

Federal Court



Cour fédérale

Date: 20190624

Docket: IMM-5116-18

Citation: 2019 FC 852

Ottawa, Ontario, June 24, 2019

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JIAN HUA CAO AND XUI YAN GAN

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Jian Hua Cao and Xiu Yan Gan, ask the Court to set aside an officer's decision not to reconsider the decision dismissing their applications for permanent resident status on humanitarian and compassionate grounds.

[2] For the following reasons, I find that this application should be allowed.

[3] The Applicants and their three children arrived in Canada in October 2005, from China and made a claim for refugee protection. It was refused in September 2007, and a Pre-Removal Risk Assessment [PRRA] was refused two months later. The certified tribunal record indicates that they then filed an application seeking permanent residence from within Canada on humanitarian and compassionate grounds [the H&A application] that was denied on October 3, 2011.

[4] On January 12, 2017, they made a second H&C application. An officer assessing the application noted in October 2017, that:

The principal applicant is a 64-year-old male citizen of China. His wife, a 65-year-old female citizen of China, is the co-applicant. The applicants' humanitarian and compassionate grounds are based on establishment, best interests of the children and adverse conditions in the country of origin.

The officer found that there were sufficient H&C considerations to permit them to process their applications for permanent residence from within Canada.

[5] Following this decision, Immigration, Refugees and Citizenship Canada [IRCC] wrote to the Applicants on October 31, 2017, informing them that further information was required in order to make a decision as to whether they met the admissibility requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27; namely, a medical examination, passports, police certificates, and the appropriate fee.

[6] By letter dated November 10, 2017, the Applicants' counsel remitted the requested fees and advised that they "are in the process of obtaining passports, police certificates and medical

examinations.” By further letter dated November 28, 2017, counsel submitted that the police certificates and medical examination had been requested and stated that the Applicants “are still in the process of applying for a passport, and will provide that as soon as it is available.”

[7] The police certificates from China are dated November 16, 2017, and are translated as follows:

Applicant: Cao Jianhua, male, was born on July 21, 1953, ID No.440111195307211515, address: No.2, Yixiang, Zhongxi North Street, Daxiang Village, Renhe Town, Baiyun District, Guangzhou City.

Notarial Item: No Criminal Record

This is to certify that Cao Jianhua had no criminal record during the period of his residence in the People’s Republic of China before November 16, 2017.

Applicant: Gan Xiuyan, female, was born on September 26, 1952, ID No.440111195209261527, address: No.2, Yixiang, Zhongxi North Street, Daxiang Village, Renhe Town, Baiyun District, Guangzhou City.

Notarial Item: No Criminal Record

This is to certify that Gan Xiuyan had no criminal record during the period of her residence in the People’s Republic of China before November 16, 2017.

The Applicants explained in a subsequent declaration that the police certificates were obtained by providing to local police, through Ms. Gan’s cousin, a copy of the Applicants’ hukou (a household registration document), along with a confirmation from a local village official.

[8] By letter of December 12, 2017, counsel for the Applicants informed IRCC that the Applicants attended the Chinese Consulate on December 4, 2017, and applied for passports. She further advised that the Chinese Consulate informed them that they “may not be eligible since they were unable to produce any original Chinese identification” because the documents were lost

at the time they first came to Canada as refugee claimants” [emphasis added]. She explained they were going back to the Consulate on February 5, 2018, to find out if the passport applications had been approved. Given this delay, counsel requested an extension of the time originally provided to submit the passport documents.

[9] By letter dated February 6, 2018, counsel informed IRCC that the passport applications had been denied “because they did not have any Chinese identification” [emphasis added]. She explained that they cannot obtain a Chinese Resident Identity Card as that must be obtained in China, and they cannot travel back to China. In the following passage from her letter she requested an exemption from the passport requirement:

Since Mr. Cao and Ms. Gan do not possess a passport and cannot apply for one, they are unable to submit copies of the bio-date pages of their passports. Therefore, we respectfully request that Mr. Cao and Ms. Gan be exempted from the passport requirement under R72(1)(e)(ii) of the *Immigration and Refugee Protection Act*. In accordance to IP 5: Immigration Applications in Canada made on Humanitarian or Compassionate Grounds, an immigration officer may make an exemption from the passport requirement if the immigration officer is satisfied as to the identity of the individual. We submit that Mr. Cao and Ms. Gan have confirmed their identities because they have included other identity documents such as their driver’s licenses, refugee protection claimant documents, and a marriage license as part of their H&C application.

[10] The relevant portion of IP5, reads as follows:

R72(1)(e)(ii) requires all foreign nationals to be in possession of a valid passport to become permanent residents. It is expected that all foreign nationals will be **in possession of a valid passport** and exemptions from this requirement should occur infrequently. Applicants who are unable to obtain a passport should provide evidence that they have applied for one and have been refused. To facilitate this, officers should give applicants a letter to send to their embassy or other representative office that requests written

reason(s) for refusing to issue a passport. Applicants should have the letter to their embassy registered to ensure it is received. This may discourage persons seeking a passport waiver because they are wanted in their country for criminal or other activities.

If an embassy refuses to provide reasons for not issuing a passport, the individual facts of the case should be considered:

- Is the officer satisfied that there is a legitimate reason the applicant does not have a valid passport?
- Is the applicant in possession of another acceptable identity document that pre-dates their arrival in Canada?

If so, an officer may waive the passport requirement when applicants cannot obtain a passport from their government and the officer is satisfied of their identity.

Before deciding that the applicant cannot obtain a passport, officers should consult with their local CBSA removals unit or with the CBSA Inland Enforcement Investigations and Removals section at NHQ. They might know whether it is possible for a person in the applicant's situation to obtain a passport.

If an exemption from the passport requirement is warranted, officers should insert the following remarks in FOSS/CPS and send a letter to the applicant containing the following statement: *“I hereby grant an exemption from subparagraph 72(1)(e)(ii) of the Immigration and Refugee Protection Regulations on behalf of [name of person(s)].”*

[11] In response to the request to waive the passport requirement, the officer responded by letter dated August 22, 2018, described as “a final notice,” that the documents on file did not establish the Applicants’ identity and for an exemption from the passport requirement, the following additional information was required:

- Identity documents issued outside Canada before your entry to Canada (such as a birth certificate or national identity card or expired passports or Hukou Booklet (previous version acceptable)); and

- Copy of Reasons for Decision from your Immigration and Refugee Board – Refugee Protection hearing and determination which was concluded on September 2007; and
- Explanation of how you travelled from China to Canada, what documents, names and identities were used to enter Canada; and
- Explanation regarding when, where, how, why all of your original Chinese documents/copies of documents were lost; and
- Explanation on how you were able to apply for and receive Chinese Police Clearance without any identity documents. Do you have documentary evidence of the application process? Who applied on your behalf? What process did they follow? What documents did they provide to the notary Public Office?; and
- Explanation of why your marriage certificate was re-issued in 2004, shortly before your arrival to Canada; and
- Explanation how your children were able to become permanent residence of Canada without passports/identity documentation (did they provide birth certificates, national identity cards, Hukou, passports in their applications for permanent residence?). If these documents are available and help substantiate your identity, please provide them.
- If there is a reasonable and objectively verifiable reason why it is not possible to obtain any of the documents listed above, a statutory declaration made by you attesting to your identity, accompanied by the following would be acceptable:
 - The statutory declaration of a person who knew you, a family member, or your father, mother, brother, sister, grandfather or grandmother prior to your arrival in Canada, attesting to your identity, or
 - The statutory declaration of an official of an organization representing nationals of your country.

[12] Counsel responded on September 13, 2018, providing the requested information, including the Applicants' hukou. Ms. Gan provided a statutory declaration responding to the officer's questions and explaining their hukou. She explains that prior to the request from IRCC mentioning the hukou she had forgotten that they had it.

I am able to find the hukou – household registration – for myself and my husband. Attached herein and marked as Exhibit “A” is a copy of my household registration.

I must apologize that I have totally forgotten about this household registration. I recall that back in 2010, my eldest daughter, Yan Zhen Cao, went back to China for a visit. I told my daughter to go back to our old house to see if she could find anything valuable or any important documents left in the house. She found our hukou and brought it back to Canada. I have not even thought about this hukou as proof of identity because there is no picture in the hukou, and over time, I have forgotten that I had this hukou.

Sometime in 2016, my youngest daughter Ting Ting Cao was approved for permanent resident status. She was also asked to produce identity documents in order to apply for a passport. She only had a birth certificate. At that point, Yan Zhen, my eldest daughter, recalled she brought back our hukou. So she gave the hukou to Ting Ting to apply for a passport from the Chinese Consulate. But in the end, Ting Ting was not able to apply for a passport. She kept the hukou with her.

It was only now when the lawyer from the legal clinic told me that immigration is asking for any documents, including hukou, that I remember that I have given Ting Ting my hukou.

Once again, I apologize that I did not think about this earlier.

[13] In her cover letter counsel wrote that as her clients only have the hukou as an identity document, and given the experience of Ting Ting, “we submit that they will not be issued a passport by the Chinese Consulate.” Therefore she reiterated “our request that IRCC exempt our clients from the passport requirement.”

[14] The officer reviewed the information provided and noted that a recent Response to Information Request CHN104575.E [the RIR] stated that an applicant for a Chinese passport must produce to the Chinese Consulate in Canada “proof of Chinese nationality, original and copy (i.e. passport, hukou, or Resident Identity Card. Birth certificate may be accepted as a last

resort.)” As the only such document the Applicants had was their hukou, they would not be issued a passport unless it was submitted.

[15] The officer noted that the declaration states that Ms. Gan forget that she had the hukou until asked about it by her counsel in September 2018; but noted that she also declared that she obtained the police clearances from China dated November 16, 2017, by giving the hukou to a cousin who obtained the clearances. The police clearances were provided to IRCC on November 29, 2017. The officer noted that they submitted their passport application to the Chinese Consulate on December 4, 2017. The officer concluded that they did not make their passport applications in good faith.

I find it likely that the applicants had access to their original hukou since 2010, when their eldest daughter brought back the document from her trip to China. Further, I note that the applicants’ younger daughter used this document in her own applications. I also note that the applicants used this document to assist them in applying for Chinese police clearance certificates in November 2017, however they declare that they forgot they had this hukou when they submitted an application for Chinese passports to the Chinese Consulate in December 2017, and did not remember that they had it until their representative inquired about such documents after my letter dated August 22, 2018.

Based on the documentation provided and the applicants’ statutory declaration, I find that the applicants did not make their application for Chinese passport to Chinese authorities in good faith, as they did not provide any of [the] original Chinese identity documents required by the Chinese Consulate although they had access to them.

Further, I note that the applicants could have also asked Chinese authorities to consider other original Chinese documents in conjunction with their original hukou, such as marriage certificate and their children’s documents (ie. two were able to obtain Chinese passports), including their children’s birth certificates which should list the applicants as their parents, in order to assist Chinese authorities in establishing their identities in their application for a Chinese passport.

[16] The officer concluded that “the applicants have not made reasonable efforts to obtain a passport from Chinese authorities in Canada [and they] ...are required to apply for a passport.” Accordingly, the officer did not exempt them from the passport requirement in the Act, and having failed to provide passports, their application for permanent residence under the humanitarian and compassionate class was refused by letter dated September 25, 2018.

[17] No application was made seeking judicial review of that initial decision. Rather, on October 1, 2018, the Applicants requested that the officer reconsider the decision:

While we appreciate your concern regarding the sudden production of the hukou of Mr. Cao and Ms. Gan, we submit that this alone should not form the basis of the refusal of their application. Instead, we ask you to reconsider your decision and re-open the file to allow Mr. Cao and Ms. Gan an opportunity to respond to your concerns and to apply for a passport so as to satisfy the *IRPA* requirement [bolding omitted].

[18] The Applicants in their request point out that the omission of the hukou was unintended and made by a couple who are both seniors and have only a few years of primary education. Moreover, it is pointed out that their younger daughter was unable to obtain a Chinese passport from the Consulate despite having a birth certificate and the hukou. Also noted was past compliance with IRCC requests for information and an assertion that they “have been, and still are, acting in good faith in their attempt to comply with all IRPA mandated requirements.”

[19] Lastly, counsel advises that in light of the refusal letter dated September 25, 2018, the Applicants made another appointment with the Chinese Consulate to apply for a passport and were given an appointment for October 25, 2018. She writes that:

We do not know if they will be able to get a passport, but we ask you to give our clients a chance to do so.

[...]

Specifically, we ask you to:

- a. Re-open the application to allow Mr. Cao and Ms. Gan an opportunity to try to apply for a passport; and
- b. If they are unable to apply for a passport, notwithstanding the hukou, to exempt them from the passport requirement.

[20] By letter dated October 4, 2018, the reconsideration request was refused. That is the decision under review. Although the letter is brief, the officer provided a page and one-half of notes which set out the reasons for the decision.

[21] The officer found that the Applicants were non-compliant with the statutory requirements of subparagraph 72(1)(e)(ii) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227), which requires a passport for processing a Permanent Resident application.

[22] The officer noted that the Applicants submitted that the omission of the hukou was unintended and commented: “The omission of the hukou is irrelevant. The Applicants do not meet the statutory requirement to be in possession of a valid passport.” [emphasis added]

[23] The officer noted the Applicants’ submission that the hukou was not effective to help their daughter gain her passport, but observed that the Applicants had said their passport applications were refused because they did not provide any Chinese identification. The officer commented that in December 2017, the Applicants had the hukou, a police certificate, a proof of

confirmation they had lived in the village, and a marriage certificate; however, there was no explanation why they did not provide any of this Chinese identification to the Consulate.

[24] The officer also noted that after the first refusal in February, 2018, and having been told it was refused for lack of Chinese identification, the Applicants did not apply again with their Chinese identification.

[25] The officer noted that the Applicants were attempting to re-apply for a passport, but commented that this appointment was only made after the IRCC refused their application: they had seven months to re-apply after having received the first refusal and reasons from the Consulate.

[26] I have concluded that the decision under review refusing to reconsider the decision dismissing their applications H&C applications is unreasonable, and must be set aside.

[27] It is unreasonable because the officer's basis for rejecting reconsideration is flawed. The officer's position appears to be that although the Applicants say they forgot the hukou, the hukou is irrelevant, and the issue is that the Applicants have not provided an explanation for why they did not submit the other documents to the Consulate. This position is based on the proposition that the Applicants' passport request to the Chinese consulate was rejected because they did not provide any Chinese identification; and that the Applicants had Chinese identification in the form of a "police certificate from China, a proof of confirmation from the local village official that they previously lived in that village and a marriage certificate".

[28] The proposition that these other Chinese documents may have resulted in the granting of the passports is based on an unreasonable and overly-literal reading of one of Applicants' counsel's letters, and ignores important documents in the record. When explaining why the Chinese Consulate had rejected the Applicants' passport applications in a February 6, 2018 letter, the Applicants' counsel wrote that the applications "were denied because they did not have any Chinese identification." [emphasis added] At first glance, the reconsideration officer's interpretation of "Chinese identification" to mean any original documents from China might appear reasonable.

[29] However, the reconsideration officer had access to the RIR in the record, which stated that passport applicants must provide the Consulate with "proof of Chinese nationality" and indicates that this proof is "passport, hukou, Resident Identity Card" or, as a last resort, a birth certificate. To interpret counsel's statement to find that the Consulate rejected the application for not having any documents, and to suggest that the Consulate's rejection should have prompted the Applicants to re-apply with their police certificate, confirmation from a village official, and marriage certificate, is to ignore the clear statement in the RIR as to the acceptable identity documents.

[30] Indeed, although the language used by Applicants' counsel was imprecise, when considered alongside the RIR, the only reasonable interpretation of Applicants' counsel's statement is that the "Chinese identification" the Consulate required was "proof of Chinese nationality." The evidence on the record is that the Applicants did not possess any "proof of Chinese nationality" other than the hukou.

[31] As a result, it was unreasonable for the reconsideration officer to have expected the Applicants to have applied again with their other documents. For this reason, the decision must be set aside.

[32] Counsel for the Minister pointed out in her submissions that the reconsideration officer, like the original officer, noted that the Applicants had access to their hukou at the time that they made their first passport application. She suggests that, contrary to the officer's remark that "[t]he omission of the hukou is irrelevant," that the failure to submit the hukou was an important factor for the negative passport decision.

[33] Moreover, the Applicants did provide an explanation for why they did not submit their hukou to the Consulate. The statutory declaration of Ms. Gan states that she had forgotten about having the hukou when making the passport applications, explaining that she did not even think "about this hukou as proof of identity because there is no picture in the hukou." The reconsideration officer does not, in the reasons, appear to take issue with this explanation. While an officer may not be required to agree that forgetting about the existence a document, irrespective of someone's circumstances, excuses a failure to submit a document, the interests of transparency and intelligibility would require an officer to explain if they have rejected an explanation on this basis.

[34] Counsel for the Minister points out the officer identified a contradiction in Ms. Gan's statutory declaration, noting that forgetting about the hukou appears to be at odds with her statement that some short time before the passport application, the hukou had been given by the

Applicants to a cousin in China to obtain the police certificates. If the reason this explanation was rejected was that the officer had credibility concerns related to this perceived contradiction, they ought to have been put directly to the Applicants to provide them with an opportunity to explain.

[35] Given the reasons above and that the officer explicitly said that the omission of the hukou was “irrelevant,” I do not agree with the Minister that the Applicants’ failure to submit their hukou makes this reconsideration decision reasonable.

[36] For these reasons, I find that the decision must be set aside and the request to reconsider must be determined by a different decision-maker. Given the passage of time, and knowing now that the hukou may be seen by the Chinese Consulate as an identity document, the Applicants are to be provided an opportunity to make further submissions and provide further evidence in support of the request for reconsideration.

[37] Neither party proposed a question for certification.

JUDGMENT in IMM-5116-18

THIS COURT'S JUDGMENT is that this application is allowed, the application for reconsideration of the denial of their H&C application is to be determined by a different officer after the Applicants are afforded an opportunity to file further evidence and submissions, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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