Date: 20060419

Docket: IMM-4092-05

Citation: 2006 FC 498

Toronto, Ontario, April 19, 2006

PRESENT: The Honourable Madam Justice Layden-Stevenson

BETWEEN:

HUIZHEN LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Li applies for judicial review of the decision of an Immigration Officer (the officer) wherein the officer concluded that there are insufficient humanitarian and compassionate (H&C) grounds to warrant exempting Ms. Li from the requirement to apply for a visa from outside of Canada in accordance with subsection 11(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

I. Background

[2] Ms. Li is a 56-year-old Chinese citizen. She came to Canada in June of 2001, and made a refugee claim two months later. In January of 2004, she withdrew her refugee claim. Since her arrival in Canada, she has lived with her daughter, a permanent resident, and her granddaughter, a Canadian citizen.

[3] In January of 2003, Ms. Li applied to remain in Canada on H&C grounds. On April 21, 2005, she provided the officer with updated information. Attached to the H&C application was a sponsorship request by Ms. Li's daughter. After reviewing the sponsorship assessment and the income total provided for a family of three, the officer determined that the daughter did not meet the requisite minimum income to sponsor her mother. The officer noted that the IRPA contemplated this type of situation and that the daughter could sponsor Ms. Li under the family class through the visa post overseas, when her (the daughter's) financial circumstances change.

[4] Ms. Li based her case primarily on a risk of returning to China due to her religious beliefs as a follower of Tian Dao. She submitted, with her application, a copy of her personal information form (PIF). The officer's notes indicate that the officer read the PIF but concluded that Ms. Li did not submit sufficient documentary evidence to support her claim. The officer also considered the fact that Ms. Li had withdrawn her refugee claim. On this basis, the officer was satisfied that no risk opinion was warranted. Ms. Li had failed to convince the officer that she would experience unusual, undeserved or disproportionate hardship on her return to China.

[5] In terms of establishment, the officer concluded that Ms. Li was somewhat established in Canada but not to a degree warranting an exemption under subsection 25(1) of the IRPA. The officer noted that Ms. Li had a son in China with whom she was living prior to coming to Canada. Also, both her parents reside in China. Ms. Li had been self-employed in China, as a seamstress, for more than 15 years.

[6] The officer determined, after consideration of all the information, that to require Ms. Li to return to China and apply in the normal manner would not constitute disproportionate or undeserved hardship.

II. Issues

[7] Ms. Li alleges two errors on the part of the officer:

(1) the officer failed to factor the best interests of the Canadian-born child into the assessment; and

(2) the officer breached the principles of procedural fairness by failing to send her application to a pre-removal risk assessment (PRRA) officer in contravention of the mandate delineated in article 13.4 of the IP 5 Guidelines.

III. The Standard of Review

[8] The standard of review applicable to H&C determinations is reasonableness: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*).

IV. Analysis

A. *Best Interests of the Child*

[9] Ms. Li submits that it was incumbent on the officer to consider the best interests of her grandchild. Ms. Li did not make any reference to and did not ask the officer to consider the best interests of her grandchild in her H&C application, or in any other document. The officer did note that Ms. Li lived with her daughter and grandchild.

[10] In *Owusu v. Canada (Minister of Citizenship and Immigration)*, [2004] 2 F.C.R. 635 (F.C.A.), the Federal Court of Appeal determined that an applicant has a duty to provide sufficient evidence in support of an H&C application. A child's interests can only be considered insofar as there is evidence of those interests. The material submitted in support of an application must be sufficiently clear regarding an applicant's reliance on this factor. That onus was not met in this case for Ms. Li made no mention of her grandchild. Consequently, she cannot succeed on this ground.

B. *Breach of Procedural Fairness*

[11] The ministerial guidelines are not law and the Minister and his agents are not bound by them. However, they are accessible to the public and the Supreme Court of Canada has qualified them as being of great assistance to the court: *Baker*; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 (*Suresh*).

[12] Ms. Li relies on *Babilly v. Canada (Minister of Citizenship and Immigration)* 259 F.T.R. 280 (F.C.) in support of the proposition that failure to forward the application to a PRRA officer for a risk assessment constitutes a breach of the duty of procedural fairness. The respondent contends

that the guidelines do not extinguish the discretion of the officer to determine, on the basis of the documentation contained within the application, whether a PRRA is warranted. The respondent refers to a number of authorities in support of this position. All of the cited decisions were in relation to the former legislation and it is clear that the guidelines under the former legislation are not precisely the same as those under IRPA.

[13] The guidelines are, in the words of the Supreme Court of Canada, "self-imposed ministerial guidelines" contained in a "set of published instructions to immigration officers": *Suresh* at para. 36.

[14] Even if I were convinced (and I make no such determination) that the respondent is correct, in order to assess whether the officer's decision not to forward Ms. Li's application for a PRRA is reasonable, (in accordance with the reasoning in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 (*Ryan*) at paras. 55 and 56), regard must be had to the material that was before the officer. Unfortunately, this is not possible.

[15] It is clear that Ms. Li's PIF was before the officer and the officer's reasons state that the officer read and considered it. However, the PIF is not anywhere to be found in the certified tribunal record. While the failure to provide a certified record in accordance with the Rules does not, in itself, warrant automatic quashing of the decision: *Hawco v. Canada (Attorney General)* (1998), 150 F.T.R. 106 (F.C.T.D.); *Murphy v. Canada (Attorney General)* (1997), 131 F.T.R. 33 (F.C.T.D.), there is authority for the proposition that Rule 17 of the *Federal Court Immigration and Refugee Protection Rules,* SOR/93-22 is mandatory. The tribunal must prepare and produce a record containing all documents relevant to the matter that are in the possession or control of the

tribunal. The decision may be set aside when the record is incomplete: *Gill v. Canada (Minister of Citizenship and Immigration)* (2003), 34 Imm. L.R. (3d) 29 (F.C); *Kong et al. v. Canada (Minister of Employment and Immigration)* (1994), 73 F.T.R. 204 (F.C.T.D.).

[16] I am aware that the weighing of relevant factors is not the function of a court reviewing the exercise of ministerial discretion: *Suresh*; *Legault v. Canada (Minister of Citizenship and Immigration*), [2002] 4 F.C. 358 (C.A.). That said, even accepting the respondent's argument for the purpose of this application, I am not in a position to determine whether the officer's decision (in contravention of the guidelines) not to forward the application for a PRRA withstands the scrutiny of a somewhat probing examination for I do not have the benefit of the evidence that was before the officer.

[17] As a result, the application for judicial review will be allowed and the matter will be remitted for determination before a different officer. Counsel did not suggest a question for certification and none arises on these specific facts.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT the application for judicial review is allowed and the matter is remitted for determination before a different immigration officer.

"Carolyn Layden-Stevenson"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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