establishment to that of others in their circumstances. They further submit that the Officer placed undue emphasis on Ms. Lin's failure to report for removal and did not consider her explanation, which is supported by the psychotherapist's opinion regarding Ms. Lin's mental and emotional state at the time.

[23] The Applicants further submit that the Officer failed to distinguish Sam's circumstances given that he remained in Canada without authorization for reasons beyond his control.

IV. The Respondent's Submissions

[24] The Respondent submits that the Officer clearly considered the Applicants' individual circumstances and that the Applicants are simply asking the Court to reweigh the evidence.

[25] The Respondent notes that officers are not required to cite each piece of evidence when rendering a decision, and that failure to mention critical evidence that contradicts the officer's conclusion may, but does not necessarily, lead to an inference that the officer did not consider and assess the evidence.

[26] The Respondent argues that the Officer reasonably considered Sam's best interests and gave this factor positive weight, but that a positive BIOC does not determine the H&C exemption. The Respondent submits that the Officer was not required to mention the letter from the local middle school in China because, by the time of the decision, Sam had already graduated from high school.

[27] The Respondent concedes that the Officer should have addressed the evidence of Sam's father's violence and neglect, but submits that this is not a fatal flaw, as nothing obliges Sam to reconnect with his father if he returns to China.

[28] The Respondent submits that the Officer did not err in assessing the Applicants' establishment against the level of establishment that is typical of others who have spent a similar amount of time in Canada. The Respondent also submits that officers are entitled to consider an

applicant's residence and employment in Canada without valid immigration status. The Respondent adds that the Officer did not dismiss the application solely on this basis.

[29] With respect to mental health considerations, the Respondent submits that *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], is distinguishable because the Applicants have not been diagnosed with a particular mental illness and have not shown that they will experience greater hardship than what can be reasonably expected of anyone facing removal from Canada. The Respondent further submits that it is not necessarily an error to consider the availability of treatment in the country of origin.

V. Issues and Standard of Review

[30] The issue is whether the Officer's decision is reasonable. This entails consideration of whether the Officer's assessment of the BIOC reflects the guidance of the jurisprudence and whether the Officer ignored evidence and reached conclusions not supported by the evidence in assessing the relevant factors and in the overall assessment of whether the H&C exemption was warranted.

[31] H&C decisions are discretionary decisions and are reviewed on the reasonableness standard (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 57–62, 174 DLR (4th) 193 [*Baker*]; *Kanthasamy* at para 44).

[32] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16, 23 [*Vavilov*], the Supreme Court of Canada confirmed that reasonableness is the applicable

standard of review for discretionary decisions. The Supreme Court provided extensive guidance to the courts in reviewing a decision for reasonableness.

[33] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at paras 85, 102, 105–07). The court does not assess the reasons against a standard of perfection (*Vavilov* at para 91).

[34] In *Vavilov*, at para 100, the Supreme Court of Canada noted that decisions should not be set aside unless there are "sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" and that "[t]he court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable."

VI. The H&C Exemption

[35] For context, it is important to note the purpose of an H&C exemption. Section 25 of the Act provides that an exemption from some findings of inadmissibility and from other criteria or obligations of the Act may be granted on the basis of H&C considerations. This is a discretionary relief that exempts an applicant from the otherwise applicable legal requirements. In the present case, the exemption, if granted, would overcome the need to return to China and seek to immigrate to Canada in accordance with the Act.

[36] An applicant bears the onus to establish with sufficient evidence that the exemption should be granted.

[37] The determination of whether an H&C exemption is justified is based on a global assessment of the relevant factors, including the best interests of any child affected by the decision. In *Kanthasamy*, the Supreme Court of Canada explained that what warrants relief under section 25 varies depending on the facts and context of each case.

[38] An officer assessing an H&C application could find several positive factors yet still conclude that the exemption is not warranted. There is no rigid formula or score assigned to each factor. The weight given to each factor or consideration is within the Officer's discretion and it is not the role of the Court to reweigh the individual factors or the overall assessment. However, an H&C determination is not immune from review where on the particular facts, for example, the officer overlooks or misconstrues relevant evidence or makes findings that are not supported by the evidence and which would have an impact on the weight to be attributed to the relevant factors.

[39] With respect to the more general argument of the Applicants that the Officer failed to adopt a compassionate approach, as required by *Kanthasamy*, there is nothing in the Officer's reasons to suggest this. While a negative result could be subjectively perceived as a lack of compassion, an H&C exemption remains exceptional relief. Officers must consider all the relevant factors and weigh the positive against the negative to reach a global assessment of whether this relief is justified in the circumstances.

[40] The jurisprudence post-*Kanthasamy* is consistent in finding that some hardship is the normal consequence of removal and, on its own, does not support the exemption, and that more than a sympathetic case is required to justify the exemption (see for example *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at paras 11–12, 16 [*Shackleford*]; *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at paras 17–19 [*Huang*]).

[41] In Huang, the Chief Justice noted at para 19 that "[a]ccordingly, an applicant for the exceptional H&C relief provided by the [Act] 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" [emphasis in the original].

[42] I have applied the principles from the jurisprudence governing H&C applications in determining whether the Officer's decision is reasonable.

VII. The H&C Decision Is Not Reasonable

[43] In the present case, the Officer gave "some weight" to the BIOC, "little weight" to establishment, "little weight" to adverse country conditions and "little weight" to other hardship considerations. This approach to identifying the weight attributed to the relevant factors is not unusual as there is no mathematical calculation, but it makes the Court's assessment of the reasonableness of the global assessment somewhat of a challenge.

A. *The Officer Made Both Reasonable and Unreasonable Findings*

[44] The Officer made several findings that are reasonable and are supported by the evidence and the jurisprudence. However, the Officer made other findings that are not supported by the evidence, that are based on speculation and that overlook relevant evidence.

[45] The Officer did not err in considering the Applicants' establishment in the context of the level of establishment that might be expected of others in similar circumstances: *Antunez Villanueva v Canada (Citizenship and Immigration)*, 2014 FC 585 at para 11. Although the Applicants submit, more generally, that H&C officers should provide an explanation of what constitutes exceptional establishment, in my view, this would impose undue rigidity in a discretionary decision where individual circumstances may vary greatly. The Applicants also argue that greater consideration should have been given to Sam's establishment in Canada, as he has spent his formative years in Canada due to circumstances beyond his own control. I agree with the Respondent that Sam's establishment was considered in the context of the Officer's BIOC analysis.

[46] Nor did the Officer err in considering that the Applicants had remained in Canada without status since the refusal of their refugee claim—a period of at least seven years—failed to appear for the pre-removal interview, and worked without authorization: *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 19; *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 904 at paras 27–29; *Choi v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 494 at paras 22–24 [*Choi*]; *Shackleford* at paras 23–25). The

Officer did not focus on this factor as determinative, but rather considered this along with the other aspects of the Applicants' establishment.

[47] The Officer considered the psychotherapist's assessment regarding the mental health of the Applicants, and insofar as Ms. Lin was concerned, the Officer's assessment is reasonable. A report or opinion on an applicant's mental health for the purpose of an H&C exemption should be closely scrutinized and the Officer did so (*Choi* at paras 16–19; *Egwuonwu v Canada (Citizenship and Immigration)*, 2020 FC 231 at para 84).

[48] Ms. Lin had described the psychological distress she experienced in China, its impact on her relationship with Sam, and the improvements since they have been in Canada. The psychotherapist's report noted that Ms. Lin continues to suffer from severe anxiety and moderate depressive symptoms, and expressed concern about Ms. Lin's reported suicidal ideation.

[49] The Officer did not dispute the findings with respect to Ms. Lin, but rather focused on the issue of whether treatment in China was available and Ms. Lin's submission that she did not previously access treatment in China due to stigma. The Officer reasonably found that there was no persuasive evidence that Ms. Lin could not access mental health services discreetly, if needed, in China.

[50] However, the Officer made other findings that are based on speculation and that do not reflect the evidence before the Officer, including that the Applicants' family in China could provide short-term support, that Ms. Lin could find employment, and that she had recourse through the courts if she faced discrimination in employment.

[51] There is no dispute that the onus is on the Applicants to establish that the H&C exemption is warranted. However, it is a challenge for any applicant to anticipate the conclusions an Officer may reach and to proffer evidence to rebut conclusions that are not based on evidence. For example, the Applicants did not provide evidence regarding whether it would be feasible for Sam to study abroad as they could not likely have anticipated that the Officer would so find, particularly given that Ms. Lin asserted that she would be unable to find employment in China and that her family could not provide any financial support.

[52] In addition to the unreasonable findings noted above, the serious shortcoming in the Officer's decision, which leads the Court to find that in the particular circumstances the decision is not reasonable, is the BIOC analysis.

B. *The Officer's Assessment of the BIOC Is Not Reasonable*

[53] BIOC is an important factor in an H&C application where children are directly affected—and although Sam was 16 at the time of the application, he was nonetheless a child and his best interests are important. The principles established in *Baker* continue to apply (*Kanthasamy* at paras 38–39).

[54] Decision-makers must "consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them" (*Baker* at para 75). A child's best interests need not be determinative nor necessarily outweigh other considerations, but a decision that inappropriately minimizes the child's interests will be unreasonable (*Baker*).

[55] I agree with the Respondent that the approach to assessing BIOC, noted in *Williams v Canada (Citizenship and Immigration),* 2012 FC 166 at para 63—to identify the child's best interests, determine the degree to which those interests would be compromised by one decision over the other, and then to determine the weight that should be attached to the BIOC in the overall H&C application—is not a rigid or required formula.

[56] As Justice Pentney noted in *Ahmed v Canada (Citizenship and Immigration),* 2020 FC 777 at para 22:

> Indeed, it would be contrary to the teachings of the Supreme Court in *Baker* and *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61 to require an Officer to follow one particular formula for such an inherently discretionary decision.

[57] The assessment of the best interests of a child should be highly contextual and responsive to each child's particular age, capacity, needs, and maturity (*Kanthasamy* at para 35; *Huang* at para 24).

[58] In *Kanthasamy* at para 39, the Supreme Court of Canada noted:

> A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12.

[59] In the present case, the Officer addressed various aspects of Sam's achievements and attributes, including that he had completed high school and was applying to university, that he had grasped the English language since arriving in Canada and could, therefore, likely upgrade his Mandarin upon return to China and, given his work ethic, could acclimatize and reintegrate in China. However, the Officer did not clearly identify or define what was in Sam's best interests. The attribution of "some weight" to BIOC does not even clearly convey that the Officer found that Sam's best interests were to remain in Canada. Although I accept that there is no rigid formula to assess BIOC, the Officer's reasons for finding "some weight" do not convey how that finding was arrived at.

[60] Moreover, the Officer made erroneous findings in the BIOC assessment regarding Sam's ability to upgrade his education in China or study abroad and regarding the benefits of reunification with his father. The Officer also overlooked the psychological impact on Sam of his potential removal as described by the psychotherapist. I consider these findings to be serious shortcomings in the BIOC analysis, which leads to the conclusion that the overall decision is not reasonable.

[61] The evidence before the Officer demonstrated that Sam was doing well academically in Canada and had applied to Canadian universities, but if returned to China, he would not be eligible to apply to attend universities there. Contrary to the Officer's finding, it is not simply a matter of upgrading his Chinese language skills. The Officer's finding that Sam could do so and gain entrance to a Chinese university is contradicted by the evidence. The Officer's finding that he could, alternatively, seek to study abroad is speculative and is not supported by any evidence.

[62] Ms. Lin stated that Sam could not speak Mandarin fluently and that he had never learned to write Chinese properly. The Officer did not refer either to the letter from the local middle school nor to the objective evidence that the university entrance exams are extremely difficult, that students in China study for them for many years, and that results can shape the course of a young person's life. The Respondent points out that Sam had already graduated high school and argues that the Officer was therefore not required to consider the letter from the school. However, the objective evidence, including the letter, suggests that this would not be sufficient to gain entrance to university in China and that Sam would have to begin high school anew. In addition, there was no evidence that it would be feasible, financially or otherwise, for Sam to seek to study abroad. As noted above, the Applicants could not anticipate the need to rebut this type of conclusion.

[63] The Officer also found, contrary to the evidence, that it would be in Sam's best interests to "have access to both parents." Ms. Lin's affidavit attested that Sam's father had little to do with him and Sam's own letter vehemently opposed any relationship with his father. The Officer's generic finding of "family reunification to be a significant factor" is based only on the Officer's opinion about what is best for this family.

[64] Although, as the Respondent notes, given Sam's age, he would have a choice whether to pursue contact with his father, the Officer's opinion about the benefits of family reunification had a bearing on the overall assessment and is not a valid consideration in this particular case.

[65] An assessment of the best interests of a child should be sensitive to the views of the child, in accordance with their age and maturity: *Hawthorne v Canada (Minister of Citizenship and*

Immigration), 2002 FCA 475 at para 48; *Huang* at para 25. Although a "mature minor person's" views are not determinative, significant weight should be given to their expression of their interests, and an officer should not substitute their own views (*Huang* at para 31). Sam had clearly set out his views about the impact of returning to China in his letter, including his views about his father, which appear not to have been given due consideration.

[66] I acknowledge that the Officer was not required to address every piece of evidence, particularly, as noted by the Respondent, in a very voluminous application. However, the report of the psychotherapist was highlighted in the H&C submissions and the Officer addressed the report, but with a focus on Ms. Lin. The Officer did not address the psychotherapist's opinion with respect to Sam in the context of the assessment of his best interests.

[67] The psychotherapist's report noted that Sam exhibits moderate symptoms of anxiety and depression and that Ms. Lin's anxiety also has an impact on Sam. The psychotherapist explained that "uprooting" Sam will significantly and negatively impact him as he moves from a stable to an insecure situation. Although the law is clear that some unfortunate consequences of removal are inherent, it was incumbent on the Officer to consider whether the psychotherapist's opinion fell within the inherent consequences of removal or went beyond. The Officer appears not to have done so.

[68] I acknowledge that even a strong positive assessment of the best interests of a child is not necessarily determinative of an H&C application. However, attributing "some weight"—even in contrast to "little weight" attributed to other factors—does not indicate how much weight the

Officer attached to the BIOC. Given that the Officer's analysis of the BIOC does not clearly identify Sam's best interests and coupled with the errors in the Officer's BIOC analysis, if properly assessed, the BIOC may have warranted greater weight, and that greater weight could have had an impact on the overall assessment of whether the H&C exemption was justified.

[69] As a result, the H&C application must be redetermined by a different officer.

JUDGMENT in file IMM-4701-20

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is allowed.

2. No question was proposed for certification and none arises.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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