Docket: IMM-5262-05

Citation: 2006 FC 717

OTTAWA, ONTARIO, JUNE 9, 2006

PRESENT: THE HONOURABLE B. STRAYER

BETWEEN:

LI XIAO YUE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for judicial review of a decision of a Visa Officer made on July 28, 2005 denying the applicant's request to be granted permanent residence status and exemption from a requirement of the *Immigration and Refugee Protection Act* (the Act).The applicant's mother who is a resident and citizen of Canada sought to sponsor her for permanent residence some years after the mother had gained permanent residence in Canada. She had not in her application for permanent residence included the name of the applicant as a member of the family class and is now unable to sponsor the applicant unless the applicant obtains an exemption on humanitarian and compassionate grounds under subsection 25(1) of the Act.

[2] The uncontroverted facts appear to be as follows. The applicant was born to her mother and her mother's first husband in China on April 1, 1988. In 1989 her father committed suicide. Her mother remarried in October, 1992 and had a daughter by that marriage as well. It appears that the applicant did not live with her mother after 1992 but lived with her maternal grandparents. The mother's second husband went to the United States in 1995 to study and in 1997 the mother joined him in the United States. They immigrated to Canada in 1999. The mother when applying for permanent residence in Canada did not list the applicant as a family member. The mother returned to China in 2000 and 2004 to see her daughter. She talked to her daughter frequently on the telephone and sent her money regularly. The applicant has lived with her maternal grandparents until she entered a boarding school where (at the time of these proceedings) she was still a student. She visits her grandparents on weekends. The applicant is now 18 years old. Her mother stated that she had not visited her daughter more often in China because while she was in the U.S. she was a student who could not leave and return on a student visa, and later when in Canada she could not afford to do so.

[3] The Visa Officer in considering the applicant's application for humanitarian and compassionate consideration interviewed the applicant and her mother. Her interview notes were recorded in the Computer Assisted Immigration Processing System (CAIPS) and form part of the record. The respondent has also submitted an affidavit sworn by the Visa Officer describing the interview and her decisional processes, and exhibiting a copy of the CAIPS notes. The applicant takes objection to the admission of such an affidavit and says that the record of the decision and the interviews on which it was based must be found in the CAIPS notes. I agree that it is inappropriate

to file such an affidavit prepared after the event, supplementing the Officer's reasons given in her letter and the record of the interviews upon which it was based. Such an affidavit as to the nature of the hearing can only be relevant and admissible if it is somehow necessary to describe the procedure or some event in the decisional proceeding which is in dispute, but not to elaborate on the evidence before the Officer or her decision. In this case, however, I do not think the affidavit adds significantly to the CAIPS notes nor to my understanding of the considerations upon which the Visa Officer's decision was based. I give it no weight.

[4] The decision as set out in a letter of July 28, 2005 simply states the conclusion that "It would not be justified by humanitarian or compassionate considerations to grant you permanent residence status or exempt you from any applicable criteria or obligation of the Act" (applicant's record page 5). To understand how this conclusion was reached it is necessary to read the CAIPS notes of the interviews with the applicant and her mother. In those notes (respondent's record pages 5-11) after reviewing the circumstances in which the mother had decided not to list the applicant as a family member in her application for permanent residence, the Visa Officer raised and took note of, *inter alia*, the following facts: that the mother had not lived with the applicant since 1992; that the mother sent money to the applicant both before and after she left China when she had money available; that the mother left for the United States in 1997; that the mother phoned the applicant three or four times a week when she was in the United States; that the mother returned to visit the applicant twice since going to Canada, once in 2000 and once in 2004; that they continue to talk on the phone three or four times a week; that her mother sends the applicant money and gifts from time to time; that she lived with her maternal grandparents until she entered boarding school and was "at the second year of senior middle school" in 2005; that she goes to her grandparents' home every weekend; that

her performance at school was "OK. I think I can get better education if I lived with my mother". The Visa Officer reinterviewed the mother and raised with her certain concerns she had. Apart from the circumstances of her failing to mention her daughter in her application for permanent residence, a matter which does not directly concern us here I believe, she explained that she was not able to go to China more often because of U.S. visa problems and her work and the cost.

[5] Essentially the applicant argues that the Visa Officer's decision was unreasonable because she failed to consider properly the applicant's best interest as a child as required by subsection 25(1) of the Act. Essentially her argument is that the Visa Officer should have considered where the applicant would be better off – China or Canada – and then concluded that her best interests would require that she be allowed to come to Canada through the exercise of the humanitarian and compassionate discretion. The respondent argues instead that a Visa Officer in taking into account the best interests of a child directly affected should do so by considering whether the continued exclusion of the child from Canada, as in this case, would constitute undue or disproportionate hardship.

Issue

[6] The essential issue appears to be whether the Visa Officer erred in considering only hardship without taking into account the relative advantages for the applicant in living in China with or near her grandparents, or in Canada with her mother.

Analysis

[7] I am satisfied that the proper standard of review here is that of reasonableness *simpliciter*. This appears to be well-established by the jurisprudence since the decision in *Baker v. Canada (M.C.I.)*, [1999] 2 S.C.R. 817, even though some doubts may remain as to how one measures reasonableness. It seems apparent that in reviewing such a decision for reasonableness one cannot reweigh the factors considered by the decision-maker, as long as the relevant factors were considered by that person; see *Suresh v. Canada (M.C.I.)* (2002), 208 D.L.R.(4th) 1 (S.C.C.); *Legault v. Canada (MCI)*, [2002] 4 F.C. 358 (C.A.). This means that if the Visa Officer here had regard to the correct factors it is not for the Court to say she gave inadequate weight to the interests of the child and therefore quash her decision.

[8] In considering what factors are relevant in a case such as the present it is important to distinguish these facts from those typically presented on judicial review, namely where a parent is to be deported, a child of that parent has a right to stay in Canada, and it is necessary to have regard to the consequences of the child for this radical disruption of the status quo. In the present case we have an applicant who has no right to come to or stay in Canada, who has never been in this country, and who has lived all of her life in China and all without any prolonged presence of her parents there and, as far as the evidence indicates, without any serious problems.

[9] Yet it would be easy to assume that, because this applicant says she would like to join her mother in Canada and, from what we know of the comparative standards of living it would, in an ideal world, be “nicer” for her to come to Canada. The applicant argues that such a comparative analysis is required by the decision of *Li v. Canada (MCI)*, [2004] F.C.J. No. 2055. The facts in that

case were fairly similar. The applicant at the time of the proceeding was a 16 year old male Chinese citizen. His parents were divorced and his mother had moved to Canada in 1998. She did not include him in her application for permanent residence. His application for humanitarian and compassionate grounds discretion was rejected. On judicial review the applications judge set aside the decision concluding that the decision-maker had not been

> alert and sensitive to the best interests of the applicant child. There is no analysis as to what the situation of the applicant child would be in China as compared to Canada. (At para. 44).

On the particular facts of that case it is distinguishable from the present. The CAIPS notes only made a formal reference to the best interests of the child without any analysis or identification of the factors taken into account and I believe that is what principally concerned the applications judge. With respect I do not understand the decision to mean that, in such circumstances, the determining factor in the child's best interests is the comparative advantage of living abroad or living in Canada and that alone. I am in respectful agreement with what Justice James Russell said in *Vasquez v. Canada (MCI)*, [2005] F.C.J. No. 96 at paras 41-43:

> 41. What the Applicants are really saying in this case is that the children would obviously be better off in Canada than in Mexico or Honduras and, because they would be better off, Canada's international Convention obligations dictate that factor be given paramountcy in an H&C Decision that involves both parents and children.
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> 42. I do not think that law, logic or established authority dictates the result urged upon the Court by the Applicants.
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> 43. On the facts of this case, there is nothing to suggest that the children would be at risk or could not successfully re-establish themselves in Mexico or Honduras. The fact that the children might be better off in Canada in terms of general comfort and future opportunities cannot, in my view, be conclusive in an H&C Decision that is intended to assess undue hardship.

[10] I do not understand the jurisprudence to require that the "best interests of the child" be assessed separate and apart from the question of hardship nor that it should be determinative if it indicates that the person in question would be more comfortable or have better opportunities in Canada. I believe that the majority reasons of the Federal Court of Appeal in *Hawthorne v. Canada (MCI)*, [2003] 2 F.C. 555 indicate the contrary. That case involved the more typical request for humanitarian and compassionate exemption to halt removal from Canada of a mother with a Canadian daughter who had permanent residence here. I believe however that the relationship between "best interests" and "hardship" as stated by the Court applies equally in the present case. The Court stated in part as follows:

> 4. The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interests of the child.
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> 6. To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial – such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent.

The certified question, and the answer given by the majority were as follows:

> Q.: Is the requirement that the best interests of children be considered when disposing of an application for an exemption pursuant to subsection 114(2), as set out in Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, satisfied by considering whether the removal of the parent will

> subject the child to unusual, undeserved or disproportionate hardship?
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> A.: The requirement that the best interests of the child be considered may be satisfied, depending on the circumstances of each case, by considering the degree of hardship to which the removal of a parent exposes the child.

[11] I am satisfied by looking at the CAIPS notes of the interviews that the Visa Officer adequately addressed herself to issues of hardship. While taking into account that it is the wish of the applicant to live with her mother she observed such facts as that: the applicant had not lived with her mother since 1992; that she was then 17 (now 18); that she lives at a boarding school and sees her grandparents on weekends; that her mother's contacts with her at least since the mother left for the United States in 1997 have been limited to phone calls three or four times a week and two visits by her mother to China in 2000 and 2004; and that her mother sends her money periodically. The Officer had no indication before her that the applicant was a needy person because of her presence in China nor was there any specific evidence as to how her life would be materially better in Canada. The only evidence in this connection was that the applicant said she would like to live with her mother. It is apparent on the basis of this information that the Visa Officer concluded there was not sufficient hardship involved in the applicant remaining in China even though the preferences of the applicant and her mother might be that she be in Canada. Against such concerns the Visa Officer was obliged, as noted by the Federal Court of Appeal in paragraph 6 of the *Hawthorne* case (*supra*) to weigh this degree of hardship against other factors such as public policy considerations. She recognized the latter in finding that paragraph 130(1)(c) of the *Immigration and Refugee Protection Regulations* had not been complied with when the mother applied for permanent residence as she failed to name the applicant as a family member. It was right for the Visa Officer to assume that this requirement is clear and is based on sound policy reasons. As a result she apparently concluded that

such degree of hardship as might be involved in the applicant remaining in China was not sufficient, when balanced against the clear non-compliance with the Regulations, to warrant a favourable exercise of discretion under subsection 25(1) of the Act on humanitarian and compassionate grounds. I am satisfied that it is not for this Court to review that balancing of factors, it being apparent that the Visa Officer had them in mind when she made her decision.

Certified Question

[12] At the end of the hearing I asked if counsel had any certified questions to suggest. It was agreed that they would consult and prepare a joint submission if they were in agreement. The question they have agreed upon is as follows:

> Is an Immigration Officer, conducting an assessment of an overseas application for permanent residence on humanitarian and compassionate grounds in which the interests of a child are directly affected, required to carry out an independent analysis of the best interests of the child, separate and apart from an analysis of whether or not the child has demonstrated sufficient humanitarian and compassionate circumstances?

Counsel for the respondent also suggested an additional question, to which counsel for the applicant objects. I do not believe it raises any new issues which are not adequately dealt with in the jurisprudence and I will not consider it further.

[13] With respect to the agreed question I do not consider that it raises a serious question that has not already been determined by necessary implication by the answer to the certified question in the *Hawthorne* case. There the Court indicated that “best interests of the child” are not separate and apart from the hardship issue to which, I believe, the proposed question adverts in its reference to

"sufficient humanitarian and compassionate circumstances". While the *Hawthorne* case dealt with non-removal of a parent from Canada it appears to me that the same principles apply to the determination of the "humanitarian and compassionate considerations" relevant to an overseas applicant and that there is not some categorical distinction between "best interests of the child" and humanitarian and compassionate considerations (assuming the latter refers in effect to hardship considerations) as implied by the question

[14] I will therefore not certify any question.

Disposition

[15] The application for judicial review will therefore be dismissed.

JUDGMENT

It is hereby ordered and adjudged that the application for judicial review of the decision of the Visa Officer of July 28, 2005 rejecting the applicant's request for an exemption on humanitarian and compassionate grounds be dismissed.

(s) "B.L. Strayer"

Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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