Federal Court Cour fédérale

Date: 20220228

Docket: IMM-574-21

Citation: 2022 FC 271

Toronto, Ontario, February 28, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

JIANHUAN YU
JIATAO LIANG

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] In this application for judicial review, the applicants ask the Court to set aside a decision by a senior immigration officer made under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA*"). The officer refused Ms Yu's request for permanent residence with an exemption on humanitarian and compassionate ("H&C") grounds.

[2] For the reasons below, I have concluded that this application must be allowed.

I. **Facts and Events Leading to this Application**

[3] The applicant, Ms Yu, is a citizen of China. She and her spouse, the applicant Mr Ling, are the parents of three sons aged 7, 7 and 5, who live in Canada and a daughter, aged 12, who resides in China. All three sons were born here and are citizens of Canada.

[4] The applicants came to Canada in 2012 from Guangzhou, Guangdong Province, China. They claimed protection under section 96 and subsection 97(1) of the IRPA.

[5] Since early 2013, the applicants have been working under work permits. I understand that their current work permit is valid until December 27, 2022.

[6] By decision dated March 27, 2018, the Refugee Protection Division ("RPD") determined that they were neither *Convention* refugees nor persons in need of protection and therefore dismissed their claims.

[7] In April 2019, they submitted an application for a pre-removal risk assessment, which was refused in July 2019.

[8] In July 2019, the applicant Ms Yu submitted an H&C application. By decision dated January 4, 2021, the officer refused the application. That decision is the subject of this application for judicial review.

[9] The applicants were scheduled for removal to China on December 17, 2021. By order dated December 16, 2021, Justice Gascon dismissed their application for a stay of removal.

[10] As of the hearing of this application, the applicants remained in Canada. The respondent's Further Memorandum of Argument filed on December 23, 2021, advised that the applicants did not appear for their removal on December 17, 2021 and took the position that the Court should dismiss their application for judicial review as a result of the applicants' serious misconduct in failing to appear. However, neither party filed evidence about what happened. At the hearing, the respondent advised that the respondent would not be pursuing the argument raised in the Further Memorandum. Based on representations made by the parties' counsel, it appears that the applicants' family did in fact come to the airport as scheduled, but were not removed at that time with the consent of Canada Border Services Agency. I record these comments from counsel not as determined facts, but simply to record that the applicants were not removed and to explain why the respondent's argument did not proceed as filed.

II. The H&C Decision under Review

[11] The H&C application raised three principal issues: establishment in Canada; best interests of the children ("BIOC"); and adverse country conditions in China. The officer prepared detailed reasons for the decision, comprising six single-spaced pages, in relation to the three issues.

[12] In brief outline, the officer considered the successful roofing business operated by the applicants since 2015, which employs not only them but also others. The officer considered letters of support from friends in Canada. Recognizing that the couple had arrived irregularly in Canada (not at a port of entry), the officer also noted their diligence in maintaining their immigration status.

[13] The officer considered the BIOC, including all four children. The officer found little information concerning the applicants’ daughter in China. There was insufficient evidence to enable the officer to conduct a meaningful assessment of her best interests, apart from reuniting with her parents and having her younger brothers present in her life.

[14] The officer considered the interests of Frankie, Felix and Freddy, the applicants’ three sons in Canada. The officer considered their stage in school and found that they understand Cantonese and would not face a language barrier if they were to accompany their parents to China. The officer considered their ability to adapt to new country conditions. The officer considered letters of support and statements from the applicants. The officer concluded that the sons relied on their parents and were young enough to be completely dependent on them emotionally, psychologically and practically. There was insufficient objective evidence to indicate that their dependency would be affected by a return to China with their parents.

[15] The officer found no indication that the applicants’ daughter in China was not attending school or unable to access social services. The officer noted that the RPD found that Guangdong province has delinked the payment of social maintenance fees from household registration in the Hukou system. Consequently, the officer did not find it likely that the three sons would be barred from accessing public education.

[16] The officer acknowledged, and was sympathetic to, the fact that the applicants’ three sons would have to renounce their Canadian citizenship, as China does not allow dual citizenship. The officer concluded, however, that the children can resume Canadian citizenship if they wish to return in the future.

[17] The officer acknowledged that the three sons' relocation to China could initially cause some difficulties in dealing with an unfamiliar culture, and granted some weight to that factor. However, the officer concluded that with their parents and older sister present, their best interests would be served by remaining with their parents.

[18] With respect to adverse country conditions in China, the officer recognized that there would, inevitably, be some hardship with being required to leave Canada. The officer considered the evidence related to the Falun Gong practice followed by the applicants. The officer noted that the RPD concluded that the applicants were neither genuine practitioners in China nor in Canada but that this finding was not binding in the H&C application. Having read three letters attesting to their practices, the officer concluded that there was insufficient evidence that the applicants would suffer hardship upon returning to China owing to Falun Gong practices.

[19] The officer considered the applicants' concerns about returning to China with three children because they had violated China's family planning (two-child) policy. Their H&C application took the position that the family would be forced to pay social maintenance fees, the children would be denied access to public education and health care, the adults would face additional barriers to finding employment and Ms Yu would be subject to forced sterilization or implantation of an intra-uterine device. The officer noted that these concerns had been raised with the RPD during the refugee determination process. The RPD found that there was no evidence of forced sterilization in Guangzhou since 2012 or that a woman would be forced to wear an IUD. The RPD further noted that Guangdong authorities had taken a more relaxed approach to family planning. With that understanding of the RPD's findings, the officer reviewed the documentation submitted with the H&C application, including an affidavit from the

applicant Ms Yu’s friend who underwent forced sterilization after returning to China from another country in 2018. The officer found that the friend’s affidavit and supporting documentation were not reliable and gave them little weight in the assessment. Overall, with respect to compliance with China’s family planning policy, the officer found that the likely repercussions were limited to a fine for their fourth child. The officer found that paying a fine would not amount to a hardship for the applicants’ family.

[20] With respect to the family Hukou, the officer stated:

> The applicants are concerned that their sons will face a denial of social services because they are not registered in the family’s Hukou (household registration) and they will not be able to until the applicants pay the social compensation fees. While I sympathize with the applicants on the basis of their concerns, I find that the RPD determined that “all children born should be registered, no matter if they are second or third or higher births, prior to the new regulations” regarding the move from a one-child to a two-child policy in 2016. I note that Guangdong Province has officially delinked fines and Hukou registration for those born outside the rules, although a fine must be paid eventually. As the applicants have been outside China since 2012, I give them the benefit of the doubt that they were not aware of these changes. I therefore find it likely, on a balance of probabilities, that the applicants’ three sons will be able to be registered in the family Hukou and they will not be denied services if they returned to China.

[21] The officer then assessed the evidence about whether the adult applicants would face unemployment due to their violation of the family planning policy if they returned to China. The officer found that the applicants had previously worked in the trades independently and it was likely that they would be able to re-establish themselves in a similar manner.

[22] The officer considered the evidence with respect to the applicants’ mental health, including a psychotherapy assessment report.

[23] Overall, the officer was not satisfied that the H&C considerations in the record justified an exemption under subsection 25(1) of the IRPA.

III. Standard of Review

[24] The standard of review of the officer's decision is reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at para 44. The reasonableness standard was described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15. The reviewing court starts with the reasons of the decision maker, which are read holistically and contextually with the record that was before the decision maker: *Vavilov*, at paras 84, 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers,* 2019 SCC 67, at paras 28-33.

[25] The Court's review considers both the reasoning process and the outcome: *Vavilov*, at paras 83 and 86. A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, at paras 24-36.

IV. Analysis

A. *H&C: Legal Principles*

[26] It is well established that when assessing H&C applications, an officer must always be alert, alive and sensitive to the best interests of the children. Those interests must be well

identified and defined, and examined with a great deal of attention in light of all the evidence. See *Kanthasamy*, at para 35 and paras 38-40; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555, at paras 5 and 10; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358, at paras 12-13 and 31; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 75; *Mebrahtom v Canada (Citizenship and Immigration)*, 2020 FC 821 (McHaffie J) at paras 7-8 and 14. The children's interests must be given substantial weight and be a significant factor in the H&C analysis, but are not necessarily determinative of an H&C application: *Kanthasamy*, at para 41; *Hawthorne*, at para 2.

[27] Children will rarely, if ever, be deserving of any hardship. While hardship may be considered, particularly if raised by an applicant, the concept of "undue hardship" is ill-suited when assessing hardship on innocent children: *Kanthasamy*, at paras 41 and 59; *Hawthorne*, at paras 4-6 and 9. See also *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 (Russell J.), at paras 64-67, as cited in *Kanthasamy*, at para 59.

[28] On an H&C application, an officer must consider the impact of removal on the particular individuals to be removed, including any hardship the individual may face: *Kanthasamy*, at paras 32-33, 45 and 48; *Zhang v Canada (Minister of Citizenship and Immigration),* 2021 FC 1482 (Zinn J.), at paras 14, 24 and 25.

B. *The Present Case*

[29] The applicants raised several issues to challenge the reasonableness of the officer's decision, related to the assessment of establishment, BIOC, hardship on return to China and the mental health evidence. It is unnecessary to consider all of the applicants' positions because the

outcome of this application turns on one of the arguments raised by the applicants concerning the BIOC, which was a focus at the hearing.

[30] On the H&C application, the applicants raised two principal concerns related to the BIOC: (i) the denial of schooling and health care for all of their children due to their inability to pay "social maintenance fees" and (ii) the denial of schooling and health care for their Canadian-born sons. On the latter, the H&C application stated that dual nationality is not permitted in China pursuant to section 5 of its Nationality Law. After setting out that provision, the H&C application stated:

> Another requirement for *hukou* registration and therefore schooling and healthcare, is Chinese citizenship. The Applicants' children will therefore be denied access to social services, such as schooling and healthcare, unless they renounce their Canadian citizenship in favour of their Chinese citizenship. If the children do not renounce their citizenship, they will need to renew their visas indefinitely. It is of note that China has been cracking down on its policy against dual nationality.

The H&C application submitted that "children will rarely, if ever, be deserving of any hardship" (citing *Hawthorne*).

[31] In this Court, the applicants submitted that in the analysis of the BIOC, the officer accepted that the three sons, who are Canadian citizens, would have to give up their Canadian citizenship to get schooling and health care in China. The applicants submitted that the officer unreasonably minimized the sons' loss of their Canadian citizenship and incorrectly assumed that they could get their citizenship back.

[32] The applicants also submitted that although the officer's reasons later considered the impact of China's two-child policy on the sons' registration in the family Hukou, the officer did

not address their express BIOC submission that the boys could not register in the Hukou while holding dual nationality (i.e., while being Canadian citizens). The applicants referred to country condition evidence consistent with the sons' inability to register if they are foreign citizens. The applicants also noted that although the RPD addressed the arguments about the impact of the two-child policy as it applied in Guangdong Province, the RPD did not consider the dual nationality issue.

[33] A similar situation arose in *Ma v Canada (Minister of Citizenship and Immigration)*, 2019 FC 108. In *Ma*, one of the principal arguments in the applicant's H&C submissions was that her children's interests would be compromised if they were to return to China because they would have to choose between either relinquishing their Canadian citizenship so as to obtain Hukou and therefore access to education and healthcare benefits in China, or maintaining that citizenship so they could return to Canada when they are adults, which would result in them being deprived of Hukou registration and the associated benefits: *Ma*, at para 19. The officer addressed the argument but was not persuaded by the evidence that the children would be prevented from accessing their Canadian citizenship in the future and therefore found that their interests were not compromised: *Ma*, at para 20. Justice Southcott set aside the H&C decision either because the officer's reasoning was unintelligible and therefore unreasonable, or because it drew a conclusion that was unreasonable on the evidence: *Ma*, at paras 21-24.

[34] In the present H&C application, the applicants made an argument similar to the applicant in *Ma*, but unlike *Ma*, the officer here did not consider it. The officer addressed the applicants' position about the impact of China's two-child family planning policy. However, as the applicants asserted at the hearing, the officer's reasons did not address the applicants' express

position concerning dual nationality and the impact of the loss or renunciation of Canadian citizenship on the three sons and their (in)ability to be registered on the family Hukou.

[35] In my opinion, the officer erred in law by failing to consider the possible hardship that the sons would face in China without a Hukou due to their dual nationality (Canadian citizenship) – in circumstances where the officer was required to examine the sons' interests with a great deal of attention, in light of all the evidence and to give those interests substantial weight: *Kanthasamy*, at paras 32-33, 45 and 48; *Zhang*, at paras 14, 24 and 25. In addition, the officer did not grapple with a key argument made by the applicants in their H&C application with respect to the BIOC: *Vavilov*, at para 128.

[36] Mindful of the importance of the outcome of this issue to the best interests and futures of the applicants' three sons if they are removed to China (*Vavilov*, at para 133), I conclude that the officer's decision must be set aside as unreasonable.

[37] There is a further point, which in my view further supports (but does not determine) the conclusion I have reached. With respect to the officer's statements about the loss or renunciation of the sons' Canadian citizenship, the applicants argued that the officer's conclusion that the sons' could later apply to resume their Canadian citizenship was speculative. The applicants observed that under paragraph 11(1)(*d*) of the *Citizenship Act*, RSC 1985, c C-29, the sons would have to be permanent residents of Canada in order to apply to resume their former citizenship. However, as the respondent properly noted at the hearing, under paragraph 9(1)(*c*) of the *Citizenship Act*, one condition required for a Canadian citizen to renounce their citizenship is that the citizen "is not a minor".

[38] It appears that these *Citizenship Act* provisions were not drawn to the officer's attention. They were, nonetheless, possible legal constraints bearing on the officer's decision. I will not comment further, other than to note that the *Citizenship Act* provisions should be drawn to the attention of the officer who will make the H&C decision on re-determination.

[39] Lastly, I note that the officer's reasons on the present H&C application were lengthy and detailed. The officer may well have inadvertently overlooked the BIOC argument made by the applicants amongst the many issues that had to be determined. These Reasons do not criticize or comment (one way or the other) on any of the other reasons provided by the officer.

V. **Conclusion**

[40] The application therefore must be allowed. The matter will be returned for redetermination by another officer. Neither party raised a question to certify for appeal.

JUDGMENT in IMM-574-21

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision dated January 4, 2021, is set aside and the matter remitted for redetermination by another officer in accordance with these Reasons. Additional evidence and/or submissions may be filed on the redetermination.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act.*

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-574-21
STYLE OF CAUSE:	JIANHUAN YU, JIATAO LIANG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 19, 2022
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	FEBRUARY 28, 2022

APPEARANCES:

Lorne Waldman	FOR THE APPLICANTS
Kevin Doyle Andrea Mauti	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lorne Waldman Waldman & Associates Toronto, Ontario	FOR THE APPLICANTS
Kevin Doyle Andrea Mauti Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT