Federal Court  Cour fédérale

Date: 20200824

Docket: IMM-4255-19

Citation: 2020 FC 848

Ottawa, Ontario, August 24, 2020

PRESENT: Madam Justice Pallotta

BETWEEN:

SHOU CHENG LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Shou Cheng Li (the "Applicant") sought permanent resident status in Canada based on humanitarian and compassionate ("H&C") considerations. A senior immigration officer (the "Officer") refused the application, concluding that the Applicant failed to establish that H&C considerations justified an exemption under subsection 25(1) of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 ("*IRPA*"). The Officer's decision (the "Decision") is the subject of this application for judicial review.

[2] The Applicant is a Chinese citizen. He arrived in Canada in February 2010. The Applicant met his wife, Jin Gao (also a Chinese citizen), in Canada and they were married in November 2011. They have three children, twin sons and a daughter. Their children are Canadian citizens.

[3] The Applicant's H&C application was based on the following grounds: his establishment in Canada, the best interests of his children, and adverse conditions in China, including limited employment prospects and adverse consequences that would result from being in violation of China's family planning policy. The application was refused for the reasons provided in the Decision. The Applicant submits that the Decision was unreasonable, and I agree.

[4] Prior to the H&C application, the Applicant made an application for permanent residence sponsored by his wife, which was rejected when Ms. Gao's permanent resident status was revoked due to a misrepresentation. Ms. Gao appealed the exclusion order that issued against her and sought relief based on H&C grounds that overlap with the H&C grounds asserted by the Applicant. While the Immigration Appeal Division ("IAD") dismissed her appeal, Ms. Gao successfully applied for judicial review and the matter was remitted to the IAD for redetermination: *Gao v Canada (Citizenship and Immigration)*, 2019 FC 939 [*Gao*]. The Applicant submits that the Court's decision in *Gao* is relevant to this application for judicial review because principles of judicial comity compel the same result in both proceedings. I

disagree. In any event, principles of judicial comity are not determinative of the outcome here, since I have independently decided to allow the application on the basis that the Officer's decision was unreasonable.

II. **Issues**

[5] There are two issues on this application for judicial review:

1. Do the principles of judicial comity compel the same result as in *Gao*?
2. Was the Decision a reasonable exercise of the H&C discretion under subsection 25(1) of the *IRPA*?

[6] The Applicant submits there is a third issue, namely, that the Officer reached a decision to refuse his application prematurely, before deciding on the reasons for the refusal. However, it is far from clear that the basis for this alleged breach of procedural fairness is accurate. The Decision is dated June 21, 2019. Although the Applicant was notified that his application for permanent residence was refused by way of a letter dated June 20, 2019, the letter appears to have been dated incorrectly because it refers to events on June 21 as having occurred in the past. There is insufficient evidence in the record to conclude that the Officer refused the Applicant's application for permanent residence before writing reasons, and it is unnecessary for me to consider whether doing so would constitute a breach of procedural fairness in the circumstances of this case.

III. **Analysis**

A. *Issue 1: Judicial comity and the decision in Gao*

[7] The Applicant relies on the decision and reasons of Justice Manson in *Gao*, a judicial review application made by the Applicant's wife. The Applicant submits that Justice Manson made strong findings regarding the evidence supporting the H&C considerations in that case, especially with respect to the children and their best interests. The Applicant argues that the H&C grounds and supporting evidence in both proceedings overlap significantly, and he urges the Court to reach a similar conclusion of unreasonableness in his case based on principles of judicial comity. In fact, the Applicant submits his case is more compelling than the case in *Gao*, since there was no misrepresentation in his H&C application. I disagree.

[8] In a judicial review proceeding, reasons are the primary mechanism by which administrative decision-makers show that their decisions are reasonable; they are the starting point for judicial review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 81. In this case, the Applicant did not compare the Decision to the IAD's reasons that were subject to review in *Gao*, and the two cases differ in the facts. Justice Manson did not make findings regarding H&C grounds in *Gao*. Rather, he found that the IAD unreasonably denied Ms. Gao a full consideration of the relevant H&C grounds by adopting an approach that "appears to be intent on punishing the Applicant and her children for the Applicant's misrepresentation": *Gao* at para 30. As the Applicant points out, misrepresentation is not an issue in his case. Generally, a judge should follow a colleague's decision on the same question unless it differs in the facts, a different question is asked, the decision is clearly wrong, or the application of the decision would create an injustice: *Alyafi v Canada (Citizenship and*

Immigration), 2014 FC 952 at para 45. The Applicant has not established that the Officer adopted the same erroneous approach as in *Gao*, with respect to the same grounds and evidence.

B. *Issue 2: Was the Decision a reasonable exercise of the H&C discretion under subsection 25(1) of the IRPA?*

[9] The parties agree, as do I, that the review of an immigration officer's H&C decision attracts the reasonableness standard: *Vavilov* at para 25. The burden of demonstrating that the Decision is unreasonable rests with the Applicant. He must establish that there are sufficiently serious shortcomings in the Decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency, or that the Decision is untenable in light of the relevant factual and legal constraints that bear on it: *Vavilov* at paras 100-103.

[10] Subsection 25(1) of the *IRPA* gives the Minister of Citizenship and Immigration discretion to grant permanent resident status to a foreign national if the Minister is of the opinion that it is justified by H&C considerations relating to the foreign national. Subsection 25(1) does not enumerate specific H&C factors to consider except that the Minister must take into account the best interests of a child directly affected.

[11] Ministerial guidelines list a number of factors to consider in H&C applications, including establishment in Canada, ties to Canada, adverse country conditions in the applicant's country of origin, and health considerations. The factors listed in the guidelines are not limiting: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 27 and 31 [*Kanthasamy*].

[12] While not determinative of an H&C application, the best interests of children ("BIOC") who are directly affected by the H&C decision must be considered, and those interests are a "singularly significant focus and perspective": *Kanthasamy* at para 40. In a BIOC analysis, the officer should consider factors that include, but are not limited to: the child's age, level of dependency on the applicant, degree of establishment in Canada, links to the potential country of residence, country conditions and the potential impact on the child, medical or special needs, the impact on the child's education, and matters related to the child's gender: *Kanthasamy* at para 40.

[13] H&C factors should not be considered in isolation; there must be a global assessment of all the relevant factors: *Kanthasamy* at para 28. Officers making H&C determinations must substantively consider and weigh all the relevant facts and factors before them: *Kanthasamy* at para 25.

[14] In the Applicant's case, the Officer considered the following H&C factors: establishment in Canada, adverse country conditions in China, and BIOC. The Applicant argues that the Officer's conclusions regarding each of these factors were unreasonable. He also argues that the Officer failed to take a holistic approach and cumulatively evaluate the factors. The Respondent submits that the Officer's findings were reasonable, and argues that the Applicant is asking the Court to reweigh the evidence. I find that the Officer's decision was unreasonable with respect to establishment, BIOC and the cumulative evaluation of all factors, and I will allow this application for judicial review.

(1) Establishment

[15] With respect to establishment, the Officer noted that the Applicant worked in Canada as a chef since 2011, and that he has co-owned a restaurant since 2016, which expanded to two locations (with a third planned) employing over a dozen people.

[16] In his H&C application, the Applicant had submitted he was central to the restaurant's success and to its continued operation—that without him, the restaurant would be forced to close and the employees would be terminated. The Officer considered whether the restaurant would be forced to close if the Applicant were required to leave Canada, and concluded it would not:

> …I find, however, that the applicant has presented insufficient evidence to demonstrate that his specialized cooking technique cannot be or has not already been taught to other employees. In fact, since the applicant and his partner own and operate 2 restaurants and plan to open a third location, it is virtually impossible, on a balance of probabilities, for the applicant to be the only one who cooks for all three locations using his specialized cooking technique. On a balance of probabilities, I find that the applicant cannot be the only chef working at all three locations. I find, on a balance of probabilities, that the other employees are able to prepare and cook food in the applicant's businesses. In sum, from the evidence before me I find that the businesses have more than one owner and multiple employees. I am unable to conclude that the restaurants would be forced into closing if the applicant is required to leave Canada and apply for permanent residence in the normal fashion.

[17] The Officer concluded:

> Aside from operating and running a business in Canada, the applicant provides no further evidence of significant integration into Canadian society or his local community (e.g. language training, continuing education, history of volunteerism or community involvement, letters of support etc.). Overall, I acknowledge that the applicant has spent the past 8 years of his life

> in Canada and he has been employed or self-employed for most of this time. I find that the applicant has demonstrated a history of stable employment and sound financial management and I find that the applicant's business venture has contributed to the Canadian economy. However, having considered the applicant's degree of establishment as a whole, I find that the Applicant has not demonstrated that he has achieved an exceptional degree of establishment in the eight years of his residency in Canada.

[18] The Respondent submits that the Officer reasonably found that the Applicant provided insufficient evidence of his establishment and ties to Canada aside from the restaurant. In the Respondent's view, the Officer gave due consideration to the restaurant as a professional accomplishment and reasonably concluded that the Applicant's establishment in Canada was insufficient to justify an exemption under the *IRPA*. The Officer's finding that the restaurant would not be forced to close if the Applicant returned to China was a reasonable finding made in response to an issue that the Applicant had raised.

[19] I agree with the Applicant that the Officer's analysis of the Applicant's establishment in Canada was unreasonable.

[20] The Officer's finding regarding forced closure was based on questionable assumptions about the employees' abilities to prepare and cook food, without considering evidence of the Applicant's role as an investor and manager who actually runs the restaurant. The Officer's statement that "aside from operating and running a business the applicant provides no further evidence of significant integration into Canadian society or his local community (e.g. language training, continuing education, history of volunteerism or community involvement, letters of support etc.)" suggests that the Officer overlooked evidence of the Applicant's establishment and

ties to Canada, apart from the restaurant business. For example, the Applicant's only sibling—his brother—lives in Canada, and the Applicant's family lives with the brother and his family. The Officer acknowledged this in a list of factors to consider regarding establishment, but failed to address it in the analysis. As another example, the Officer overlooked letters of support from members of the Applicant's community. Possibly, the Officer considered the other evidence and found it did not qualify as "evidence of significant integration into Canadian society or his local community"; however, the Decision fails to justify such a conclusion. Furthermore, in the absence of an explanation, I would be speculating about what the Officer might have been thinking, which a reviewing judge should not do: *Vavilov* at para 97.

[21] Also, the analysis leading to the Officer's conclusion that "the Applicant has not demonstrated that he has achieved an exceptional degree of establishment in the eight years of his residency in Canada," is not transparent. I agree with the Applicant that the Officer's analysis seemed unduly focused on whether the restaurant could continue to operate if the Applicant returned to China. No other establishment factor received more attention in the Decision, which suggests it was an important factor. The Decision does not explain why this should be the case, and it is not apparent to me. Furthermore, the Officer treated the restaurant's success and expansion to multiple locations with many employees as a factor that diminished, rather than enhanced, the degree of the Applicant's establishment in Canada and this is contrary to a reasonable and logical line of analysis. It was the only "negative" finding in the Officer's analysis of establishment; other factors were considered to be positive. In particular, the Officer gave positive consideration to the fact that the Applicant had established a business that contributes to the Canadian economy, and that the restaurant was evidence of "significant

integration" into Canadian society. The Decision fails to explain how the restaurant's continued operation was weighed against the positive factors or how it fit into the Officer's conclusion on the Applicant's degree of establishment in Canada. Perhaps the Officer discounted the positive factors, or gave significant weight to the "negative" finding that the restaurant would not close, or both, but this was not explained in the Decision.

[22] Finally, I note that while the Officer concluded the Applicant did not exhibit an exceptional degree of establishment in Canada, the Officer used the same factor, i.e. the Applicant's success as an entrepreneur in Canada, to undermine his hardship upon removal and to support a finding that the Applicant could re-establish himself in China. The Officer also found that the income from the Applicant's investment (due to the restaurant's continued operation, since the Applicant failed to show that it would shut down) could assist with his re-establishment in China. This Court has warned against using the degree of establishment in Canada to undermine the hardship faced on removal: *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at para 26. In my view, the Decision failed to explain how the Applicant's establishment in Canada, after eight years, does not justify an exemption under subsection 25(1) of the *IRPA*, but proves that the Applicant can establish himself in China within a reasonable time. Furthermore, the Officer failed to examine whether the disruption of establishment in Canada weighs in favour of granting an exemption under subsection 25(1) of the *IRPA*: *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 at para 21.

[23] For the reasons above, I find that there are sufficiently serious shortcomings in the establishment analysis such that the Decision cannot be said to exhibit the requisite degree of

justification, intelligibility and transparency, nor is it tenable in light of the relevant factual and legal constraints that bear on it.

[24] As previously noted, officers making H&C determinations must weigh all the relevant factors before them and assess them globally: *Kanthasamy* at para 28. Establishment was an important factor in the Applicant's H&C application. Since I find that the establishment analysis in this case was unreasonable, there could not have been a proper weighing of all the relevant factors and this is sufficient to allow the application for judicial review. Nevertheless, I will address the parties' arguments regarding adverse country conditions and BIOC.

(2) Adverse Country Conditions in China and the Best Interests of the Children

[25] With respect to adverse country conditions and BIOC, the parties' submissions focus on two interrelated issues: (i) whether the Applicant and his wife violated China's family planning policy, and the consequences of any violation; and (ii) whether the Applicant's children would have status in China to receive state-funded education and health care services.

[26] The Officer found there was insufficient evidence to demonstrate a violation of the family planning policy. If the Applicant did in fact violate the policy, the Officer found that the consequence would be a monetary fee (referred to as a social maintenance fee, social compensation fee, or family planning fee). There was insufficient evidence to conclude that the payment of a fee, which may or may not be imposed, would result in significant financial hardship.

[27] With respect to the children's status in China and access to education and health care, the Officer considered the Applicant's submissions and found that the Applicant failed to meet his burden for each one. The Applicant had alleged—among other things—that by violating the family planning policy, none of the children would have clear rights to education and health care. The Applicant had alleged this would cause particular hardship for one of his children with medical needs. This child had undergone surgery in Canada for a cleft palate and required a second surgery, but since he could not be registered in China, the surgery would not be covered by the state and would be unaffordable. The Applicant also argued that unregistered children are considered "illegal" in China and fines are deliberately set beyond the means of the average working citizen. He submitted that treating a child as illegal and requiring payment of a fine for having a child contravenes international law. The Officer made a series of negative findings on these points. For example, the Officer was "unable to conclude" the following: that the children would be unable to obtain household registration as citizens or permanent residents in China, that the child with medical needs would not be eligible for state-funded surgery, and that the children would not have access to state-funded education in China.

(a) *The factual findings were reasonable*

[28] The Applicant takes issue with the Officer's findings that he failed to establish a violation of the family planning policy, resulting financial hardship due to the social maintenance fees, and his children's inability to obtain state-funded health care and education. The Applicant contends that the Officer failed to consider the totality of the evidence and unreasonably discounted letters from a Chinese hospital and public agency, which the Officer found to lack certain indicia of reliability.

[29] The Applicant must demonstrate that any alleged shortcomings or flaws in the Decision are sufficiently central or significant to render the Decision unreasonable, or that the Decision is untenable in light of the relevant factual and legal context: *Vavilov* at para 100. I am not satisfied the Applicant has done so with respect to the Officer's factual findings regarding the Applicant's alleged violation of the family planning policy, hardship due to fees, and the children's lack of access to education and health care. I am not satisfied that the Officer ignored or misconstrued important evidence, and I agree with the Respondent that the Applicant's arguments amount to a disagreement with the Officer's assessment of the evidence and the weight placed on it.

[30] Although I agree with the Applicant that the Officer seemed confused about certain indicia of reliability regarding the letters from the hospital and the public agency, I am not satisfied that the Officer's overall assessment of the probative value of the letters was unreasonable. Another officer might have viewed the evidence differently; however, that is not the test. It was reasonable for the Officer to discount the letters because they failed to address key points and included vague, conclusory statements without adequate support. For example, the letter from the public agency (which is responsible for administering the family planning policy in the Applicant's home city in China) states only that the child with medical needs is a Canadian citizen who would not be eligible for Chinese medical benefits, and that if he undergoes reparative therapy, his medical expenses would not be reimbursed. That statement would be true in Canada as well. The letter does not set out the conditions for state reimbursement, and it does not speak to how the public agency would apply China's family planning policy to the Applicant's family if they were to return to the Applicant's home city.

The letter from the hospital, although brief, provided more context. Nonetheless, it was not unreasonable for the Officer to assign diminished weight to the hospital letter on the basis that it did not state the child would be unable to receive the second surgery in China, and it did not explain the basis for the suggestion that the second surgery should be done at the Canadian hospital where the first surgery was carried out. In my view, the weight assigned to the impugned letters was reasonable, and supported.

[31] Similarly, I am not satisfied that the Officer erred in finding there was insufficient evidence of a violation of the family planning policy, and insufficient evidence that the children would be denied access to state-funded health care and educational services as a result. The Officer considered the Applicant's evidence and conducted independent research. I acknowledge that the evidence before the Officer demonstrated variability in the administration of China's family planning policy. As the Applicant points out, the Officer noted that the administration of the policy varies by province, and that the "sources are silent" on the effect of a second pregnancy after the birth of twins. However, it was the Applicant's onus to prove his allegation that he and his wife violated the policy. The finding that the Applicant failed to do so was a finding that was open to the Officer to make based on the evidentiary record.

(b) *BIOC analysis, failure to conduct global assessment were unreasonable*

[32] I agree with the Applicant that the Officer did not conduct a proper BIOC analysis, and failed to consider the H&C factors globally.

[33] With respect to BIOC, the Officer made a reviewable error in the overall assessment by failing to consider the *best* interests of the children. The Officer did not address the children's establishment in Canada, their limited connections to China, or the impact on their interests of requiring their father—who supports them financially—to leave his Canadian business and re-establish himself financially in China. The starting point for the Officer's analysis was that the children would likely relocate to China with their parents if the Applicant's H&C application were rejected. The Officer then considered the impact of relocation on the children's best interests by going through the points of hardship raised by the Applicant and finding, for each, that the Applicant had not met his burden. At the end of this process, the Officer stated, "I am unable to conclude that having to relocate to China with their parents would directly impact the best interests of the three children concerned." While a hardship analysis can be part of a BIOC analysis, it cannot replace a BIOC analysis: *Osun v Canada (Citizenship and Immigration)*, 2020 FC 295 at para 21, citing *Singh v Canada (Citizenship and Immigration)*, 2019 FC 1633 at para 30 and *Patousia v Canada (Citizenship and Immigration)*, 2017 FC 876 at paras 53-56. On judicial review, the Court should be satisfied that the decision-maker considered not only hardship, but also the H&C factors in the broader sense: *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 33. I am not satisfied that the Officer did so here when considering the best interests of the children.

[34] Also, the Officer erred by failing to conduct a global assessment of all the relevant H&C factors. While the Officer's conclusions on establishment, adverse country conditions, and BIOC were negative, that does not remove the obligation to analyze all relevant factors globally in order to determine whether an exemption is justified under section 25 of the *IRPA*. The

Officer's summary of conclusions in the final paragraph of the Decision was not a global analysis of H&C factors. The conclusion that it would be in the children's best interests to follow their parents to China "so as to remain in the care of their parents" effectively makes BIOC irrelevant to a global H&C analysis because it amounts to a statement that the children would be better off with their parents. The conclusion that the Applicant "has become a successful chef and restauranteur in Canada and would be able to secure a source of income on return to China" effectively makes the Applicant's establishment irrelevant as a "positive" H&C factor that might justify an exemption. In my view, the Decision does not demonstrate that the Officer considered the relevant H&C factors globally, and this was a reviewable error.

IV. **Conclusion**

[35] The application for judicial review is allowed. The matter is remitted to a different officer for redetermination.

[36] Neither party raised a question for certification, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter referred back for redetermination by a different decision-maker.

2. There is no question to certify.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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