Federal Court  Cour fédérale

Date: 20241018

Docket: IMM-9431-23

Citation: 2024 FC 1645

Ottawa, Ontario, October 18, 2024

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

TIANFAN ZOU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Tianfan Zou, seeks judicial review of the June 16, 2023, decision of a Senior Immigration Officer [the Officer] who refused Mr. Zou's application for permanent residence from within Canada, which Mr. Zou sought on humanitarian and compassionate [H&C] grounds, pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

I. Overview

[2] Mr. Zou argues that the Officer's decision is not reasonable, including because the Officer failed to grapple with his submissions and evidence regarding his establishment and hardship, and more particularly by finding that his establishment in Canada was "typical", which suggests that there is some unknown benchmark or standard for establishment. Mr. Zou also argues that the Officer ignored the recent photos and letters that are evidence of his practice of Falun Gong in Canada and failed to assess a *sur place* claim. He argues that the Officer failed to consider that he would be unable to practice Falun Gong if returned to China, which would cause both hardship and risk.

[3] The Respondent emphasizes that an H&C exemption from the requirements of the Act is exceptional and that such discretionary decisions are owed significant deference. The Respondent submits that the Officer considered all the relevant evidence and reasonably found that Mr. Zou's establishment, although given positive weight, was not of such significance to result in an overall finding that the exemption was justified. The Respondent further submits that the Refugee Protection Division [RPD] previously found that Mr. Zou was not a genuine practitioner of Falun Gong and the new evidence, consisting of photographs of Mr. Zou in Canada, was the same type of evidence considered by the RPD.

[4] I find that the decision is reasonable for the reasons set out below. The Officer did not err in the exercise of their discretion. The Application for Judicial Review is therefore dismissed.

II. The Officer's Decision

[5] The Officer's decision addressed the submissions made by Mr. Zou and the evidence presented. The Officer noted Mr. Zou's employment, sound financial management, volunteerism and establishment of friendships in Canada. The Officer found that Mr. Zou demonstrated a typical level of establishment and integration for a person in similar circumstances, noting that he had arrived in Canada in 2014.

[6] The Officer also addressed Mr. Zou's submission that his adherence to Falun Gong would draw attention to him if he returned to China and could lead to his mistreatment or arrest. The Officer considered the supporting documents that post-dated Mr. Zou's refusal of refugee protection in 2014.

[7] The Officer noted that the RPD had refused Mr. Zou refugee protection given credibility findings regarding his identity as a genuine Falun Gong practitioner. Although the Officer acknowledged that the RPD decision was not binding, the Officer attributed considerable weight to the RPD's factual findings. The Officer found that Mr. Zou had not presented evidence to overcome the RPD's finding that he was not a genuine Falun Gong practitioner. In addition, the Officer was not satisfied that returning to China would expose Mr. Zou to hardship due to his adherence to Falun Gong.

[8] The Officer concluded that based on all the factors set out in the application, granting the exemption was not warranted.

III. The Standard of Review

[9] H&C decisions are discretionary and are reviewed on the reasonableness standard (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 57–62, 174 DLR (4th) 193; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16, 23 [*Vavilov*].

[10] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at paras 85, 102, 105–07). A decision should not be set aside unless it contains "sufficiently serious shortcomings … such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

IV. The H&C exemption

[11] Subsection 25(1) of the Act provides that permanent resident status or an exemption from applicable criteria or obligations of the Act may be granted if justified by H&C considerations. In the present case, the H&C application, if granted, would result in permanent resident status for Mr. Zou while remaining in Canada, despite the previous refusal of refugee protection and his current lack of status in Canada.

[12] In *Kanthasamy*, the Supreme Court of Canada provided extensive guidance about how subsection 25(1) should be interpreted and applied. The Court endorsed the approach previously

set out in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 [*Chirwa*], which described H&C considerations as referring to "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another—so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the *Immigration Act*." In *Chirwa,* the Immigration Appeal Board acknowledged that this definition implied "an element of subjectivity", noting that there must also "be objective evidence upon which the relief ought to be granted" (*Kanthasamy* at para 13, citing *Chirwa* at p 350).

[13] In *Kanthasamy* at para 23, the Supreme Court of Canada also noted that "[t]here will inevitably be some hardship associated with being required to leave Canada", which on its own is generally not sufficient to grant relief, adding that the H&C exemption is not intended to be an alternative immigration scheme. The Court explained that what will warrant relief under subsection 25(1) varies depending on the facts and context of each case.

[14] There is extensive jurisprudence on the application of *Kanthasamy* to the judicial review of H&C decisions.

[15] For example, in *Huang v Canada (Citizenship and Immigration),* 2019 FC 265 at para 19, the Chief Justice addressed what is required to meet the *Chirwa* "test" to warrant an H&C exemption:

> Section 25 was enacted to address situations in which the consequences of deportation "might fall *with much more force on some persons ... than on others*, because of their particular circumstances ...": *Kanthasamy,* above, at para 15 (emphasis

> added), quoting the *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Immigration Policy*, Issue No. 49, 1st Sess., 30th Parl., September 23, 1975, at p. 12. Accordingly, an applicant for the exceptional H&C relief provided by the IRPA must demonstrate the existence or likely existence of misfortunes or other H&C considerations *that are greater than those typically faced by others who apply for permanent residence in Canada*.
>
> [Emphasis in the original.]

[16] In *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at para 16, Justice Roy noted that:

> Nothing in *Kanthasamy* suggests that H&C applications are anything other than exceptional: the *Chirwa* description itself, the fact that it is not meant to be an alternative immigration scheme, the fact that the hardship associated with leaving Canada does not suffice are all clear signals that H&C considerations must be of sufficient magnitude to invoke section 25(1). It takes more than a sympathetic case.

[17] In *Lewis-Asonye v Canada (Citizenship and Immigration)*, 2022 FC 1349 at para 47, following a review of the relevant jurisprudence, this Court noted:

> In summary, *Kanthasamy* and the post-*Kanthasamy* jurisprudence provides the following guidance:
>
> - An H&C exemption is a discretionary and exceptional relief;
> - Reviewing courts must not substitute their discretion for that of the Officer;
> - While undue, undeserved and disproportionate hardship is not the standard, hardship remains a relevant consideration;
> - Some hardship is the normal consequence of removal and that hardship, on its own, does not support granting the exemption;
> - Applicants must demonstrate with sufficient evidence that the misfortunes or hardships they will face are relatively greater

than those typically faced by others seeking permanent residence in Canada;

- All other relevant H&C factors—not just hardship—must be considered and weighed; and,
- The best interest of the child is an important consideration but is not determinative of an H&C application.

V. The Decision is Reasonable

[18] The Officer did not err in refusing to exercise their discretion to grant the H&C application. The Officer considered all the evidence and the submissions. The Court notes that while Mr. Zou argues that his hardship as a Falun Gong practitioner in China was not assessed based on his new evidence, in his submissions to the Officer he only raised the hardship of returning to China based on his current establishment in Canada. In any event, the Officer noted Mr. Zou's submission that his adherence to Falun Gong in Canada would attract adverse attention if he were returned to China and considered Mr. Zou's additional photos and letters by noting, "[t]he applicant has also presented with submissions and supporting documentation that includes three news articles that report on the treatment of Falun Gong practitioners in China". This reference does not suggest that the Officer failed to consider the submissions, photos or letters.

[19] The Officer did not err by stating that "the applicant has demonstrated a typical level of establishment and integration for a person in similar circumstances". This finding does not suggest that the Officer was holding Mr. Zou to a specific or unknown standard of establishment. The Officer acknowledged that Mr. Zou had been employed and managed his finances well,

volunteered and had several friendships; however, there was no other evidence to suggest that he was established in Canada to a greater extent than as acknowledged.

[20] Officers do not apply a particular standard for establishment. Indeed, there is no measurement of establishment that could be applied as all applicants for an H&C exemption have different circumstances. Whether and how a single mother of several children demonstrates their establishment in Canada may differ greatly from whether and how a single man with no dependants in Canada demonstrates their establishment. The Officer is best placed to assess an applicant's establishment and to attribute the appropriate weight to that factor and to all other relevant factors given the many H&C applications that they determine. Moreover, establishment is one factor; even where an officer finds that an applicant has significant establishment in Canada, the Officer may not find that all the relevant considerations cumulatively warrant the exemption.

[21] As recently noted by Justice Whyte Nowak in *Njoku v Canada*, 2024 FC 1396 at para 24:

> An applicant must show how their degree of establishment and hardship are beyond what would normally be expected (*Shah v Canada (Citizenship and Immigration)*, 2022 FC 424 at para 16), and it was open to the Officer to find that the Applicant's establishment is not so out of the ordinary in assessing the weight to be attributed to it (*Santos v Canada (Citizenship and Immigration)*, 2019 FC 1332 at para 24, citing *De Sousa v Canada (Citizenship and Immigration)*, 2019 FC 818 at para 27).

[22] The Officer also did not err by failing to assess a *sur place* claim. The Officer's role was to determine if an H&C exemption was warranted. The Officer considered the more recent supporting documents Mr. Zou relied on to demonstrate his practice of Falun Gong in Canada, in

the context of assessing hardship upon return, but like the RPD, concluded that Mr. Zou would not face hardship as a Falun Gong practitioner upon return to China.

[23] Mr. Zou appears to seek a reweighing by the Court of the limited evidence he presented to support his H&C application; however, this is not the Court's role.

[24] In conclusion, the Officer's decision is justified in accordance with the facts and the law; the Officer's decision demonstrates a rational chain of analysis no reviewable error can be found.

JUDGMENT in file IMM-9431-23

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. There is no question for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9431-23
STYLE OF CAUSE:	TIANFAN ZOU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 9, 2024
JUDGMENT AND REASONS:	KANE J.
DATED:	OCTOBER 18, 2024

APPEARANCES:

Vakkas Bilsin	FOR THE APPLICANT
Althea Song	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT