

Date: 20070326

Docket: IMM-3966-06

Citation: 2007 FC 314

Ottawa, Ontario, March 26, 2007

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

RUI FU LIN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant brings this application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision, dated June 5, 2006, by Ms. Judyanna Ng, Designated Immigration Officer, Hong Kong (Visa Officer), wherein the Visa Officer denied the Applicant's application for her daughter's immigration to Canada on humanitarian and compassionate grounds (H&C). In addition to subsection 25(1) of the Act, the application was also assessed based on paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

ISSUES

[2] Although the applicant raises three issues, the Court will analyse only the following one:

- a) Was the Visa Officer's decision unreasonable?

[3] For the reasons that follow, the answer to this question is positive. The application for judicial review will therefore be allowed.

BACKGROUND

[4] In July 2001, the applicant submitted an application for permanent residence in Canada at the Hong Kong office and at that time he did not declare as his dependent, his first born daughter, Xin Miao Lin, who was born out of wedlock on January 5, 1995.

[5] On August 6, 2003, the applicant obtained landing under the Independent category and still did not declare his daughter as a dependent. Instead, the applicant declared as his only dependents Lin Shun Xiang, the child's mother, now the applicant's wife, as well as their second child, a daughter, named Lin Yun Lei, born on March 7, 2003.

[6] Upon arrival in Canada, the applicant then applied to sponsor his undeclared daughter, Xin Miao Lin, to join the family in Canada. However, his application was turned down because she was not considered a member of the Family class since the applicant had failed to declare her in his application for permanent residence and was therefore not examined, according to the provisions of paragraph 117(9)(d) of the Regulations. Notwithstanding, the applicant pursued the application for

permanent residence in Canada but that application was also refused for the same reasons on November 4, 2004. An appeal of that decision was disallowed on March 5, 2006.

[7] On June 6, 2006, the applicant made a second sponsorship application, this time requesting the matter also be considered on H&C grounds. It was again determined that the daughter was still excluded under the provisions of the Regulations and the file was forwarded to Hong Kong where the Visa Officer assessed the H&C application. That decision was also negative and forms the basis of the present application for judicial review.

DECISION UNDER REVIEW

[8] The decision is straightforward and in essence says that after considering the file and in light of the interviews both with the daughter and her guardian, her maternal grandmother, in Hong Kong, the daughter did not meet the requirements of the Act (subsections 11(1) and 12(1)) because she fell within paragraph 117(9)(d) of the Regulations. The Visa Officer then assessed the application according to subsection 25(1). The Visa Officer stated as follows:

[...] I have also considered the best interests of the child in my decision. The conclusion is that I am not satisfied that you meet the requirements of the Act nor that there are sufficient humanitarian and compassionate grounds to overcome your inability to meet the norms of selection.

[9] The decision is accompanied by the Computer Assisted Immigration Processing (CAIPS) notes, including the remarks of the child noted during her interview with the Visa Officer. While the Visa Officer appeared sympathetic to the cultural reasons that may have motivated the applicant to not declare her existence to Canadian authorities at the relevant times, the officer was not satisfied that there were sufficient H&C grounds to grant the application.

PERTINENT LEGISLATION

[10] The relevant passages of the Act and the Regulations are set out below:

The Act

Application before entering Canada

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

Family reunification

12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.

Humanitarian and compassionate considerations

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption

La Loi

Visa et documents

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.

Regroupement familial

12. (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

Séjour pour motif d'ordre humanitaire

25. (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances

from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

The Regulations

117. Excluded relationships

(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if

[. . .]

(d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifie.

Les Règlements

117. Restrictions

(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :

[. . .]

(d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

Analysis

Standard of Review

[11] This case deals with issues of mixed fact and law. As established by my colleague Justice James Russell in *Ly v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 527, [2003] 4 F.C. 658 at paragraph 20, the standard of review applicable to questions of mixed fact and law is reasonableness *simpliciter*:

The issue before this Court is whether the Board erred in finding that it lacked jurisdiction to hear an appeal from the deletion of the Applicant's nephew from his grandmother's application for landing. This issue raises questions of mixed fact and law, and the standard of review is, therefore, reasonableness *simpliciter*.

(See also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Chalaby v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 66 (QL) at paragraph 4).

[12] In *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, Mr. Justice Iacobucci explained this test. I rely on the direction he provided at paragraph 55:

A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at paragraph 56) [. . .].

[13] Consequently, this Court will not interfere with the Visa Officer's decision unless its reasons cannot be supported by the evidence that was before it.

Was the Visa Officer's decision unreasonable?

[14] I have carefully reviewed the arguments of the Applicant, as well as the Visa Officer's decision, subsection 25(1) of the Act, as well as the CAIPS notes and all the other documents, upon which the decision is based. I have weighed these in the balance with the arguments of the respondent. I find that the decision of the Visa Officer was unreasonable.

[15] In arriving at my decision, I have carefully reviewed the affidavit of the Visa Officer who points out that she was guided by several factors. First, the child and her guardian wished to remain

together. Second, the applicant and the child's mother did not return to visit the child as promised since their arrival in Canada in 2003, although the family communicates regularly by telephone. The Visa Officer was mindful also of the fact that neither the applicant nor his spouse made the trip to attend the hearing in person. The child was 11 years old at the time. The Visa Officer found her to be sincere and candid in her desire to remain with her grandmother who raised her since her early infancy. The specific facts of the child's testimony were corroborated by the grandmother in a later interview.

[16] The Visa Officer was also mindful of the applicant's desire to be reunited with the child in Canada in order to enable her to pursue her studies here. The age of the child's guardian was also considered. However, when the Visa Officer weighed in the balance the various items of evidence before her, she was led to conclude that there were insufficient reasons to use her discretion to make an exception based on subsection 25(1) to allow the applicant's application on humanitarian and compassionate grounds.

[17] The decision was rendered in June 2006 after an interview with the child and the grandmother (the guardian) in May 2006. At page 37 of the Tribunal's Record, a statement by the grandmother dated February 21, 2006 and signed in front of a notary public in China reveals the following:

I, the undersigned:

Lin Jinmei, female, born on August 22, 1951, is now residing at No. 29, Tiantoudian, Qinlin Village, Gaiwei Town, Xianyou County, Fujian Province.

I am Lin Xinmiao's grandmother and Lin Ruifu's mother-in-law. I have been caring for Lin Xinmiao since her parents immigrated to Canada and I wish to make the following declaration:

1. It is two years and six months since Lin Xinmiao's parents left for Canada on August 6, 2003. Lin Xinmiao is growing up, and I can tell she is not a happy child, even though I do my best to take care of her. I can witness great changes in her personality and temper. In the past she was a very optimistic and active girl. Now she is becoming lonely and sad with little smile. No doubt living far away from her parents is hurting her deeply and I fear that she does not understand why her parents left her behind. She cried the whole night once when she fell ill, despite my greatest comfort.

2. As she grows up, Lin Xinmiao needs to follow up with her education. Now she is in Grade 6 of the primary school, and after the summer she is going to enter junior high school. I am poor in education and I can't help her any longer with her instruction.

3. As years goes by, my health state is getting worse and worse, especially my nephropathy, and I am no longer capable to take care properly of a young child. As for my children, Lin Xinmiao's uncles, the all have their own families and struggle for their lives in the village. It is impossible for them to bring up another child like Lin Xinmiao in their households.

Considering that, I do hope that Lin Xinmiao can return to her own parents and siblings.

I declare that the information I have given above is truthful. If not, I am willing to shoulder any legal responsibility.

[My emphasis]

[18] This statement along with the one of the paternal grandparents at page 42 contradicts the CAIPS notes as far as the best interests of the child are concerned.

[19] There is no discussion or mention whatsoever in the CAIPS notes or in the decision about these two important documents. The maternal grandmother has not been confronted with her

statement of February 21, 2006 and therefore the Court is of the opinion that its intervention is warranted.

[20] The applicant submits the following question for certification:

Is there an obligation to give effect to the principal of the best interests of the child and the protection of family life when clear references is made to section 25 of the *Immigration and Refugee Protection Act* and where this is the only available recourse?

[19] The respondent opposes such a question. I agree as it is not relevant to the present case.

JUDGMENT

THE COURT ORDERS that the application is allowed. The matter is referred back to another Visa Officer for redetermination. No question is certified.

“Michel Beaudry”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-3966-06

STYLE OF CAUSE: **RUI FU LIN and
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: March 21, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** Beaudry J.

DATED: March 26, 2007

APPEARANCES:

Stewart Istvanffy FOR APPLICANT

Sylviane Roy FOR RESPONDENT

SOLICITORS OF RECORD:

Stewart Istvanffy FOR APPLICANT
Montreal, Quebec

John Sims, Q.C. FOR RESPONDENT
Deputy Attorney General of Canada
Montreal, Quebec