Federal Court  Cour fédérale

Date: 20220317

Docket: IMM-330-21

Citation: 2022 FC 368

Ottawa, Ontario, March 17, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

NONGMIN WANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Nongmin Wang, seeks judicial review of the decision of a Senior Immigration Officer (the "Officer") of Immigration, Refugees and Citizenship Canada, dated January 4, 2021, dismissing his application for permanent residence within Canada on humanitarian and compassionate ("H&C") grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant submits that the Officer's decision is unreasonable and that the Officer erred in their assessment of the Applicant's establishment in Canada and the hardship he would face upon return to China.

[3] In my view, the Officer failed to conduct a holistic analysis of the relevant H&C considerations in this case. For the reasons that follow, I find that the Officer's decision is unreasonable.

II. **Facts**

A. *The Applicant*

[4] The Applicant is a 69-year-old citizen of China. He and his ex-spouse have a 33-year-old son together. The Applicant states that he has lost contact with both his son and his ex-spouse.

[5] The Applicant alleges that in 2004, he was targeted by China's Public Security Bureau ("PSB") as a Falun Gong practitioner. The Applicant arrived in Canada on May 20, 2004 and submitted a claim for refugee protection based on his fear of persecution in China due to his Falun Gong practice.

[6] In a decision dated February 24, 2005, the Refugee Protection Division refused the Applicant's refugee claim. On April 20, 2009, the Canada Border Services Agency ("CBSA") issued a warrant for the Applicant's arrest, requiring the Applicant to report to the CBSA. The Applicant states that he did not receive any notice or letter from the CBSA.

[7] On September 9, 2016, the Applicant submitted an H&C application, which was refused on June 13, 2017 because the Applicant failed to report to the CBSA as directed. The Applicant states he did not know about the CBSA warrant until the refusal of his H&C Application.

[8] On July 26, 2019, the Applicant submitted a second H&C application based on his establishment in Canada and the hardship he would face if returned to China. By letter dated January 4, 2021, the Officer refused the Applicant's second H&C application.

B. *Decision Under Review*

[9] In the reasons for the decision, the Officer gave some positive weight to the Applicant's establishment in Canada over 16 years, yet found that it was mitigated by the fact that the Applicant was not authorized to stay or work for the majority of his time in Canada, and that he continued to evade immigration authorities by not reporting to CBSA. The Officer also considered the hardship the Applicant would face in China and found that given his resourcefulness and family ties, the Applicant would be able to re-establish himself in China. Overall, the Officer was not satisfied that the Applicant's H&C considerations justify an exemption under subsection 25(1) of the *IRPA*.

III. **Issue and Standard of Review**

[10] The sole issue in this application for judicial review is whether the Officer's assessment of the H&C factors is reasonable.

[11] Both parties agree that the Court is to review the Officer's decision on the standard of reasonableness. I agree that the appropriate standard of review for an H&C decision is reasonableness (*Rannatshe v Canada (Citizenship and Immigration)*, 2021 FC 1377 at para 4; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*") at paras 8, 44-45; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16-17).

[12] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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 para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[13] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

IV. **Analysis**

A. *Establishment*

[14] In their decision, the Officer found that the 16 years the Applicant has been in Canada is "a significant amount of time". The Officer considered the Applicant's linguistic and professional training, his ability to maintain employment, the good character references from friends, and his community volunteer work, and gave some weight to the Applicant's self-sufficiency while in Canada. The Officer noted that the Applicant does not have any family members in Canada and that he allegedly has no communication with his son, his ex-spouse and his siblings in China, yet found insufficient evidence to support that the Applicant has no family ties in China.

[15] The Officer gave negative weight to the fact that, for the majority of his time in Canada, the Applicant has been without status to stay or work. The Officer also gave considerable negative weight to the fact that the Applicant has been wanted by immigration authorities since 2009 and had not reported to the CBSA. The Officer wrote:

> The applicant states that he did not receive the notices informing him to report to CBSA and that he only became aware of the warrant for his arrest through his previous H&C decision. However, his previous H&C decision was delivered in 2017 and the applicant has still not reported to CBSA, as is required. I find that these factors carry significant negative weight and demonstrate disregard from the Act from which the applicant is requesting a regulatory waiver. I further find there is little information or evidence from the applicant demonstrating these circumstances were entirely beyond his control. As a result, I have given each of these factors considerable negative weight in this assessment.

[16] Overall, the Officer found that, given the length of time the Applicant has spent in Canada, "a certain level of establishment is expected to have occurred," yet determined that this is mitigated by the Applicant's unauthorized stay in Canada and continuous evasion of immigration authorities.

[17] The Applicant submits that it was unreasonable for the Officer to find that his establishment in Canada over 16 years falls below what is considered exceptional, without providing a standard or definition. To support this argument, the Applicant relies on *Henson v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 1218, in which this Court found this type of analysis to be deficient: "[T]he Officer clearly indicates that the Applicant's establishment fell below what would be considered exceptional, but did not state what would be considered exceptional." (at para 29; see also *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258 at para 80).

[18] The Respondent contends that the Officer did not ignore or misconstrue any of the Applicant's evidence of establishment, including his continuous work history, training, friendships and volunteer work, nor did the Officer err in stating that a certain level of establishment is to be expected after living in Canada for 16 years. The Respondent submits that the Applicant's arguments are misplaced, as the Officer did not use the word "exceptional" in their decision. To support this position, the Respondent relies on this Court's decision in *Thiyagarasa v Canada (Citizenship and Immigration)* 2019 FC 111, at paragraph 31:

> […] The Officer did not adopt an exceptional level of establishment as a legal threshold required to be met for the application to succeed, and therefore reject on that basis. Nor did

> the Officer discount the Applicant's degree of establishment because it did not rise to an exceptional level. On the contrary, the Officer afforded positive weight to the Applicant's establishment and considered that factor, in conjunction with other H&C factors raised by the Applicant, but concluded that the H&C considerations did not justify an exemption from the requirement to apply for permanent residence outside of Canada.

[19] I agree with the Respondent that the Officer's decision is distinguishable from the cases cited by the Applicant, as the Officer in this case did not characterize the Applicant's establishment as falling below what would be considered "exceptional," nor did the Officer require the Applicant to show "exceptional circumstances" to warrant H&C relief (see: *Zhang v Canada (Citizenship and Immigration),* 2021 FC 1482 at paras 1-2).

[20] Furthermore, while the Applicant acknowledges that his lack of status in Canada and the warrant from the CBSA do carry negative weight, the Applicant submits that the Officer failed to fully consider the circumstances surrounding these factors in assigning them "considerable negative weight." The Applicant argues that the Officer failed to consider his attempts to be lawful without burdening the Canadian purse by working to support himself, maintaining housing, and filing his taxes every year. The Applicant further states that he was unaware of the CBSA warrant until 2017 and had updated his address with the CBSA but had not received any notices or letters from them.

[21] The Respondent submits that it was open to the Officer to consider the Applicant's contravention of the *IRPA* and his lack of status to live and work in Canada, and to attribute negative weight to these factors (*Legault v Canada (Minister of Citizenship and Immigration),* 2002 FCA 125 (CanLII) at para 19). The Respondent relies on this Court's decision in *Edo-*

Osagie v Canada (Citizenship and Immigration), 2017 FC 1084, which affirms at paragraph 17: "[…] applicants cannot and should not be rewarded for accumulating time in Canada, when in fact, they have no legal right to do so" (citing *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 48). Further, the Respondent notes that in *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313, at paragraph 23, this Court states:

> […] The mere presence in Canada by someone who has been in this country illegally, for a long time, should affect weight in a negative way. There may well be other considerations, but length of time being illegally in Canada cannot carry much favour. The circumstances of this case do not bring the matter to a level such that the decision is unreasonable.

[22] While I agree with the Respondent that the Officer was entitled to consider the Applicant's immigration history and the integrity of the immigration system in their analysis, I do not find that the Officer reached a rational and reasonable conclusion by determining that the Applicant's positive establishment factors were mitigated by the negative weight given to his immigration history. The Officer's decision states:

> I find that overall, the weight I have assigned to the applicant's establishment in Canada is mitigated by the fact that he was without authorization to stay or work for the majority of the time he was in Canada and by the fact that he continues to evade immigration authorities by not reporting to CBSA

[23] Regardless of whether or not he was authorized to stay and work in Canada, the Applicant still spent over a decade and a half in Canada, and the evidence before the Officer demonstrates that he has worked continuously to support himself, including acquiring language

and job training; he has filed his income taxes, has volunteered in the community, and is described by employers as a responsible and professional employee. A similar approach was found to be unreasonable by this Court's recent decision in *Quiros v Canada (Citizenship and Immigration)*, 2021 FC 1412 ("*Quiros*"), in which my colleague Justice Go writes at paragraph 22:

> […] the Officer's unreasonable preoccupation with the Applicants' lack of status inhibited a proper assessment of the Applicants' establishment level. The Officer devoted several passages, albeit justifiably so, on Mr. Quiros' negative immigration history, including the fact that he did not surrender himself until 15 years after the CBSA issued a warrant against him.

[24] While Justice Go found it was reasonable of the officer in *Quiros* to attribute negative weight to the Applicants' past immigration history, the decision became unreasonable when the officer discounted the Applicants' establishment based on their past immigration history after already giving that factor negative weight (*Quiros* at paras 23-25). As was noted by my colleague Justice Campbell in *Dowers v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 593 at paragraph 6:

> [6] A situation such as the Applicant's, where a person comes to Canada and stays without adhering to the immigration laws, but, nevertheless, succeeds to be a positive, productive, and valuable member of society must be given careful attention. Section 25 has no purpose if that person is easily condemned for her or his immigration history. The history must be viewed as a fact which is to be taken into consideration, but within a serious holistic and empathetic exploration of the totality of the evidence, to discover whether good reason exists to be compassionate and humanitarian.

[25] I am not convinced that the Officer empathetically considered the Applicant's immigration history in light of the totality of the evidence before them, as is required by subsection 25(1) of the *IRPA.* Accordingly, I find that the Officer's assessment of the Applicant's establishment over 16 years in Canada was unreasonably and unduly influenced by the Applicant's immigration history.

B. *Hardship and Adverse Country Conditions*

[26] In considering the Applicant's submissions regarding the hardship he would face upon return to China, the Officer noted the Applicant's claim that he is no longer in contact with his son, his ex-spouse or his siblings in China, but found there was insufficient evidence that the Applicant is estranged from all ties in China. The Officer stated that there was insufficient evidence to demonstrate that the Applicant would not be able to eventually secure employment in China and found that the Applicant's resourcefulness would allow him to readjust to life in China:

> […] While I am mindful that the applicant has been away from China for 16 years, I am also mindful that the applicant was born and raised in China, he speaks the language and is familiar with the culture; all of which are mitigating factors. The applicant also presents himself as a resilient and resourceful individual who came to Canada, did not speak the language, was not authorized to work, yet he found employment, found housing, learned the language and assimilated into the culture. I find that this indicates that after an initial period of adjustment he will be able to adjust to life in China and secure employment and housing.

[27] The Applicant submits that the Officer's decision unreasonably minimized the hardship he would face in China by using his establishment factors against him (*Sosi v Canada (Citizenship and Immigration)*, 2008 FC 1300 ("*Sosi*") at para 18).

[28] The Applicant further submits that the Officer failed to consider the evidence as a whole regarding the hardship he would face in re-establishing himself in China. Specifically, the Applicant argues that the Officer erroneously assumed that the Applicant continues to have a network of support in China, when the Applicant's submissions outline that he is estranged from his ex-spouse, his son, and his siblings in China, and has not returned to China for 16 years. The Applicant argues that it is unreasonable to expect his family to support him when he has been away for so long and is estranged from them. Additionally, the Applicant argues that the Officer disregarded the fact that he is 69 years old and past the age of retirement in China with no recent work experience in China, making it difficult to secure employment.

[29] The Respondent contends that the hardship associated with leaving Canada and the inconvenience of having to return home to apply for permanent residency in Canada is not sufficient to warrant an H&C exemption. The Respondent asserts that these are the expected consequences when someone who is not entitled to remain in Canada is required to leave (*Jiang v Canada (Citizenship and Immigration)*, 2010 FC 580 at para 41; *Singh Gill v Canada (Citizenship and Immigration)*, 2012 FC 835 at para 28).

[30] The Respondent relies on this Court's decision in *Zhou v Canada (Citizenship and Immigration)*, 2019 FC 163 ("*Zhou*") to submit that it was reasonable of the Officer to consider

the Applicant's resilience and the skills he has acquired in Canada in assessing the hardship related to a return to China. At paragraph 17 of *Zhou*, this Court states:

> […] In my view, despite concluding that the applicants' establishment and integration in Canada was a positive factor, it remained open to the Officer to consider that some of the skills the applicants had acquired in Canada could reduce the potential hardship of their return to China […]

[31] The Respondent submits that their position is further supported by this Court's decision in *Zhang v Canada (Citizenship and Immigration)*, 2020 FC 503, in which the Court found no error where an officer considered the applicant's ability to adjust to life in China separately from the establishment factors (at para 33).

[32] I find that the Officer failed to adequately assess the hardship factors and the evidence before them as a whole. In their decision, the Officer concluded:

> While I acknowledge that the applicant has been away from China for over a decade, I find that given his familiarity with the culture, resourcefulness, and his familial ties to the country, that after an initial period of adjustment he would be able to re-establish himself in China.

[33] This Court's jurisprudence has held that factors weighing in favour of an applicant's establishment cannot be applied to minimize the hardship an applicant would experience upon return to their country of citizenship (*Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at paras 25-26; *Singh v Canada (Citizenship and Immigration)*, 2019 FC 1633 at paras 27-28). While I recognize that it is acceptable to consider how the Applicant's skills could reduce

potential hardship in China, I find that the Officer erred by placing undue weight on the Applicant's resiliency and resourcefulness and failed to adequately assess the other evidence regarding the hardship the Applicant faces in China at this stage in his life. There is no way of knowing whether the skills used by the Applicant to adjust to life in Canada are the same as those he would need if he were to return to China as an aging person with no family ties, after 16 years of being away (*Sosi* at para 18). In my view, the Officer erred by placing excessive weight on the transferability of the Applicant's abilities.

[34] I also find that the Officer unreasonably presumed that the Applicant "[…] likely has a network of support, including family members, in China who would reasonably be able to assist the applicant as he resettles," when the evidence before the Officer was that the Applicant is estranged from his family in China. This conclusion lacks rationale (*Vavilov* at para 15).

[35] For these reasons, I find that the Officer's assessment of the hardship the Applicant would face upon return to China is unreasonable.

V. **Conclusion**

[36] The Officer conducted a flawed analysis of both the Applicant's establishment in Canada and the hardship he would face upon return to China. I therefore find the Officer's decision to be unreasonable. Accordingly, this application for judicial review is allowed.

[37] No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-330-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination by a different decision maker.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-330-21
STYLE OF CAUSE:	NONGMIN WANG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 7, 2022
JUDGMENT AND REASONS:	AHMED J.
DATED:	MARCH 17, 2022

APPEARANCES:

Allen Chao-Ho Chang	FOR THE APPLICANT
Catherine Vasilaros	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Allen Chao-Ho Chang Barrister and Solicitor North York, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT