Federal Court  Cour fédérale

Date: 20240221

Docket: IMM-13224-22

Citation: 2024 FC 281

Ottawa, Ontario, February 21, 2024

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

PINGNI SHAO AND XIAN ZHANG

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS AND JUDGMENT

[1] Ms. Pingni Shao (the "Principal Applicant") and her husband Mr. Xian Zhang (collectively "the Applicants") seek judicial review of the decision of an immigration officer (the "Officer") refusing their application for permanent residence as members of the family class, co-sponsored by their daughter and son-in-law.

[2] The Officer found Mr. Zhang inadmissible on grounds of serious criminality, pursuant to paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"). As a consequence of this inadmissibility finding, the Officer determined that the Principal Applicant is inadmissible pursuant to subsection 42(a) of the Act.

[3] The Officer also declined to grant relief on humanitarian and compassionate grounds, pursuant to subsection 25(1) of the Act.

[4] Mr. Zhang was convicted of embezzlement under Articles 25, 382 and 383 of the Criminal Law of the People's Republic of China.

[5] The initial application for permanent residence was refused on June 7, 2021 but following an application for leave and judicial review in cause number IMM-4083-21, the Minister of Citizenship and Immigration (the "Respondent") consented to a redetermination by a different officer.

[6] The Officer sent the Principal Applicant a procedural fairness letter dated October 29, 2021, advising that she and her husband may be inadmissible to Canada because the offence for which the conviction was entered in China would have been punishable under subsection 322(1) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 (the "Criminal Code"), that is theft.

[7] A second procedural letter, dated December 6, 2021, was sent after an error was identified in the first letter.

[8] The Applicants responded, through Counsel, on February 4, 2022. In that response, they submitted that Articles 382 and 383 of the Criminal Law of the People's Republic of China are not equivalent to subsection 322(1) of the Criminal Code. They also asked for the positive exercise of discretion on humanitarian and compassionate grounds.

[9] The Applicants now argue that the Officer committed a reviewable error in following the equivalency analysis set out in *Hill v. Canada (Minister of Employment and Immigration)* (1987), 73 N.R. 315 (F.C.A.). They submit that the Officer did not identify the essential elements of the offence of embezzlement under the Chinese criminal law or determine if the evidence was sufficient to support the offence of theft in Canada. In particular, the Applicants target the manner in which the Officer apparently overlooked the element of *mens rea* and the relevance of Mr. Zhang's subjective belief.

[10] The Applicants also argue that the decision is unreasonable because the Officer ignored contradictory evidence.

[11] Finally, the Applicants submit that the Officer unreasonably dealt with their request for humanitarian and compassionate relief.

[12] The Respondent argues that the Officer reasonably applied the equivalency test and otherwise committed no reviewable error.

[13] The decision of the Officer is reviewable on the standard of reasonableness, following the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 S.C.R. 653 (S.C.C.).

[14] In considering reasonableness, the Court is to ask if the decision under review "bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision"; see *Vavilov*, *supra*, at paragraph 99.

[15] I substantially agree with the submissions of the Applicants, that the Officer either improperly or unreasonably applied the equivalency test set out in *Hill*, *supra*. In my view, the Officer constrained the analysis of Mr. Zhang's claimed subjective belief to whether a reasonable person would have held that belief. The Officer failed to consider whether Mr. Zhang genuinely held that belief.

[16] In my opinion, the decision fails to meet the test of reasonableness. It is not necessary for me to address the findings on the refusal to grant relief pursuant to subsection 25(1).

[17] In the result, the application for judicial review will be allowed, the decision will be set aside and the matter will be remitted for redetermination by a different officer. There is no question for certification.

JUDGMENT IN IMM-13224-22

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision is set aside and the matter is remitted for redetermination by a different office. There is not question for certification.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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