Federal Court  Cour fédérale

Date: 20221208

Docket: IMM-1783-21

Citation: 2022 FC 1691

Ottawa, Ontario, December 8, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

WAI MAN LIU
MEI JUNG LO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Wai Man Liu and Mei Jung Lo have been in Canada since December 2018, caring for Mr. Liu's elderly mother, who has Parkinson's disease and other ailments and requires constant care. Wishing to continue this arrangement, they applied for permanent residence in Canada on humanitarian and compassionate [H&C] grounds pursuant to subsection 25(1) of the

Immigration and Refugee Protection Act, SC 2001, c 27 [*IRPA*]. A senior immigration officer rejected the application, noting that the applicants had not demonstrated they are required to remain in Canada permanently to care for Mr. Liu's mother, that they were not health care professionals or providers, and that there was insufficient evidence that they were the best-positioned people to provide the assistance the mother required.

[2] I agree with the applicants that the officer's decision was unreasonable. The officer was required to assess whether the applicants' circumstances would excite in a reasonable person a desire to relieve their misfortunes, such that they warrant granting special relief from the provisions of the *IRPA*. Instead, the officer appears to have answered a different question, namely whether the applicants had established that they were the only, or best, people available to take care of Mr. Liu's mother. Regardless of what the answer to the former question may be, it was not answered by the officer's reasons either expressly or implicitly. The decision therefore does not show the justification, transparency, and intelligibility required of a reasonable decision, and the applicants' H&C application must be redetermined.

[3] The application for judicial review is therefore granted.

II. Issues and Standard of Review

[4] As the parties agree, decisions on H&C applications are reviewable on the reasonableness standard: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–

25. The only issue raised by this application for judicial review is therefore whether the officer's decision refusing the applicants' H&C application was reasonable.

[5] A reasonable decision is one that is based on an internally coherent and rational chain of analysis, that is justified in relation to the facts and law that constrain the decision maker, and that adequately demonstrates the qualities of justification, transparency, and intelligibility: *Vavilov* at paras 15, 86, 95, 99–101; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 31–32.

III. Analysis

A. *The applicants' H&C application*

[6] Mr. Liu and Ms. Lo lived and worked in Hong Kong before coming to Canada in 2018. He is a citizen of China (Hong Kong SAR) and holds a British National (Overseas) passport. She is a citizen of Taiwan and a permanent resident of China (Hong Kong SAR). Mr. Liu's mother, father, and sisters came to Canada in 2002 and became citizens in 2007. His father died in 2013, and his mother has continued to live with one of his sisters in Markham. The other sister has moved to the United States, where she now has permanent residence.

[7] The health of Mr. Liu's mother has declined since the death of her husband. In 2017, she suffered a fall that resulted in a leg and back injury and limited her mobility. To assist her in her recovery, the applicants came to Canada in late 2018 on electronic travel authorizations (eTAs), which they have renewed. Since their arrival, Mr. Liu's mother has been diagnosed with

Parkinson's disease, and osteoporosis has resulted in broken vertebrae. A doctor's note indicates she needs to be taken care of at all times by others, and her own evidence and that of her family members confirm this.

[8] Since Mr. Liu's sister works full time as a pharmacist, the applicants have taken on the mother's care. This care has included assistance in bathing, hygiene, preparing meals, and mobility, as well as arranging and attending health care appointments. Recognizing that Mr. Liu's mother will require such care for the rest of her life, while also wanting to settle in Canada, the applicants applied for permanent residence on H&C grounds. Their H&C application focused primarily on their care for Mr. Liu's mother, her ongoing need for extensive care and support, and the family's desire that this care be provided by family members. The applicants also highlighted their ability to establish themselves in Canada and Mr. Liu's involvement in volunteering activities in Canada.

B. *The officer's decision*

[9] Using the form adopted by Immigration, Refugees and Citizenship Canada for H&C applications, the officer fairly summarized the applicants' H&C application. This included summarizing the applicants' circumstances, their status in Canada, the evidence filed, and the "Factors for Consideration." At the outset of the "Decision and Reasons" section of the form, the officer stated that the application would be refused, noting that while they were sympathetic to the applicants' family situation, "they have not demonstrated that they require to remain in Canada permanently in order to provide care for [Mr. Liu's] mother."

[10] The officer went on to discuss the applicants' links to Hong Kong; their links with family members in Canada, noting that they had not provided evidence of travel to Canada between 2002 and 2018; their ability to continue to rely on eTAs to travel to Canada; and the family's lack of financial dependence on them. The officer concluded with the following sentence:

> While it is clear that [Mr. Liu's] mother requires assistance, there is insufficient evidence provided to establish that [Mr. Liu] and his spouse are the best positioned people to provide this service, or that it requires them to permanently relinquish their lives and livelihood in Hong Kong in order to provide it.

C. *The officer's decision is unreasonable*

[11] Subsection 25(1) of the *IRPA* permits the Minister to grant a foreign national permanent resident status or an exemption from the obligations of the *IRPA*, if he 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." No parameters are defined in the *IRPA* for the exercise of this broad discretion. However, in *Kanthasamy*, the Supreme Court of Canada has endorsed the approach first described over 50 years ago by the Immigration Appeal Board in *Chirwa v Canada (Minister of Citizenship and Immigration)*, [1970] IABD No 1. This approach recognizes that the purpose of subsection 25(1) is 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": *Kanthasamy* at paras 13, 21, citing *Chirwa* at para 27.

[12] The Supreme Court recognized that this approach was crafted to strike a balance between the availability of compassionate relief and the need to avoid destroying the essentially exclusionary nature of the *IRPA* or creating an alternative immigration or refugee scheme:

Kanthasamy at paras 14, 19–24. As the Court noted, what warrants relief will vary depending on the facts and context of the case, but officers making H&C determinations must consider and weigh all relevant facts and factors: *Kanthasamy* at para 25.

[13] This binding case law regarding the nature and purpose of subsection 25(1) is an important "legal constraint" on those making H&C determinations: *Vavilov* at paras 108, 112. In essence, officers are called upon to consider and weigh all of the facts and factors relevant to the H&C application before them and to apply their compassion and discretion to assess whether the circumstances are such that they would excite in a reasonable person in a civilized community a desire to relieve the applicant's misfortunes by granting permanent resident status or an exemption from the provisions of the *IRPA*. Although an officer need not expressly set out the language or approach of *Chirwa*, a decision that does not adequately show that it has been applied will not be justified in light of the legal constraints upon it, and will be unreasonable: see, *e.g.*, *Apura v Canada (Citizenship and Immigration)*, 2018 FC 762 at para 25; *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 33; *Gregory v Canada (Citizenship and Immigration)*, 2022 FC 277 at para 36.

[14] In the present case, the officer's reasons indicate they were considering a different question, namely whether the applicants had demonstrated that they were "required" to remain in Canada to care for Mr. Liu's mother and, relatedly, whether as lay people they were the "best positioned people" to provide the care the mother needed. There is no particular requirement in an H&C application that an applicant show a necessity for them to be in Canada. Nor must they show that they are qualified as a health care worker to provide personal care and support to a

family member. This is particularly so where, as here, the physical and emotional care that the applicants have been providing—and wish to continue providing as permanent residents—does not appear to require particular health care training. While issues of necessity or capacity may be relevant factors for consideration, they are not the central question and cannot alone be determinative. Rather, the question is whether, considering all of the relevant factors, the circumstances of the applicant would excite in a reasonable person a desire to relieve them of their misfortunes through H&C relief.

[15] The officer considered a number of relevant factors, including the mother's health condition, her need for ongoing care, the applicants' willingness and desire to take care of her at home, and their ability to continue providing such care through the status granted by their eTAs. However, a review of the officer's reasons shows that they appear to have considered these factors to assess whether the applicants had established that they were essential or uniquely able to care for Mr. Liu's mother. The officer then took the negative answer to that question as determinative of the application. I conclude that the officer did not conduct the assessment required for an H&C determination. Whether the same result might be reached or not, the applicants are entitled to have the appropriate approach applied to the determination of their H&C application. If a decision is reached on an improper basis, it is unreasonable regardless of its outcome, unless the error cannot possibly have affected the outcome such that a particular outcome is inevitable: *Vavilov* at paras 86, 142; *Marinaj v Canada (Citizenship and Immigration)*, 2020 FC 548 at paras 72–74; *Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 33. That is not the case here. As a result, the decision must be set aside and the applicants' H&C application reconsidered.

[16] Having reached this conclusion, I need not address the other arguments raised by the applicants, such as whether the officer failed to properly consider their establishment in Canada or the principles of family reunification, whether the officer erred in saying they had not provided evidence of travel to Canada between 2002 and 2018, and whether the officer improperly relied on the fact that they would be "sacrificing careers by settling in Canada permanently."

IV. Conclusion

[17] For the foregoing reasons, the application for judicial review is granted. No question was proposed for certification and I agree that none arises in the matter.

JUDGMENT IN IMM-1783-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted and the applicants' application for permanent resident status based on humanitarian and compassionate considerations is remitted for redetermination by a different officer.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1783-21
STYLE OF CAUSE:	WAI MAN LIU ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 14, 2022
JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	DECEMBER 8, 2022

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