Federal Court  Cour fédérale

Date: 20130528

Docket: IMM-2280-12

Citation: 2013 FC 559

Ottawa, Ontario, May 28, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

REUPANG CAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision by a Citizenship and Immigration Canada Officer (the officer) dated January 26, 2012, wherein the applicant's permanent residence application was refused. This conclusion was based on the officer's finding that there were insufficient humanitarian and compassionate (H&C) grounds to warrant an exception allowing the applicant's permanent residence application to be made from within Canada.

[2] The applicant requests that the officer's decision be set aside and the application be referred back to Citizenship and Immigration Canada (CIC) for redetermination by a different officer.

Background

[3] The applicant is a citizen of the People's Republic of China. In 2001, he was sent by his parents to study in Peru. After being harassed and attacked on the basis of his Chinese nationality, he left Peru for Canada, arriving on September 24, 2004. He claimed refugee protection on October 22, 2004.

[4] The applicant was convinced by an immigration consultant to claim refugee status on the basis of Falun Gong membership. In December 2004, the applicant became a Christian of the Protestant faith. Believing that he should tell the truth, the applicant submitted a new Personal Information Form (PIF) narrative indicating his real refugee claim was based on his conversion to Christianity.

[5] The officer did not believe that the applicant had sincerely converted to Christianity and rejected his claim on March 24, 2006.

[6] The applicant submitted an H&C application on August 7, 2009 on the basis of the difficulty he would face practicing his religion in China. That application was reviewed together with his pre-removal risk assessment (PRRA) application by the same officer.

Officer's Decision

[7] In a letter dated January 26, 2012, the officer informed the applicant that his H&C application had been denied. Reasons for the decision were provided.

[8] The reasons began by summarizing the applicant's immigration history and the H&C factors identified by the applicant. The officer first dealt with the establishment factor.

[9] The officer acknowledged the applicant had been a student in English classes for four years and a regular volunteer at a geriatric care centre. The officer concluded the applicant did not have a stable history of employment given that he had indicated in one part of his application that he was unemployed, while had claimed elsewhere he was employed but provided no documentary evidence.

[10] The officer noted the applicant indicated he lived with his parents, brother and sister and had provided copies of permanent residence cards for his parents but not his siblings. The applicant had not provided any letters of support from family members or friends. The applicant had provided a letter indicating he had joined a Christian church in 2004 before leaving it in 2007 to join another church. The officer found that he had not established whether he had been involved in another religious institution since then.

[11] The officer concluded that the hardships associated with the applicant's establishment in Canada were not unusual and undeserved or disproportionate.

[12] The officer then considered the risks of return to China. The officer noted that the Refugee Protection Division (RPD) had determined that on a balance of probabilities, the applicant was not a genuine Christian. The officer nonetheless considered the applicant's risks on the assumption that he is a genuine Christian.

[13] The officer recognized that the situation of Protestant Christians in China is not perfect, but noted that the Chinese government officially recognized Protestantism as a religion. While churches must be registered with the government, authorities in the provinces of the east coast, where the applicant is from, are increasingly tolerant. It is reported that the government tolerates family and friends meeting at homes to practice their religion without having to register.

[14] The officer concluded that if the applicant was a Protestant, he would, on a balance of probabilities, be able to practice his religion upon return to China within the framework prescribed by the authorities and would not face risks that would constitute unusual and undeserved or disproportionate hardship.

[15] The officer reviewed country conditions documents provided by the applicant pertaining to human rights in China generally and concluded that there was no connection between the general status of human rights and the particular risks faced by the applicant.

Issues

[16] The applicant submits the following points at issue:

1. Did the officer err in his assessment of establishment factors?

2. Did the officer err in his assessment of risk factors?

[17] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer breach procedural fairness?

3. Did the officer err in denying the application?

Applicant's Written Submissions

[18] The applicant argues the officer misapplied the H&C test by concluding the applicant would not face unusual hardship before considering both establishment and risk factors. The officer also erred by concluding the applicant was not employed at the time of the application, when the applicant had submitted that he was. Natural justice required that the officer solicit a file update from the applicant and inform him that his H&C application was being transferred to a PRRA decision maker.

[19] On the risk factors, the officer erred by not considering discrimination based on religion choice as unusual hardship. The officer only concluded the applicant would not experience hardship by complying with authoritarian rules restricting practice to government sanctioned churches. The officer's opinion that the Chinese government might tolerate unregistered churches was not a reasonable explanation for failing to consider discrimination. There was ample documentary evidence supporting this claim.

[20] The officer failed to appreciate that the applicant's father was found to be a Convention refugee by the RPD based on religious persecution.

Respondent's Written Submissions

[21] The respondent submits that the appropriate standard of review is reasonableness and that H&C decisions are discretionary. The onus is on the applicant to provide sufficient documentation. Given the contradictory information and lack of supporting documents, it was reasonable to conclude the applicant was unemployed.

[22] It was not a breach of procedural fairness for the officer to fail to request an update of the H&C application. There is no legislative requirement for this request and it is trite law that the onus is on the applicant to support his application. Citizenship and Immigration Canada has discontinued the practice of soliciting updates since April 1, 2011. The public and immigration practitioner organizations were informed of this change.

[23] The applicant did not establish his religious identity and the status of his father is irrelevant, if only because that refugee claim was based on being a practitioner of Falun Gong.

Analysis and Decision

[24] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57, [2008] 1 SCR 190).

[25] It is trite law that the appropriate standard of review for issues of procedural fairness is correctness (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 798 at paragraph 13, [2008] FCJ No 995 and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43, [2009] 1 SCR 339). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50).

[26] It is well established that assessments of an officer's decision on H&C applications for permanent residence from within Canada is reviewable on a standard of reasonableness (see *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paragraph 18, [2009] FCJ No 713; *Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193 at paragraph 14, [2009] FCJ No 1489; and *De Leiva v Canada (Minister of Citizenship and Immigration)*, 2010 FC 717 at paragraph 13, [2010] FCJ No 868).

[27] In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible

and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47 and *Khosa* above, at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[28] **Issue 2**

Did the officer breach procedural fairness?

It is well established that the onus to provide sufficient evidence is on the H&C applicant and the officer is under no duty to inform the applicant about evidentiary concerns (see *Garnett v Canada (Minister of Citizenship and Immigration)*, 2012 FC 31 at paragraph 30, [2012] FCJ No 28).

[29] Similarly, there is no duty on an officer to request an update from an applicant (see *Zhu v Canada (Minister of Citizenship and Immigration)*, 2011 FC 952 at paragraph 20, [2011] FCJ No 1246).

[30] There is therefore no procedural fairness violation.

[31] **Issue 3**

Did the officer err in denying the application?

I do not read the officer's reasons as having made a decision on unusual hardship before having considered both risk and establishment factors. The conclusion at the end of the establishment factors portion of the decision is presumably meant only to summarize the officer's

finding on that issue and does not preclude the possibility that the applicant can still be granted his application based on the risk factors or the two in combination.

[32] Similarly, I see no indication that the officer failed to consider any employment evidence. The applicant gave contradictory information at different parts of his H&C application and provided no documentary evidence of employment. It was therefore reasonable to conclude the applicant was unemployed.

[33] On the risk factor of discrimination, I would first note that this issue was not raised before the officer. The applicant's PIF narrative referred to "persecution or mistreatment" and his H&C application made no mention of the IP5 Manual's instructions on discrimination. The excerpted text from that Manual provided by the applicant indicates that "[a]pplicants may claim to be victims of "discrimination"", but this applicant made no such claim. It is therefore not clear the officer was required to consider this argument on his own.

[34] Regardless, however, the IP5 Manual also indicates that discrimination alone would not warrant a positive H&C determination and an officer must perform a global assessment that considers establishment factors. Here, the officer clearly considered the evidence of how Christians were treated in China, even if not invoking discrimination explicitly. The officer also considered the relevant establishment factors. Taking this evidence together, the officer concluded there would not be unusual hardship for the applicant. Therefore, I am not convinced that an explicit consideration of discrimination as a ground of hardship would have resulted in a different analysis of the evidence

or a different outcome for the applicant. I would therefore dismiss the application for judicial review.

[35] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa

residence and is unable or, by reason of that fear, unwilling to return to that country.

résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

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