Federal Court  Cour fédérale

Date: 20240409

Docket: IMM-10414-22

Citation: 2024 FC 560

Ottawa, Ontario, April 9, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

KWAI FONG CHENG
HAY LONG HAYDEN LEUNG

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of a decision of a Senior Immigration Officer (the "Officer") of Immigration, Refugees and Citizenship Canada ("IRCC") dated October 17, 2022, denying her application for permanent residence 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 Officer was not satisfied that the Applicants' establishment in Canada and the factors in China, as well as the best interests of the children ("BIOC"), warranted an H&C exemption.

[3] The Applicants submit that the Officer's decision is unreasonable for failing to undertake an analysis of the Applicants' particular circumstances and analyzing the BIOC.

[4] For the following reasons, I find that the decision is unreasonable. This application for judicial review is granted.

II. **Analysis**

A. *Background*

[5] Kwai Fong Chen (the "Principal Applicant") is a 58-year-old citizen of China. Her son, at the time of her H&C application, was 16 years old.

[6] In 2019, the Principal Applicant arrived in Canada and made a claim for refugee protection. Her claim was refused by the Refugee Protection Division ("RPD"), as was its appeal at the Refugee Appeal Division ("RAD"). This Court refused leave of the RAD's decision.

[7] On December 8, 2021, IRCC received the Applicants' H&C application.

[8] In a decision dated October 17, 2022, the Officer found that the Applicants' circumstances did not warrant H&C relief pursuant to section 25(1) of the *IRPA*.

[9] The Officer acknowledged the Principal Applicant's employment, social groups, volunteering, and religious practice in Canada but found that these were "not uncharacteristic activities undertaken by newcomers to a country," with the Applicant having demonstrated a "typical level of establishment" for someone in similar circumstances.

[10] The Officer acknowledged evidence regarding the Principal Applicant' son and his medical conditions, but was not satisfied he could not be treated in China. The Officer further found that it was reasonable to expect that education would be available in Hong Kong. The Officer was therefore not satisfied that returning the Applicant's son to Hong Kong would "compromise" his best interests.

[11] The Officer acknowledged country condition evidence and medical evidence provided by the Applicants but found that the RPD had already found her to not be credible. The Officer therefore found that returning her to China would not put her at risk.

[12] For these reasons, the Officer was not satisfied that an H&C exemption under section 25(1) of the *IRPA* was warranted.

B. *Issue and Standard of Review*

[13] This application for judicial review raises the sole issue of whether the Officer's decision is reasonable.

[14] The standard of review on the merits of the decision is not disputed. The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) ("*Vavilov*"). I agree.

[15] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). 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 decision that is reasonable as a whole 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).

[16] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. 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 superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100).

C. *The decision is unreasonable*

[17] The Applicants submit that the Officer erred by giving neutral weight to the Principal Applicant's establishment in Canada by describing her circumstances as "typical" for a person in similar circumstances (*Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 ("*Zhang*")). The Applicants further submit that the Officer erroneously disregarded medical evidence regarding the Principal Applicant's child's medical conditions and education in Canada, focussing instead on whether his "basic needs" could be met in China (*Ganaden v Canada (Citizenship and Immigration)*, 2023 FC 325 ("*Ganaden*")). Additionally, the Applicants submit that the Officer did not consider the Principal Applicant's medical conditions when considering return to China, instead deferring to the RPD's credibility findings.

[18] The Respondent submits that the Applicants are simply requesting that the Court reweigh and reassess the Officer's factual findings, which does not warrant the Court's intervention. The Respondent maintains that the Officer was sensitive to the evidence of the Applicants' circumstances, as well as the BIOC. Additionally, the Respondent submits that the Officer was entitled to defer to the RPD's findings.

[19] I agree with the Applicants. The Officer found that the Principal Applicant's establishment was "typical" for a person in similar circumstances. This Court has deemed this approach to be unreasonable (*Stuurman v Canada (Citizenship and Immigration)*, 2018 FC 194 at paras 23-24).

[20] Moreover, this comparative approach betrays an essential feature of the standard for H&C applications: The examination of the individual person's circumstances to determine whether H&C relief is warranted. To quote my colleague Justice Zinn, "[w]hat is required is that an applicant's personal circumstances warrant humanitarian and compassionate relief" (*Zhang* at para 28 [emphasis added]).

[21] Ascribing neutral or negative weight to factors in an H&C application because an individual's circumstances are comparable to others necessitates that an individual's circumstances must be unlike others to have positive weight ascribed. The individual's circumstances must therefore be "exceptional" to be granted positive weight. This is an incorrect threshold (*Apura v Canada (Citizenship and Immigration)*, 2018 FC 762 at para 23; *Zhang* at paras 1-2, 28; *Peter v Canada (Citizenship and Immigration)*, 2022 FC 208 at para 48).

[22] The Officer further found that the Principal Applicant's activities in Canada "are not uncharacteristic activities undertaken by newcomers to a country."

[23] This is neither intelligible nor transparent and is unreasonable (*Vavilov* at para 15).

[24] What is a "characteristic" activity undertaken by newcomers to a country? And why would someone be faulted in their path to immigrating to Canada for, in these circumstances, volunteering, finding work, interacting with her community, and practicing her religion?

[25] Faced with an officer deeming one's situation to be "typical," an applicant encounters an inauspicious logic: "Establish yourself in Canada and be deemed 'typical;' fail to establish

yourself in Canada and be deemed to lack ties in Canada. Either will seal your fate." This renders the establishment analysis a meaningless disjunction, and therefore illogical (*Vavilov* at para 104).

[26] It is more troubling, however, that the Officer's decision reduces the Principal Applicant's efforts to make a life in Canada as her being another "newcomer." Individuals are "newcomers" insofar as they are new to a country. But that does not entail that their experiences are one and the same, or even remotely similar. It is an error to consider them as such. Casting people as "newcomers" who engage in "newcomer" activities approaches stereotyping, and is the antithesis of viewing applicants' claims with compassion (*Kaur v Canada (Citizenship and Immigration)*, 2022 FC 220 at para 45; *Dowers v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 593 at para 3).

[27] While these shortcomings are sufficiently serious to render the decision unreasonable as a whole (*Vavilov* at para 100), I agree with the Applicants that the Officer's BIOC analysis is unreasonable. The Officer found that returning the Principal Applicant's son to China would not "compromise his best interests," as there was no evidence that the child suffered from a medical condition "whose treatment was unavailable in Hong Kong," and that he would be able to return to China for his education despite having "excelled academically and thrived socially" in Canada.

[28] This analysis erroneously suggests that the Principal Applicant's child's "interests in remaining in Canada are somehow lessened if the alternative meets their basic needs" (*Ganaden* at para 16). In my view, the Officer lessened the child's particular interests in Canada of having

his particular medical needs met and having the opportunity to flourish socially and academically, simply because he could have the basic needs of medical care and education met in China. Furthermore, the Officer provides only speculative evidence for finding that these needs could be met in China, the decision lacking justification (*Vavilov* at para 15).

[29] Finally, I agree with the Applicants that the Officer unduly deferred to the RPD's findings regarding the hardship the Principal Applicant would face upon return to China. My colleague Justice Turley has held that an H&C officer may defer to the RPD's credibility findings "where the evidence merely corroborates allegations already found not credible," but must explain why they are rejecting the evidence (*Joyettte v Canada (Citizenship and Immigration)*, 2023 FC 1670 ("*Joyette*") at paras 13-16). Here, the Officer does not explain why they are rejecting the Principal Applicant's medical evidence tendered in support of her H&C claim, instead simply deferring to the RPD's credibility findings. This is unreasonable (*Joyettte* at para 18).

[30] For these reasons, the Officer's decision as a whole is unreasonable.

III. **Conclusion**

[31] This application for judicial review is granted. The Officer's decision lacks the transparency, intelligibility, and justification required to be reasonable (*Vavilov* at para 15). No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-10414-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

2. The decision under review is quashed and the matter remitted to a different officer for redetermination.

3. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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