

Federal Court



Cour fédérale

Date: 20211230

Docket: IMM-256-21

Citation: 2021 FC 1482

Ottawa, Ontario, December 30, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

PENG ZHANG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

Overview

[1] There is a fundamental and significant difference when making decisions on humanitarian and compassionate grounds between, on the one hand, observing that the relief is exceptional and, on the other hand, requiring an applicant seeking relief on humanitarian and compassionate grounds to show exceptional circumstances warranting the relief.

[2] The second is not the proper test. The officer reviewing Mr. Zhang's application for permanent residence on humanitarian and compassionate grounds [the Officer] used that improper test. The Officer required Mr. Zhang to demonstrate that his circumstances were "exceptional" and this is not the legal threshold required in humanitarian and compassionate decisions. The decision is therefore unreasonable.

[3] It is also unreasonable because the Officer failed to grapple with the particular and unique circumstances of Mr. Zhang. The decision must be set aside and returned for redetermination, in keeping with these reasons, by a different officer.

Background

[4] The Applicant is a citizen of China. He has cerebral palsy and is confined to a wheelchair. Other than noting that the Applicant has cerebral palsy, the Officer does not set out his background and significant accomplishments, all of which have been achieved with the support and care of his parents, who now reside in Canada with the only other member of the Applicant's immediate family, his brother. This important background is summarized in the submissions filed in support of the application under the heading "Background and History", and it is worth setting it out in full in order to appreciate Mr. Zhang's past and current life challenges and how they have been and continue to be addressed with the assistance of his family:

Mr. Zhang was born in China on June 7, 1980. He is the oldest of two children. When he was born, there were complications which resulted in a very prolonged labour of up to 20 hours and apparent oxygen deprivation. After birth there were further complications which required a return to the hospital for treatment. Later as his parents watched his development, they observed that he was not developing as an apparently normal baby should. He was not able

to turn over at 9 months and around one year old he was not able to stand or walk as other infants could at this age. He was taken to the hospital where it was diagnosed that he suffered from brain damage due to lack of oxygen during a prolonged child birth. His condition was identified as cerebral palsy his doctors advised that there was no treatment or cure and that he would be dependant on care for the rest of his life. The family did their best to deal with the disability and made efforts to find anything that could be beneficial or improve their son's quality of life. Mr. Zhang's parents have been and continue to be very dedicated and devoted to their son. Over the years he has received several operations and treatments to improve his physical condition and well-being. Notwithstanding his physical disabilities, Mr. Zhang has a very sharp and creative mind and has defied the odds for someone with his condition, especially in China where people with his disability do not get much support or encouragement as they would in Canada. It was very difficult to find a school to accept him, but with his parents' perseverance, he started school when he was 10 years old. His mother took him to school everyday and picked him up at the end of each school day. He showed talent for painting and his parents hired a painting teacher to encourage him to develop his talent. During his time in primary school, he participated in many domestic and foreign exhibitions and received several rewards. He attended junior and regular high school and his attendance was ensured through the assistance of family and friends who dropped him off and picked him up from school and later a driver was hired to do this. In 2002 he was accepted to the College of Art of Heilongjiang University. The family hired a full-time helper for him so he could get around the campus which required him to attend at several different buildings. He graduated in 2006 after completing a four-year degree with exceptional grades and was awarded a scholarship for two of the years there. After graduation he was employed as a graphic designer with Harbin Meihua Biotechnology Co., Ltd. His family continued to find ways to ensure that he could get to and from where he needed to be with respect to his employment commitments. As mentioned, there were two children. The applicant's younger brother Zheng Zhang came to Canada to study in 2004, he was sponsored by his Canadian wife and became a permanent resident in October of 2006. In 2014 he became a Canadian citizen. In 2011, the younger brother Zhang sponsored his parents. The parent's sponsorship application was approved in 2016 and they landed in Canada in February 2017. The applicant accompanied his parents when they landed in Canada in February and he remained with them until July 2017 when he went back to China with his brother and father. He returned to Canada in October

2017 with his friends and he went to Cancun, Mexico with his mother, brother and sister-in-law for one week. He has been in Canada with a valid visitor status since.

The Decision

[5] The Officer's decision was issued on January 4, 2021. The Officer indicated that the application was based on the following factors: establishment in Canada, family ties in Canada, and adverse living conditions in China due to his disability.

[6] The Officer noted that the Applicant had developed friendships in the approximately three years he had lived in Canada. The Officer acknowledged that the Applicant had an offer of employment, but found that only current establishment could be considered. The Officer expressed sympathy for the fact that the Applicant's family resided in Canada and assigned "some positive consideration" to his family ties, but overall, did not find the Applicant's "establishment to be exceptional." [emphasis added]

[7] The Officer was not satisfied that separating the Applicant from his family and friends in Canada would sever the bonds that had been established. The Officer further found that "insufficient evidence has been put forward to support that the aforementioned relationships are characterized by a degree of interdependency and reliance to such an extent that if separation were to occur it would justify granting an exemption under humanitarian and compassionate considerations."

[8] The Officer acknowledged an assessment letter submitted by the Applicant from a psychologist, which, according to the Officer, indicated that the Applicant “would have difficulties returning to China as he has relied on his parents to assist with his physical errands.”

[9] I pause and note that the record contains two letters from the psychologist and neither letter makes that statement. Rather, the psychologist’s report dated February 11, 2019, notes Mr. Zhang’s dependence on his parents and the mobility challenges Mr. Zhang faces in China compared to Canada:

Prior to his parents' relocation, Mr. Zhang resided with them in China. As such, when they came to Canada, the patient accompanied them as a visitor, given his dependency on them for his daily activities. ...

[...]

[G]iven the length of time that Mr. Zhang lived in Canada, he is settled here, and adjusted well to the lifestyle and change in climate. Importantly, he is provided with a sense of independence and autonomy that was not available to him in China. Specifically, Mr. Zhang noted that there are stairs throughout numerous public spaces in China without ramps or elevators. As a result, the patient was confined to the home, only being able to venture out when his family members assisted him.

In contrast, within Canada, there are accessibility regulations in place to ensure that individuals with mobility issues do not encounter barriers to accessing services. With his electric wheelchair, Mr. Zhang is unrestricted in his ability to move around on his own, shop at the mall, and complete simple errands self-reliantly. This bolster's [*sic*] Mr. Zhang's confidence and fills him with a sense of pride and accomplishment.

[10] Rather than examining this information and the independence that the Applicant has achieved and enjoys in Canada, the Officer notes only that the psychologist report “does not indicate that the Applicant must remain in Canada.” [emphasis added] The Officer found that

the information in the application “does not indicate that he would be unable to reside on his own in China.”

[11] With respect to risk and adverse country conditions, the Officer found that “although the environment in China may have different economical and supportive aspects and thus [is] not comparable to Canada” the Officer did not “find this to be an exceptional circumstance to justify a positive exemption.” [emphasis added] The Officer observed that humanitarian and compassionate exemptions are not intended to make up for the “difference in the standard of living between Canada and other countries.” The Officer was not satisfied that the Applicant had “established that the hardships associated with his medical condition was entitled to more than some weight.”

[12] The Officer noted that “[w]hile it may be difficult for the applicant to return to China after spending a period of time in Canada,” the Applicant had spent most of his life in China and found that he had “provided insufficient evidence to indicate that he would be unable to resettle into the community and society.” [emphasis added]

Issue

[13] The sole issue is whether the Officer’s decision is reasonable.

Discussion and Analysis

[14] I find the decision under review to be unreasonable for two reasons. First, the Officer applied the wrong test in focusing on whether the Applicant’s establishment or hardship met the threshold of being “exceptional” rather than considering whether the circumstances as a whole justified humanitarian and compassionate relief. Second, the Officer’s analysis of the Applicant’s personal circumstances is framed as if he were just another individual from China returning without his immediate family. Instead of asking whether there are humanitarian and compassionate grounds to grant the relief, the Officer focuses on whether he would be able to resettle in China. Someone who is unable to resettle in their country of origin most certainly has humanitarian and compassionate grounds for relief; however, others who can resettle may also be deserving of such relief if the conditions faced in such resettlement warrant it.

1. The Test for Humanitarian and Compassionate Relief

[15] Humanitarian and compassionate relief is provided for in subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27, as follows:

**Humanitarian and
compassionate
considerations — request of
foreign national**

25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act,

**Séjour pour motif d’ordre
humanitaire à la demande
de l’étranger**

25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d’un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c’est en raison d’un cas visé aux articles 34, 35 ou 37

and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

—, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[16] The legal test for humanitarian and compassionate relief is described by the Supreme Court of Canada in *Kanhasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanhasamy*], where it adopted the approach set out by the Immigration Appeal Board in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 [*Chirwa*].

[17] *Chirwa* observed that this provision provided “the power to mitigate the rigidity of the law in an appropriate case:” *Chirwa* at 350. Justice Abella at para 15 of *Kanhasamy* notes that in proceedings before the Special Joint Committee of the Senate and the House of Commons on Immigration Policy in 1975, Janet Scott, the first Chair of the Immigration Appeal Board, elaborated on the importance of being able to guard against the unfairness of deportation in certain cases:

. . . it was recognized that deportation might fall with much more force on some persons . . . than on others, because of their particular circumstances, and the Board was therefore empowered to mitigate the rigidity of the law in an appropriate case. Section 15 [now subsection 25(1)] is a humanitarian and equitable section, which gives the Board power to do what the legislator cannot do, that is, take account of particular cases.

[emphasis added.]

[18] At para 21 of *Kanhasamy*, Justice Abella lays out the purpose and legal test for the humanitarian and compassionate exception:

But as the legislative history suggests, the successive series of broadly worded “humanitarian and compassionate” provisions in various immigration statutes had a common purpose, namely, to offer equitable relief in circumstances that “would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another”: *Chirwa*, at p. 350.

[emphasis added]

[19] In my view, the test under subsection 25(1) and the question to be asked, is this:

Understanding that relief from the rigidity of the law is exceptional, do the particular circumstances of the applicant excite in a reasonable person in a civilized community a desire to relieve their misfortunes?

[20] There are decisions of this Court that frame this question and the test differently and, in particular, decisions that require that an applicant’s circumstances be compared to those of others. It is challenging to find the origin of this line of cases. It is best represented by the statement of the Chief Justice at para 20 of *Huang v Canada (Minister of Citizenship and Immigration)*, 2019 FC 265:

Put differently, applicants for H&C relief must “establish exceptional reasons as to why they should be allowed to remain in Canada” or allowed to obtain H&C relief from abroad: *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, at para 90. This is simply another way of saying that applicants for such relief must demonstrate the existence of misfortunes or other circumstances that are exceptional, relative to other applicants who apply for permanent residence from within Canada or abroad: *Jesuthasan v Canada (Citizenship and Immigration)*, 2018 FC 142, at paras 49 and 57; *Kanguatjivi v Canada (Citizenship and Immigration)*, 2018 FC 327, at para 67.

[emphasis added]

[21] This statement of the test has been followed and appears to have been relied upon by officers tasked with making humanitarian and compassionate exemption determinations.

[22] In my view, the stated comparison requirement is not one supported by *Kanthisamy*. It appears to be based on the observation by Ms. Scott in the passage quoted earlier that this exceptional relief “recognized that deportation might fall with much more force on some persons . . . than on others, because of their particular circumstances:” see *Kanguatjivi v. Canada (Minister of Citizenship and Immigration)*, 2018 FC 327 at para 67, citing *Kanthisamy* at para 15.

[23] There is a significant difference between observing that this exceptional relief is provided for because the personal circumstances of some are such that deportation falls with more force on them than others, and stating that the relief is available only to those who demonstrate the existence of misfortunes or other circumstances that are exceptional relative to others. The first explains why the exemption is there, while the second purports to identify those who may benefit from the exemption. The second imports a condition into the exception that is not there.

[24] Once the exception is established in law, as it is in subsection 25(1), it is available to all but will only be granted to those whose particular circumstances excite in a reasonable person in a civilized community a desire to relieve their misfortunes. It requires only an examination of the personal circumstances of an applicant. It does not require that a comparative analysis be done.

[25] Subsection 25(1) of the Act allows the Minister to grant an exemption to an application requirement “if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.” Thus, the sole question that must be asked is whether humanitarian and compassionate relief for this applicant is justified.

[26] In *Damian v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1158 [*Damian*] at para 22, Justice McHaffie considered an officer’s use of the words “exceptional” and “extraordinary” in a humanitarian and compassionate decision:

[T]o the extent that words such as “exceptional” or “extraordinary” are used simply descriptively, their use appears to be in keeping with the majority in *Kanhasamy*, although such use may not add much to the analysis. However, to the extent that they are intended to import a legal standard into the H&C analysis that is different than the *Chirwa/Kanhasamy* standard of “exciting in a reasonable person in a civilized community a desire to relieve the misfortunes of another, provided those misfortunes justify the granting of relief,” this would appear to be contrary to the reasons of the majority. Given the potential for words such as “exceptional” and “extraordinary” to be taken beyond the merely descriptive to invoke a more stringent legal standard, it may be more helpful to simply focus on the *Kanhasamy* approach, rather than adding further descriptors.

[emphasis added]

[27] The Officer here uses the word “exceptional” twice in the decision: When discussing establishment, the Officer says he does not “find the applicants [*sic*] establishment to be exceptional.” Later, when discussing hardship upon returning to China, the Officer writes that “although the environment in China may have different economical and supportive aspects and thus not [be] comparable to Canada; I do not find this to be an exceptional circumstance to justify a positive exemption.”

[28] These passages demonstrate that the Officer was operating with an understanding that the Applicant was required to demonstrate “exceptional” establishment or hardship. This is not the test for a humanitarian and compassionate decision. As set out by Justice McHaffie in *Damian*, humanitarian and compassionate exemptions are “exceptional” in the sense that they operate as exceptions to the general rule. There is no requirement that any individual factor, such as establishment or hardship, be exceptional. Nor is there a requirement that an applicant’s circumstances as a whole meet the threshold of being exceptional when compared to others. What is required is that an applicant’s personal circumstances warrant humanitarian and compassionate relief.

[29] The Officer’s reasoning demonstrates that he was not focused on the proper question, namely, whether the Applicant’s circumstances would excite a reasonable person in civilized community a desire to relieve the Applicant of his misfortunes. Therefore, I find it to be unreasonable.

2. *The Applicant’s Personal Circumstances*

[30] I agree with the Applicant that the Officer, in assessing the Applicant's past life in China and success in establishing himself in Canada, failed to properly consider the significant role played by his family. The Officer noted the Applicant's past educational and career success, his financial independence, and his ability to establish himself in Canada, and found that this suggested that the Applicant would likely be able to re-establish himself upon return.

[31] However, throughout his life in China and in establishing himself in Canada, the Applicant has had the benefit and support of his family. If he were to return, this would no longer be the case. In fact, he would not even have a home to go back to. This represents a significant change in his circumstances.

[32] The Officer failed to consider whether the Applicant would still be able to re-establish himself in China or even live a reasonable life in light of this change. It was unreasonable to not give consideration to how family separation would affect his prospects of re-establishment and quality of life.

[33] This failure and improper focus renders the decision unreasonable.

Conclusion

[34] Among other decisions, the Applicant cites my judgment in *Ullah v Canada (Minister of Citizenship and Immigration)*, 2015 FC 815. One of the decisions under review there was a negative decision on an application for permanent residence based on humanitarian and compassionate grounds.

[35] With respect to the humanitarian and compassionate decision, I found that the officer asked the wrong question:

In the context of this case, the officer ought to have asked how would I feel as a paraplegic wheel-chair bound man suffering from PTSD arriving in Pakistan with no place to live, no family support for my daily needs such as bathing and treating bed sores, no income or possibility of work, and no ability to care for myself?

[36] In the context of the personal circumstances of Mr. Zhang, I would rephrase that as follows:

In the context of this case, the Officer ought to have asked how would I feel as a wheel-chair bound man suffering from cerebral palsy arriving in China with no place to live, no family support for my daily needs, no income or immediate possibility of work, multiple physical barriers to my mobility, and no ability to care for myself?

[37] In my view, and while recognizing that the decision is not mine to make, those circumstances cry out and excite in a reasonable person in a civilized community a desire to relieve Mr. Zhang from those misfortunes.

[38] No question was proposed for certification.

JUDGMENT IN IMM-256-21

THIS COURT'S JUDGMENT is that this application is allowed, the decision is set aside, the application for humanitarian and compassionate relief permitting an application for permanent residence to be made from within Canada is remitted back for determination by a different officer, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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