Federal Court  Cour fédérale

Date: 20240628

Docket: IMM-6176-23

Citation: 2024 FC 1023

Toronto, Ontario, June 28, 2024

PRESENT: The Honourable Justice Battista

BETWEEN:

FUXIN DONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision to refuse the Applicant's application for permanent residence on Humanitarian and Compassionate ("H&C") grounds

pursuant to s. 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The H&C application was based primarily on the Applicant's establishment in Canada.

[2] For the reasons that follow, I find the decision to be reasonable and I dismiss the application.

II. Background

[3] The Applicant is a citizen of China who arrived in Canada in 2007 as a temporary worker. His worker status was eventually extended to November, 2010. He worked in a restaurant in Alberta as a cook for three years before moving to Ontario in October or November, 2010 to seek alternative employment.

[4] The Applicant secured a new job at another restaurant in January, 2011, but he was not able to renew his worker status because he had lost his passport. Without valid status in Canada, the Chinese consulate would not issue a new passport to him. He states that he was in limbo because he could not leave the country or remain lawfully. He has not had a valid status in Canada since November, 2010.

[5] The Applicant remained in Canada and began to work as a self-employed Chinese and Sushi Cook. Between 2011 and 2019, the Applicant states that he subcontracted as a Cook with five different restaurants across the Greater Toronto Area and he became very skilled.

[6] In October 2019, he was hired as a Subcontract Cook at the Dumpling King Restaurant in Markham, Ontario. In June 2021, he was promoted to Subcontract Head Chef, a position which he continues to hold. He also began his own business as a sole proprietor called Fu Xin's Food Services.

[7] After being in Canada for over fifteen years, the Applicant attempted to regularize his status by submitting an application for permanent residence based on H&C grounds on July 11, 2022. His application was based on his establishment, including his many years of Canadian work experience as a cook and chef, his close relationships in Canada, including a friend's son who was turning 18 at the time of the application, and the difficulties he would face in returning to China.

[8] The application was refused on May 1, 2023.

III. H&C Decision under Review

[9] As stated above, the application was based on the Applicant's establishment in Canada, the best interest of a child affected by the application, and the hardship of returning to China. The Officer who refused the application considered each of these factors.

[10] Regarding establishment, the Officer gave *some* positive weight to the Applicant's establishment due to his employment, finances, and community relationships, but found that these factors were not sufficient for H&C processing under s. 25. Specifically:

- noting the insufficiency of evidence to determine the extent of the Applicant's employment from 2010 to 2018, during which he did not file taxes, the Officer accorded little weight to this factor;
- the Officer also noted that the Applicant provided little evidence to show the extent of his language proficiency;
- the Officer acknowledged the personal friendships and community ties the Applicant developed but noted that they were not characterized by such a degree of interdependency that the Applicant would face impediments maintaining them from abroad;
- the Officer found that the Applicant's contravention of Canadian immigration laws over the majority of his stay detracted from the favourable weight afforded to his establishment. The Officer was not persuaded that the Applicant remained in Canada without authorization due to reasons that were beyond his control, casting doubt on his evidence of inability to procure a passport, and wondered why no attempt was made to regularize his status before 2022.

[11] The Officer assigned little weight to the Applicant's claim that it was in the best interest of the 17 year old son of his friend for him to acquire permanent resident status. The Officer noted that the friend's son was in the primary care of his parents for care and support and also that the son was at an age where he was gaining more independence. The Applicant did not challenge this finding before the Court.

[12] Regarding the anticipated hardship of returning to China, the Officer gave little weight to this factor, through the following observations:

- the Officer acknowledged that the Applicant has been absent from China for a prolonged period and would face a temporary period of adjustment with some associated difficulties as he reintegrates and re-establishes himself;
- the Officer noted that the Applicant would not be returning to an unfamiliar place that is devoid of family, cultural and linguistic ties. The Officer did not find any evidence that the Applicant would face obstacles reconnecting with his family in China or that they were unwilling to support his return;
- the Officer mentioned that the Applicant's savings, skills and employment experience acquired in Canada may assist in his re-integration and employment prospects upon his return to China.

IV. Issue and Standard of Review

[13] The sole issue is whether the Officer reasonably dealt with the evidence presented in the application before refusing to grant permanent residence.

[14] The appropriate standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras 16-17 [*Vavilov*]. The Court's role is to examine the reasoning of the administrative decision-maker and the result obtained to determine whether the decision 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). When reviewing a decision for reasonableness, this Court is to read the decision-maker's reasons "holistically and contextually" and ask "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).

V. Analysis

[15] As stated above, I determine that the Officer reasonably assessed the establishment and hardship evidence before it.

A. *Establishment*

[16] The Applicant's challenges to the Officer's findings on establishment focus first on the concern that his establishment was unreasonably devalued by the Officer, who viewed the Applicant's lack of status as determinative, and second, that the Officer applied the wrong legal test in imposing a requirement that the Applicant's time without status in Canada was due to circumstances beyond his control.

[17] Regarding the first challenge to the establishment finding, the Applicant refers to *Aboubacar* v. *Canada* (M.C.I.), 2014 FC 714 in which the Court held that ""[s]ection 25 is directed to whether an exception should be made to the unusual application of the IRPA laws and regulations. If the usual laws and regulations are considered to be dispositive of the outcome of a section 25 application, section 25 becomes a hollow exercise."

[18] He also refers to *Trinidad* v. *Canada* (M.C.I.), 2023 FC 65 at para 39, in which Justice Go emphasizes the principle that H&C officers should assess the nature of an applicant's non-compliance and its relevance to weigh it in the context of other H&C factors, rather than simply invoking it as an obstacle to granting the relief sought.

[19] I agree with the Applicant that his unauthorized stay and work cannot be viewed as determinative in the establishment analysis. It is unreasonable to wholly disregard evidence of establishment simply because it arose when an applicant was without status: *Sebbe* v. *Canada (Citizenship and Immigration)*, 2012 FC 813 at paras 23–24; *Singh v Canada (Citizenship and Immigration)*, 2019 FC 1142 at paras 31–32 [*Singh*]; *Lopez Bidart v Canada (Citizenship and Immigration)*, 2020 FC 307 at para 32.

[20] However, I disagree with the Applicant that the Officer wholly disregarded the Applicant's evidence of establishment due to his lack of status. Before considering the lack of status, the Officer had already concluded ".. I do not find that the Applicant has demonstrated that his degree of establishment is as significant as he alleges." The Officer reached this conclusion after finding the Applicant's evidence of work experience, personal relationships in Canada, and language skills to be thin.

[21] It is true that the Officer concludes the assessment of establishment by finding that the Applicant's contravention of immigration laws negatively detracted from the favourable establishment evidence. I do not find this unreasonable in these circumstances.

[22] Justice Nicholas McHaffie in *Browne* v. *Canada (Citizenship and Immigration)*, 2022 FC 514 [*Browne*] summarized the jurisprudence regarding the impact of lack of status on establishment as follows:

> The foregoing cases can be viewed as standing for three propositions: (1) it is unreasonable for an officer assessing an application for relief on H&C grounds under subsection 25(1) of the *IRPA* to discount an applicant's evidence of establishment in Canada because it arose while they had status as refugee claimants; (2) it is unreasonable for an officer assessing an application for relief on H&C grounds under subsection 25(1) of the *IRPA* to wholly discount or disregard an applicant's evidence of establishment in

> Canada because it arose while the applicant did not have legal status;
> **(3) it is not unreasonable for an officer to take into account the circumstances giving rise to the establishment, including lack of status or misrepresentations, and to conclude that the positive weight to be given to establishment ought to be attenuated because of those circumstances.** [Emphasis added]

[23] In my view, the Officer simply attenuated and did not wholly discount the Applicant's evidence of establishment due to his lack of status.

[24] In the second challenge to the Officer's establishment findings, the Applicant submits the Officer held him to the wrong legal standard to assess establishment. Specifically, the Applicant believes the Officer required him to produce evidence that the circumstances that led him to remain in Canada were beyond his control. He quotes the Court in Jaramillo *Zaragoza* v. *Canada* (M.C.I.), 2020 FC 879 at 38 [*Jaramillo*] which states that "the failure to leave Canada whether or not for reasons beyond one's control, although a factor to be considered, cannot be conclusive as regards the assessment of the degree of establishment."

[25] I do appreciate the Applicant's concern that the Officer noted that the Applicant did not remain in Canada for reasons beyond his control. However, in my opinion, this does not amount to the Officer holding him "to the wrong legal standard to assess establishment." The Officer did not "require him to produce evidence that the circumstances that led him to remain in Canada were beyond his control." It is a factor that the Officer considered, but I do not find that this was conclusive in their decision (*Jaramillo* at 38). I note that Immigration, Refugees and Citizenship (IRCC) online guidelines for the processing of H&C applications suggest that Officers consider "Were the circumstances that led the applicant to remain in Canada beyond their control?": https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-

manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-establishment-canada.html

[26] I do not find that the Officer applied this factor as a determinative test, or that the Officer gave unreasonable weight to it.

B *Assessment of Hardship of Returning to China:*

[27] The Applicant is concerned that the Officer used certain of the same positive factors of the Applicant's establishment, notably skills, experience and savings gained in Canada as factors that would mitigate the hardship of returning to China. However, I do not find that these factors were the focus of the Officer's analysis.

[28] The Officer found several reasons for which the hardship of returning to China did not warrant relief on H&C grounds. First, the Officer noted that the Applicant provided little evidence of factors other than finding housing that may pose challenge to his return to China. Next, the Officer noted that the Applicant remained involved with Chinese culture, through his work and community and thus retained familiarity with customs, norms and language, which would assist his reintegration. The Officer also noted that there was little evidence that would suggest the Applicant would face obstacles reconnecting with his family or that they were unwilling to support his return. Finally, the Officer mentioned there was little evidence to demonstrate that he would experience difficulties obtaining adequate employment in China. In my opinion, it is mostly for these reasons that the Officer found the Applicant would not experience challenges reintegrating and re-establishing in his country of citizenship to such a degree that would extend beyond a temporary period of adjustment.

[29] I find that the Officer's consideration of the Applicant's hardship of returning to China was reasonable.

JUDGMENT in IMM-6176-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance for certification.

"Michael Battista"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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