

Federal Court



Cour fédérale

Date: 20120430

Docket: IMM-4109-11

Citation: 2012 FC 495

Ottawa, Ontario, April 30, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

XIAO YU WANG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In 2000, Ms. Xiao Yu Wang came to Canada from China on a study permit. She stayed in Canada on additional study permits and work permits. She has two Canadian-born children. Her husband is a Hungarian citizen.

[2] Ms. Wang applied for permanent residence in Canada as a skilled worker, but was turned down because her husband was inadmissible to Canada. He was deported to Hungary in 2010.

[3] Ms. Wang then submitted an application for humanitarian and compassionate [H&C] relief. An immigration officer refused her application, finding that Ms. Wang and her family would not suffer unusual, undeserved or disproportionate hardship if they had to apply for permanent residence either from China or Hungary.

[4] Ms. Wang argues that the officer treated her unfairly by relying on documentation of which she was unaware. She also argues that the officer rendered an unreasonable decision. She asks me to overturn the officer's decision and order another officer to reconsider her application.

[5] In my view, the documents on which the officer relied did not have to be explicitly disclosed to Ms. Wang. They were publicly available and it was foreseeable that the officer would consult them. However, the officer's analysis of the hardship that would face the family if they relocated to Hungary and China was incomplete. While the officer considered whether the family could obtain status in those countries and basic amenities such as health care and education, she did not actually consider whether their removal would cause them serious hardship. Therefore, her conclusion was unreasonable. I must, therefore, allow this application for judicial review.

[6] The issues are:

1. Did the officer treat Ms. Wang unfairly?
2. Was the officer's conclusion unreasonable?

II. The Officer's Decision

[7] The officer accepted that Ms. Wang had a close relationship with her family in Canada. However, the officer weighed a number of negative factors against her. For example, Ms. Wang's husband had been excluded from refugee protection for criminality, and had worked illegally in Canada.

[8] Ms. Wang pointed out to the H&C officer that she was not certain her husband would be allowed to accompany her if she returned to China. She also worried that her children would not be entitled to health care or schooling in China. Similarly, she submitted that her children would not be entitled to health care or education in Hungary, if the family reunited there.

[9] In response to these submissions, the officer sought out information on the rules of naturalization in both China and Hungary. She found this information on the Internet. After reviewing it, she concluded that both China and Hungary allow the spouses of citizens to become permanent residents. In Hungary, the children of citizens are recognized as citizens. The rules in China are less clear, but it appeared to the officer that, because Ms. Wang was merely a temporary resident of Canada when her children were born, they would be recognized as Chinese citizens. Therefore, the children would have all of the rights of citizenship, including health care and education, in both Hungary and China. The officer also pointed out that both countries have private schools if the parents wished their children to be educated in English.

[10] The officer accepted that it was in the children's best interests for the family to reside together. She considered them young enough to adjust to a new country. They could keep in touch

with family members in Canada through visits and Skype. There would naturally be a period of adjustment, but they had significant material and personal resources on which they could rely. Therefore, the hardships the family would face were not unusual or unanticipated.

[11] Accordingly, the officer refused Ms. Wang's application.

III. Issue One - Did the Officer Treat Ms. Wang Unfairly?

[12] Fairness usually requires that decision-makers disclose any materials they consult that are not in the record and give applicants a chance to make submissions on them. However, this is not the case for documents that are general, neutral, publicly available, and do not contain novel and significant information (*Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 565 (CA), at paras 26-27).

[13] Here, the officer relied on publicly available documents and, therefore, did not violate any rules of procedural fairness. Moreover, Ms. Wang raised the issue of the family's status in Hungary and China in her H&C application. Therefore, she could have anticipated that the officer would consult the citizenship laws of those countries (*Nadarajah v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 283 (CA), at para 1). The officer simply relied on information taken from the website of Hungary's Ministry of Foreign Affairs and of China's Embassy in Canada. These are obviously well-known, publicly available sources.

[14] Still, as will be seen below, the officer's analysis would have benefited from additional submissions Ms. Wang could have provided, had she been given an opportunity.

IV. Was the officer's decision unreasonable?

[15] It seems clear that the children would be recognized as Hungarian citizens, and that Ms. Wang would be able to acquire permanent residence in Hungary. However, there seem to be significant hurdles regarding Ms. Wang's entitlement to Hungarian citizenship. It appears that she would have to show that she was fully employed in Hungary and to pass an examination in basic constitutional studies in the Hungarian language. The officer did not appear to consider these provisions or the hardship it might cause Ms. Wang to satisfy them. Similarly, for the children to become citizens of China, it appears that Ms. Wang would have to demonstrate that she had only been living in Canada temporarily and had not actually settled here. It was not obvious that she could satisfy that burden.

[16] In other words, the meaning of the rules the officer consulted was not self-evident. Further, the officer essentially stopped her analysis of hardship at the issue of status. For example, she did not consider whether Ms. Wang or the children would experience discrimination in Hungary. Nor did she consider whether Ms. Wang's spouse would be able to work in China, or the impact on the family of China's one-child policy.

[17] Given these uncertainties and omissions, I find that the officer's analysis of the potential hardships facing Ms. Wang and her family was incomplete and her conclusion was unreasonable.

V. Conclusion and Disposition

[18] The officer did not have an obligation to disclose the documents she relied on to Ms. Wang or to give her a chance to comment on them. However, had she done so, her analysis of the issue of the family's status in China and Hungary would likely have been more complete. However, the officer also failed to analyze fully the hardships that would face the family if they relocated to Hungary or China. Her conclusion that the hardship was not sufficiently serious to merit relief, therefore, was unreasonable.

[19] The application for judicial review is allowed. Counsel for Ms. Wang proposed questions for certification. However, given the basis on which I have allowed this application for judicial review, the proposed questions should not be stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is referred back to the Board for reconsideration by another officer;
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

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APPEARANCES:

Micheal Crane

FOR THE APPLICANT

Maria Burgos

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Micheal Crane
Barrister & Solicitor
Toronto, Ontario

FOR THE APPLICANT

Myles J. Kirvan
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT