Federal Court  Cour fédérale

Date: 20151022

Docket: IMM-3666-14

Citation: 2015 FC 1189

Ottawa, Ontario, October 22, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

HUO JUN YANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by a Citizenship and Immigration Canada officer [the Officer] refusing to issue the Applicant, Huo Jun Yang, permanent residence based on Humanitarian and Compassionate [H&C] grounds. The Applicant is seeking an order to

quash the decision and refer the matter back to Citizenship and Immigration Canada for reconsideration.

[2] For the reasons that follow, the application for judicial review is dismissed.

II. Background

[3] The Applicant, a citizen of China, entered Canada in February 2010. Shortly after his arrival, he filed a refugee claim, which was denied a few months later. On September 12, 2012, the Applicant submitted an application for permanent residence based on H&C grounds.

III. Impugned Decision

[4] On April 9, 2014, the Officer refused the Applicant's permanent residence application on H&C grounds. The Officer weighed all the factors in support of the H&C application and concluded that the Applicant failed to discharge his burden of proving that he would suffer unusual and underserved or disproportionate hardship if the application was refused.

[5] The Officer found that the Applicant failed to make reasonable efforts to obtain travel documents and thus could not demonstrate that he remained in Canada beyond his control. Little weight was therefore attributed to this submission.

[6] The Officer further considered the Applicant's work and ability to meet his financial needs. These findings, although not determinative, were deemed favourable to the Applicant and given some weight.

[7] In reviewing the Applicant's establishment, the Officer found that there was no real establishment in Canada, and thus attributed little weight to this argument. The Officer concluded that renting a room and considering the landlord near-family could not reasonably be considered demonstrating stronger ties to the Applicant than the ties he would have with his own wife, daughter, and parents who all reside in China.

[8] The Officer considered the Applicant's English courses as a favourable factor, although not determinative in the matter.

[9] The Officer found that the Applicant's volunteer activities and charitable donations, as well as his good civic record, indicated good qualities, but did not warrant an H&C exemption.

[10] After the decision, the Applicant raised concerns with respect to the incompetent representation he received for the preparation of his H&C application and for his Application Record filed in the Federal Court on June 16, 2014. Further to motions, the Applicant was granted leave to file a Supplementary Application Record. This was for the purpose of applying pursuant to the *Protocol Re Allegations against Counsel or Other Authorized Representative in Citizenship Immigration and Protected Person Cases before the Federal Court* in order to

advance an argument of a procedural fairness violation resulting from incompetent representation.

[11] The Applicant claims that his representative failed to bring forward the situation of his daughter born on April 27, 2009 and make submissions concerning her best interests as part of the H&C application. After further investigation, the Applicant stated that he was deceived as to the identity and professional status of the person who provided him with legal advice and services since he was provided with legal services by an imposter or by a person acting without supervision by a licensee of the Immigration Consultants of Canada Regulatory Council [ICCRC].

[12] The Court granted leave to the Applicant to file a Supplementary Application Record which goes to the inaccuracies in the original Application Record as well as the competence and diligence of previous counsel. This evidence is admitted in order to resolve issues of procedural fairness regarding the best interest of the child [BIOC] in China.

IV. Issues

[13] The following issues arise in this application:

1. Should the decision of the H&C Officer be set aside on the grounds of procedural fairness regarding the Applicant's representation?

2. Did the Officer commit a reviewable error in concluding that the Applicant's extended stay in Canada was not due to any inability to leave involving his lack of a passport?

V. Standard of Review

[14] The applicable standard of review for an officer's H&C decision is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18).

VI. Analysis

A. *Incompetent Representation*

[15] The incompetence of counsel will only constitute a breach of natural justice in "extraordinary circumstances." The incompetence must be sufficiently specific and clearly supported by the evidence: *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36.

[16] In order to succeed on the basis of a procedural fairness violation resulting from incompetent representation, the Applicant must meet the requirements of the following tripartite test:

1. The representative's alleged acts or omissions constituted incompetence;

2. There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different; and

3. The representative be given notice and a reasonable opportunity to respond. See: *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 11; *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 25; and *Zdraviak v Canada (Citizenship and Immigration)*, 2013 FC 640 at para 25.

[17] In this matter, I am satisfied that items 1 and 3 of the tripartite test have been met. The only issue for serious consideration is whether there is a reasonable probability that the result of the original hearing would have been different had evidence been led on the BIOC.

[18] A decision on an H&C application must include an assessment of the BIOC affected by the decision. This includes children outside Canada. The H&C Officer was aware that the Applicant had a wife and child in China. The Officer found it anomalous that the submission emphasized the ties of the Applicant to the family of his landlord in Toronto, yet not mentioning those of his wife, child and parents in China, which she thought would be stronger than those he had with the family of his landlord.

[19] The humanitarian submissions made on behalf of the Applicant made no mention whatsoever of his child's situation. The Officer was aware that the Applicant sent money back to China from his submissions that stated "[f]rom time to time, Mr. Yang sends some financial

support to China to his wife and daughter." There was no evidence contained in the submissions before the H&C Officer corroborating that money was sent to his wife and daughter. Also, no mention is made in the H&C decision of any problems or hardships faced by his wife and child as no evidence was presented to the Officer on this issue.

[20] The Applicant has submitted additional evidence in his Supplementary Application Record which is limited to the situation of the child. In his February 2015 affidavit, the Applicant deposes to the following evidence at paragraphs 32 to 34 in support of his claim that if he had remained in China his daughter would not have been able to attend school for lack of funding:

> 32. At no time was I asked anything about my daughter, Jia Hui Yang, who was born on April 27, 2009 some 9 months before I left China. She is now five years old. If I had remained in China, it would have been very difficult for me to send my child to school based upon the income I was receiving in China. It may come as a surprise to many people that China which has done so much to elevate the standard of living for its citizens over the last 60 years does not enable all children to attend school, but it is a fact.
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> 33. If I were in China, I would have to pay 800 to 1000 RMB each month to finance my child's school tuition. My income in China as a forklift operator was somewhere between 1000 to 2000 RMB per month. The cost of living in China is high in our area, and to live decently we would require between 3000 – 5000 RMB.
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> 34. I am advised and verily believe that there are objective sources of country condition information which verify that China does not enable all children throughout the country to attend school at no cost to the parents. I am advised that the US government DOS report for the calendar year 2013 states:
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> > Education: Although the law provides for nine years of compulsory education for children, in economically disadvantaged rural areas many children did not attend school for the required period; some never attended. Although public schools were not allowed to charge tuition, faced with insufficient local and central government

> funding, many schools continued to charge miscellaneous fees. Such fees and other school-related expenses made it difficult for poorer families and some migrant workers to send their children to school.

[21] Because the Applicant seeks an extraordinary remedy, he is required to put his best foot forward with the view of persuading the Court that there is a reasonable probability that the result of the original hearing would have been different had his representative introduced evidence on the BIOC. Accordingly the Applicant is required to provide the Court with the proposed evidence to establish a reasonable probability that the result of the original hearing would have been different.

[22] The evidence presented to the Court does not meet that requirement. I would have expected affidavits or similar documents from the Applicant's spouse, their grandparents or his sister confirming the perilous education circumstances of the Applicant's daughter and their need for his contributions as the only means to ensure she obtains her education. Normally, one would also expect some form of documentation from the school in the area where the daughter would be attending setting out fees and so forth that could similarly corroborate the cost of education.

[23] I also would have expected the Applicant to provide documentation backing up his claim in the H&C submissions that he was sending money from time to time to his wife and child in China. Records exist for these transfers and they should have been placed in evidence. I say this particularly in light of the very significant efforts made by the Applicant's lawyers to bring the procedural fairness argument forward with extensive documentation in support in a case where lawyer competence is already an issue.

[24] I also note that the objective documentary evidence does not support the Applicant's claim that his daughter would not be able to attend school for any part of the compulsory minimum of nine years required in China. The US government DOS report indicates that "in economically disadvantaged rural areas," and then only "for the required period," some children are not attending school. The Applicant and his family live in Guangzhou, formally known as Canton, which is one of China's thriving economic megacities. It is not a disadvantaged rural area in China. It would appear therefore, on the Applicant's own evidence, his daughter should be entitled to basic free compulsory schooling for nine years.

[25] The Court also notes that the Applicant's education record indicates that he attended at three levels of schools in China, including a technical secondary senior high school. It is hard to imagine that in modern China, his only child would not have access to the same education as he did in light of his education and family circumstances.

[26] Accordingly, I am not satisfied that the Applicant has provided sufficient evidence to support his contention that there exists a reasonable probability that the result of the original hearing would have been different based on a submission that his daughter requires him to remain in Canada as her only means to attend school.

B. *Failure to Provide a Passport*

[27] The Respondent acknowledges an error on the Officer's part when she concluded that the Applicant failed to show that he had made reasonable efforts to obtain a Chinese passport. She overlooked a letter on the file that indicated attempts were being made to obtain the passport.

Her oversight led her to conclude that the Applicant had not demonstrated that the situation of remaining in Canada was beyond his control. It would appear that the Applicant's inability to leave Canada after leave was refused on his refugee application was due to his inability to obtain a Chinese passport.

[28] Apart from the error on this fact however, the Officer's assessment of the Applicant's establishment was reasonable. She gave favourable consideration to being able to meet his financial needs through self-employment. However, the Officer also found that renting a room in someone else's home does not show any real establishment in Canada. Similarly, she quite reasonably concluded that he had more ties to his family in China than those in Canada. Altogether, she concluded that these factors did not warrant an exemption.

[29] I find little on the record that would contradict the Officer's conclusion that the Applicant would not suffer undue hardship if he had to apply for permanent residence from outside Canada. I do not see how an error on the Officer's part with respect to the time spent in Canada under his control could have much bearing on the decision. It is essentially a claim of hardship based on living and working in Canada for four years with few other ties to the country. There is no serious evidence that returning to the country where he spent most of his life and where his family and relatives resides would present a situation of hardship or be any different from when the applicant left to come to Canada.

VII. Conclusion

[30] The application is therefore dismissed. No question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed and no question is certified for appeal.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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