Federal Court Cour fédérale

Date: 20240726

Docket: IMM-3601-21

Citation: 2024 FC 1188

Toronto, Ontario, July 26, 2024

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

YINGCHUN WANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS AND JUDGMENT

[1] Ms. Yingchun Wang (the "Applicant") seeks judicial review of the decision of a Senior Immigration Officer (the "Officer"), refusing her application for permanent residence from within Canada on Humanitarian and Compassionate ("H and C") grounds, pursuant to section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

[2] The Applicant names the "Minister of Immigration, Refugees and Citizenship" as the respondent. There is no such Minister.

[3] The style of cause will be amended to name the Minister of Citizenship and Immigration as the Respondent (the "Respondent").

[4] The hearing in the matter was initially scheduled for April 5, 2022. Days before the hearing, Ms. Jacky Shun Sui Chiu, a lawyer with the Chinese and Southeast Asian Legal Clinic (the "Clinic") filed a motion pursuant to Rule 125(1) of the *Federal Courts Rules*, SOR/98-106 (the "Rules") for leave to withdraw as solicitor of record.

[5] By Order issued on April 4, 2022, the motion was granted and the hearing was adjourned and rescheduled to May 12, 2022.

[6] The hearing scheduled for May 12, 2022 did not proceed as the Court was not satisfied that the Applicant had been served with a copy of the Order of April 4, 2022.

[7] According to the Index of Recorded Entries, Counsel from the Clinic made inquiries of the Registry in Toronto over a period of time, about its status in this proceeding.

[8] By Order dated January 26, 2024, a new hearing date was scheduled. The Registry of the Court in Ottawa sent copies of the Order to the Applicant to the last known address. According

to entries made on the Index of Recorded Entries, the letters were returned as “Moved/Unknown”.

[9] In the exercise of my discretion pursuant to Rule 38 of the Rules, the hearing proceeded in the absence of the Applicant. I have considered the written submissions filed on behalf of the Applicant in the disposition of this application for judicial review.

[10] The Applicant is a citizen of China. She entered Canada in September 2015 and intended to claim refugee status on the basis of her participation in underground religious services in China. Upon the advice of an immigration consultant, she advanced her claim on the basis of a fear of forced sterilization, which was untrue.

[11] The Immigration and Refugee Board, Refugee Protection Division (the “RPD”) dismissed her claim in May 2017. An appeal to the Immigration and Refugee Board, Refugee Appeal Division (the “RAD”) was dismissed in March 2018. An application for leave and judicial review was dismissed in July 2018.

[12] The Applicant submitted her H and C application in January 2021.

[13] The Applicant based the application upon a history of domestic abuse in Canada, on the part of a former boyfriend.

[14] The Officer refused the Applicant's H and C application on the grounds, among other reasons, that she had failed to show an "exceptional" level of establishment in Canada. The Officer considered the fact that the Applicant had deliberately provided a false narrative in support of her claim for refugee status. The Officer describes this as a sign of the Applicant's "disregard for Canadian immigration law".

[15] The Officer further considered that a warrant for the Applicant's arrest had been issued on April 25, 2019, for failing to appear for a removal interview on April 23, 2019. The Officer found that her failure to show up for the removal interview "also shows a disregard for Canadian immigration law".

[16] The Officer also found that risk assessment in a H and C application is not the same risk assessment contemplated by sections 96 and 97 of the Act, and determined that risk to the Applicant in China would be minimal.

[17] The Applicant filed an affidavit in support of this application for judicial review. She set out a history of her life in China during her marriage and her involvement with an underground church.

[18] The Applicant further deposed about her application for permanent residence on H and C grounds, in January 2021. She made this application with assistance from a lawyer with the Clinic.

[19] The Applicant also deposed that she only learned about the warrant for her arrest when staff from the Clinic informed her that it had been mentioned as a negative factor in the decision to refuse her application. She deposed that she did not know what address the Canada Border Services Agency ("CBSA") had used to send her notice about the removal interview and she did not know how to contact the CBSA or to report a change of address.

[20] The Applicant now argues that the Officer breached her right to procedural fairness by relying on extrinsic evidence, that is the notice of the removal interview and the warrant for her arrest, without giving her the opportunity to respond.

[21] As well, the Applicant submits that the Officer ignored relevant evidence or made findings of fact without evidence, and applied the wrong test upon an H and C application.

[22] The Respondent submits that little weight should be given to the Applicant's evidence that she was unaware of attempts by the CBSA to contact her, as this evidence is contradicted by the chronology of events set out in the Officer's decision. Otherwise, he argues that the Officer reasonably weighed the evidence and reasonably dismissed the H and C application.

[23] Any issue of procedural fairness is reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 (S.C.C.).

[24] Following the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 S.C.R. 653 (S.C.C.), the merits of the decision are reviewable on the standard of reasonableness.

[25] 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.

[26] I agree with the Applicant that the Officer breached procedural fairness by relying on extrinsic evidence without giving her the opportunity to respond. The removal interview notice and the arrest warrant from the CBSA are not included in the record. The Applicant's failure to cooperate with the CBSA factored negatively in the Officer's decision.

[27] A finding that an applicant has shown a disregard for Canadian immigration law is not "justified" if it results from a breach of procedural fairness. In *Do v. Canada (Citizenship and Immigration)*, 2017 FC 1064, Justice Ahmed said the following:

> [21] The Officer further stated the Applicant "worked illegally while he was a student and soon after his arrival in Canada. This is another sign of his disregard for the immigration law in Canada." This is not a justifiable finding by the Officer as it is a result of a breach of procedural fairness. The Officer never put this to the Applicant during his interview or at any point of the process. I find it troublesome that the Officer failed to put the question to the Applicant as to whether he worked illegally in Canada, but rather chose to rely on evidence that had not been brought to the Applicant's attention. This is an obvious failure to comply with the Officer's duties as prescribed by the policy and

> procedures that govern him. The Respondent agreed that the Officer committed a breach of procedural fairness.

[28] It seems that the Applicant's alleged failure to appear for her removal interview may have influenced the Officer's assessment of her application. I share the concern expressed by Justice Brown in *Cristobal v. Canada (Citizenship and Immigration)*, 2017 FC 70 in that regard, as follows:

> [25] I am unable to determine the extent to which this procedural unfairness influenced the ultimate decision to deny the H&C application. It is not safe to let this decision stand given this relatively serious breach of natural justice. Therefore and on this basis judicial review must be granted.

[29] Usually, a breach of procedural fairness makes a decision unreasonable, considering the applicable jurisprudence.

[30] I note, as well, that the Officer failed to address country condition evidence concerning domestic abuse in China, apparently based on an erroneous understanding that this consideration was beyond the scope of an H and C application.

[31] This oversight further undermines the reasonableness of this decision.

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

JUDGMENT IN IMM-3601-21

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision is set aside and the matter is remitted to a different officer for redetermination. There is no question for certification. The style of cause is amended to name the Minister of Citizenship and Immigration as the Respondent.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3601-21
STYLE OF CAUSE:	YINGCHUN WANG v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 6, 2024
REASONS AND JUDGMENT:	HENEGHAN J.
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APPEARANCES:

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