Federal Court Cour fédérale

Date: 20220204

Docket: IMM-828-21

Citation: 2022 FC 138

Ottawa, Ontario, February 4, 2022

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

LIQING QIU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant challenges a negative decision of a Senior Immigration Officer [Officer] dated January 22, 2021 refusing her second application for permanent residence based on humanitarian and compassionate [H&C] grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicant asserts that the Officer: (a) erred by using "catch-22" reasoning as the Officer used positive factors or attributes to discredit the Applicant's H&C application; (b) erred by applying the unusual and undeserved or disproportionate hardship test, rather than applying the broader, equitable approach established by the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration*), 2015 SCC 61; and (c) erred by failing to consider the hardship associated with the Applicant's practice of Falun Gong.

[3] For the reasons that follow, the application for judicial review shall be dismissed.

I. Background

[4] The Applicant is a 35-year-old citizen of China. She received twelve years of formal education in China and obtained her high school diploma. In 2009, she states that she distributed two copies of Falun Gong flyers to a friend. She states that on the same day, her friend was detained by police and as a result, the Applicant went into hiding. She asserts that she was thereafter sought by the police.

[5] In January 2010, the Applicant came to Canada and made a claim for refugee protection, which was ultimately denied in 2011. The Applicant was unsuccessful in her attempt to obtain leave to judicially review the denial of her refugee claim. In February 2012, the Applicant was issued a work permit. In April 2012, the Applicant submitted her first H&C application, which was refused in April 2013. The Applicant sought leave to judicially review the H&C refusal, which leave was denied in September 2013.

[6] In March of 2019, the Applicant submitted her second H&C application, requesting that the Officer consider the following factors: (a) her establishment in Canada; (b) the risk, hardship and discrimination that she would face in China because of her involvement in Falun Gong; and (c) adverse country conditions in China.

II. Decision at Issue

[7] On January 22, 2021, the Officer refused the Applicant's second H&C application. The Officer considered each of the factors raised by the Applicant in turn.

[8] In relation to establishment, the Officer found that the Applicant has been in Canada for an extensive amount of time (11 years), she has been employed with her present employer since 2018, she paid taxes from 2010 to 2012 but that the Officer could not conclude that the Applicant is currently paying taxes due to a lack of documentation, and the Applicant possesses some savings. The Officer went on to assign some positive weight to the fact that the Applicant has taken ESL and childcare courses while in Canada to upgrade her employable skills and that she has been volunteering since 2018. The Officer also assigned some positive weight to the fact that the Applicant has made friends while in Canada and that they describe her as reliable, kind and hard-working. The Officer noted that while not perfect, the Applicant could still maintain those friendships from abroad. While the Officer found the Applicant had kept a good civil record, the Officer noted that is what is expected of all Canadians, permanent residents and visitors to Canada.

[9] The Officer went on to find that the Applicant still has strong familial ties to China (her parents and sister reside in China) and that she resided in China for much of her formative and

adult years. While the Applicant may experience some initial difficulty in readjustment, the Officer found that the support of her family would assist her in re-integrating back into Chinese society. Moreover, given her warm personality, the Officer found it was reasonable to conclude that the Applicant could accomplish similar outcomes in the country where she has spent most of her formative years to re-establish her social circle in China and that there was little evidence before the Officer to suggest otherwise.

[10] While the Applicant asserted that she would face hardships being separated from her boyfriend (who was in Canada on a work permit), the Officer found that it was more likely than not that her boyfriend would return to China at the expiry of his work permit and they would be reunited, as, at the time of the decision, the boyfriend's work permit was expired and the Officer had no evidence of any efforts to renew it.

[11] The Officer concluded under the establishment factor that, while the Applicant was assigned some positive weight, it is not uncommon for applicants to hold employment, make friends and involve themselves in community events while in Canada. Overall, the Officer was not satisfied that the Applicant's degree of establishment was greater than what would be expected of other individuals who have been in Canada for over 10 years.

[12] In relation to the risk and discrimination factor, the Officer began by noting that the Officer could not consider the factors taken into account under sections 96 and 97 of the *IRPA*, but rather had to consider elements related to the hardships that affect the foreign national. As such, the Officer noted that he was precluded from assessing the risk factors advanced by the Applicant

regarding persecution. However, the Officer stated that he would consider the adversity that the Applicant could face in returning to China in order to apply for permanent residence abroad.

[13] The Officer reviewed the submissions made by the Applicant and found that there was little independent and corroborative evidence that had been brought forward that: (a) the Applicant was being sought by the police in China; (b) the police are currently interested in the whereabouts of the Applicant some 10.5 years after the incident; and/or (c) the Applicant would, on a balance of probabilities, experience discrimination or harm due to the fact that she may have distributed two Falun Gong flyers over 10 years ago. While the Officer accepted that the Applicant joined a Falun Gong group in Toronto and continues to practice Falun Gong in Canada, the Officer found that there was little evidence to suggest that Chinese authorities are aware of the Applicant's personal circumstances or that the Applicant is wanted by authorities in China. Given the insufficient evidence, the Officer was unable to conclude that the Applicant would face hardship owing to her membership in a Falun Gong group in Canada. The Officer concluded by assigning this factor little weight.

[14] Finally, the Officer addressed the Applicant's assertion that if forced to leave Canada, she would face the hardship of living separately from her boyfriend and having to start over from scratch. The Officer's analysis pointed to the Officer's earlier findings regarding the Applicant's boyfriend and her ability to re-establish herself in China with the assistance of her family, noting that in all cases there will inevitably be some hardship associated with being required to leave Canada.

III. Analysis

[15] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada if the Minister is of the opinion that such relief is justified by H&C considerations. An H&C determination under section 25(1) of the *IRPA* is a global one, where all the relevant considerations are to be weighed cumulatively in order to determine if relief is justified in the circumstances. Relief is considered justified if the circumstances would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another [see *Kanthasamy, supra* at paras 13, 28; *Caleb v Canada (Citizenship and Immigration),* 2020 FC 1018 at para 10].

[16] The granting of an exemption for H&C reasons is deemed to be exceptional and highly discretionary and therefore "deserving of considerable deference by the Court" [see *Qureshi v Canada (Minister of Citizenship and Immigration),* 2012 FC 335 at para 30]. There is no "rigid formula" that determines the outcome [see *Sivalingam v Canada (Citizenship and Immigration*), 2017 FC 1185 at para 7].

[17] In the H&C context, the onus is on the applicant to include pertinent information and evidence in support of their submissions. Lack of evidence or failure to adduce relevant information in support of an H&C application is at the peril of the applicant [see *Kisana v Canada (Minister of Citizenship and Immigration),* 2009 FCA 189 at paras 35, 45 and 61; *Owusu v Canada (Minister of Citizenship and Immigration),* 2004 FCA 38 at paras 5, 8-9].

[18] The applicable standard of review of an H&C decision is reasonableness [see *Kanthasamy*, *supra* at para 44]. In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, in order to ensure that the decision as a whole is transparent, intelligible and justified [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 15].

[19] The sole issue before the Court is whether the Officer's decision is reasonable. A determination of that issue requires a consideration of the Applicant's three grounds of review.

A. *Did the Officer engage in "catch-22" reasoning?*

[20] The Applicant asserts that the Officer improperly engaged in "catch-22" reasoning in relation to the Officer's assessment of the establishment factor when the Officer accepted that the Applicant had a positive employment history and commended her for taking ESL and child care courses to upgrade her employable skills, but then concluded that the Applicant's employment experience and education received in Canada may help her re-establishment in China. The Applicant asserts that the Officer made a similar error when the Officer found that the Applicant's warm personality (that helped her establish and integrate to Canada) meant that she could accomplish similar outcomes in China to re-establish her social circle.

[21] I agree with the Applicant that this Court has repeatedly held that turning positive establishment factors on their head and using them against an applicant as a sword rather than a shield is unreasonable [see *Alghanem v Canada (Citizenship and Immigration)*, 2021 FC 1137 at para 39; *Singh v Canada (Citizenship and Immigration Canada)*, 2019 FC 1633 at para 23].

However, I am not satisfied that the Applicant has demonstrated that that is what occurred in this case.

[22] A review of the reasons reveals that the Officer attributed some positive weight to the Applicant's eleven years in Canada, her employment, her modest savings, her educational pursuit while in Canada and her volunteer service. The Officer also attributed limited weight to her relationships in Canada and her good civil record.

[23] The Officer then went on to conduct a balancing exercise, albeit under the heading of establishment. The Officer balanced the aforementioned positive factors against the fact that the Applicant had spent her formative years in China, had close family in China that could assist her in reintegrating into Chinese society and that her warm personality (as attested to in her support letters) could assist her in re-establishing her social circle in China. While one might normally expect to see such a balancing exercise being done in the final section of the reasons where an officer considers the global assessment of the H&C considerations, the Court must consider the Officer's reasons holistically and format concerns do not trump the substance of the reasons. I do not find that the Officer improperly used the Applicant's positive establishment factors against her. In that regard, it must be recalled that the Applicant was accorded positive weight for her degree of establishment. Rather, it was only in the final balancing exercise that the Officer determined that the Applicant had not established that extraordinary H&C relief was warranted.

[24] As such, I reject the Applicant's assertion that the Officer's reasoning constitutes a reviewable error.

B. *Did the Officer err by applying the unusual and undeserved or disproportionate hardship test?*

[25] The Applicant asserts that the Officer erred by restricting their H&C considerations to a search for unusual and disproportionate hardship and by doing so, failed to apply the broader, equitable approach in *Kanthasamy*, where the Supreme Court of Canada stated at paragraph 33:

> The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.

[26] The Applicant asserts that while it was not wrong for the Officer to consider the presence of any unusual or disproportionate hardship or lack thereof, it became an error when the Officer applied this concept as the overriding standard to reject the H&C application. In support of this assertion, the Applicant points to the Officer's conclusion that her "degree of establishment is no greater than what would be expected of other individuals who have been in Canada for over 10 years".

[27] I reject the Applicant's assertion. It is incumbent on an applicant for H&C relief to demonstrate exceptional circumstances (including establishment), rather than simply expected circumstances [see *Baquero Rincon v Canada (Minister of Citizenship and Immigration)*, 2014 FC 194 at para 1; *Regalado v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 540 at para

8]. It is therefore not uncommon to see such references in officers' decisions. I am not satisfied that the Officer's one statement comparing the Applicant's level of establishment to others in Canada over 10 years amounts, on its own, to the imposition of an impermissible "unusual and undeserved or disproportionate hardship" test. To the contrary, when read holistically, I am satisfied that the Officer's reasons demonstrate that the Officer considered an expansive range of grounds for H&C relief as required by *Kanthasamy*.

C. *Did the Officer err by failing to consider the hardship associated with the Applicant's practice of Falun Gong?*

[28] The Applicant asserts that the Officer erred in failing to consider the plain reality that a Falun Gong practitioner faces hardship upon a return to China, regardless of whether or not she would be specifically sought after by the Chinese authorities at the time of her return. The Applicant asserts that any meaningful restriction on the Applicant's ability to practice her religion as she wishes can constitute religious persecution and that it is unreasonable to restrict the analysis of religious persecution to arrest and incarceration.

[29] The Applicant asserts that it is well-known that Falun Gong is banned in China and that Falun Gong practitioners risk facing harrowing persecution if they are caught. The Applicant asserts that the Officer failed to consider at least three dimensions to this hardship vis-à-vis the Applicant – (i) being unable to practice Falun Gong openly and freely in China; (ii) the risk of being identified as a Falun Gong practitioner as a result of practicing Falun Gong in Canada and continuing to do so in China; and (iii) the risk of harm at the hands of the Chinese authorities upon

identification. The Applicant asserts that the Officer's failure to consider these factors constitutes a reviewable error.

[30] The evidence before the Officer was that the Applicant has been a member of a Falun Gong group in Canada since 2010 and continues to practice Falun Gong in Canada. The Applicant also stated that she was sought by the local police in China for distribution of two Falun Gong flyers in 2009. The Applicant submitted numerous NDP documents in support of her application regarding the treatment of Falun Gong practitioners in China and asserted that if she returns to China, she will likely be arrested. The Applicant also asserted in her application that "it is more probable than not that the applicant would be prosecuted, arbitrarily rejected, jailed and mistreated for her Falun Gong activities in Canada, in addition to her previous distribution of Falun Gong fliers in China".

[31] While the Applicant now complains that the Officer failed to consider the hardship that would arise from her inability to openly practice Falun Gong in China, the Applicant did not make a submission asserting that hardship to the Officer. Rather, her submissions focused on her risk of arrest from her flyer distribution in 2009 and from her involvement in Falun Gong in Canada. Those submissions were reasonably addressed by the Officer, who ultimately found that the evidence tendered by the Applicant was insufficient to establish that she is wanted by the authorities in China or that she would face hardship from her Falun Gong practices in Canada.

[32] It is not open to the Applicant to reframe her submissions on judicial review to raise an issue not put before the Officer. Even if the Court were inclined to consider this submission, I note that the Applicant has not pointed the Court to any evidence in her application regarding the

Applicant's intention to continue to practice Falun Gong in China and how her specific plans would be impacted. Moreover, I would note that notwithstanding the Officer's finding that the Applicant has tendered insufficient evidence to support her assertions, the Officer nonetheless assigned some weight to this factor.

[33] Accordingly, I find that the Officer's conclusion in relation to this factor was reasonable based on the evidence and submissions before them.

IV. Conclusion

[34] For the reasons set out above, I am satisfied that the Officer's decision was reasonable. It was based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the applicable legal principles. Accordingly, the application for judicial review is dismissed.

JUDGMENT in IMM-828-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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