Federal Court  Cour fédérale

Date: 20200709

Docket: IMM-2888-19

Citation: 2020 FC 754

Ottawa, Ontario, July 9, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

JIEMING LI & MINGXI LIU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision made by a Senior Immigration Officer [Officer] on April 11, 2019 [Decision] denying the Applicants' application for permanent residence based on humanitarian and compassionate grounds [H&C application].

[2] For the reasons that follow, this application is dismissed.

II. Background Facts

[3] The Principal Applicant, Jieming Li and her son, Mingxi Liu, are citizens of China.

[4] The Applicants came to Canada in May 2014 and made an unsuccessful refugee claim. In November 2015, the Canada Border Services Agency [CBSA] issued a warrant for the Principal Applicant's arrest after she failed to attend her removal interview.

[5] The Applicants made an H&C application, which was denied in October 2018. The Applicants sought judicial review of that decision, but discontinued the application after the Respondent made an offer to settle. The settlement gave the Applicants 30 days to provide further evidence and submissions on their H&C application.

[6] Upon reconsideration of the application and the new supporting documentation, the Officer denied the H&C application. That is the Decision under review.

III. Decision Under Review

[7] The Officer found there was insufficient evidence of establishment in Canada. The Officer considered the best interests of Mingxi, who was 17 at the time the application was submitted, and found that returning to China would be difficult for him. The Officer also considered the best interests of the Principal Applicant's two grandchildren and found that while separation would not be ideal, there would be no negative psychological impact on the grandchildren.

[8] The Officer also considered the Principal Applicant's submission that she would face gender and age discrimination in employment in China. The Officer accepted the documentary evidence of discrimination but found that the Principal Applicant did not describe how these adverse conditions would affect her, since she was likely in receipt of a pension in China.

[9] Details of these findings are set out and considered in the Analysis portion of this judgment and reasons.

IV. Preliminary Issue: Temporary Resident Permit [TRP]

[10] The Applicants applied for TRPs, to be issued if their H&C application was denied, but the Officer did not make a decision on the TRP issue. The Applicants argue that subsection 24(1) of the *Immigration and Refugee Protection Act* [*IRPA*] required the Officer to make a decision on the TRP application.

[11] The parties agree, as do I, that as the TRP issue was not considered it should be remitted to a different officer for determination of the issue. It is nonetheless still necessary to consider the reasonableness of the H&C refusal in the Decision.

V. Preliminary Issue: Improper Affidavit

[12] The Principal Applicant provided an affidavit in support of this application. The Respondent submits that paragraph 15 of the affidavit, including subparagraphs (a) to (h), be struck in their entirety as the paragraphs contain information about the Principal Applicant's pension, her financial situation and her employment intentions if returned to China.

[13] The Principal Applicant states that she would have provided that information to the Officer, if she had been given the opportunity to respond to the Officer's external research which she refers to as "extrinsic evidence".

[14] The general rule is that evidence that was not before a decision-maker and that goes to the matter that was before the decision-maker is not admissible on judicial review: *Love v Canada (Privacy Commissioner)*, 2015 FCA 198 at paragraph 17. This rule exists to maintain the distinction between the roles of a fact-finding administrative tribunal and this Court as a judicial review court: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraphs 19 and 23 [*Access Copyright*].

[15] There are limited exceptions to the rule that judicial review should only consider the materials that were before the original decision-maker. Exceptions are made if the proposed evidence: (1) contains general information to help the Court understand the issues; (2) may demonstrate a procedural defect that cannot be found in the evidentiary record; (3) is presented to highlight the complete absence of evidence before the decision-maker when it made the particular finding: *Access Copyright* at paragraph 20.

[16] The information being challenged by the Principal Applicant fails to meet any of the three exceptions. Specifically, as it is in the evidentiary record, it fails to meet the second exception. It is publicly available. The titles of the articles, together with the pinpoint *url* cites, are set out in the footnotes to the Decision.

[17] Subparagraphs 15(a) to (h) inclusive attempt to address the Applicant's "pension situation" and whether she would seek employment in China. She attests to actions that she would have taken with respect to that situation. I have reviewed the paragraphs in question and find that they do not fall into any of the *Access Copyright* exceptions. They either attempt to introduce new evidence on the merits that could have been put before the Officer, or they contain submissions and legal arguments that could have been made to the Officer as part of the H&C application.

[18] For the foregoing reasons, paragraph 15, inclusive of subparagraphs (a) to (h), of the Principal Applicant's affidavit dated June 24, 2019 are struck.

VI. Issues and Standard of Review

[19] The Applicants argue that the Officer breached procedural fairness by failing to give the Applicants an opportunity to respond to extrinsic evidence about country conditions.

[20] The Applicants also argue that the Decision is unreasonable because the Officer failed to explain the weight given to key factors, failed to consider other factors, and applied the wrong test when considering the best interests of the Principal Applicant's grandchildren.

[21] Recently, the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness subject to certain exceptions, none of which apply on these facts: *Vavilov* at paragraph 23.

[22] The presumption of reasonableness does not apply to an issue involving a breach of natural justice or the duty of procedural fairness: *Vavilov* at paragraph 23. In considering issues of procedural fairness, the ultimate question to be answered by a reviewing Court is whether the Applicant knew the case to be met and had a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraph 56.

[23] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*]; *Vavilov* at paragraph 86.

VII. Analysis

[24] The Applicants bear the onus of establishing that the refusal to grant them H&C relief was either unreasonable or unfair, as the case may be: *Vavilov* at paragraph 29.

[25] Granting H&C relief has been described as a "flexible and responsive exception to the ordinary operation of the [IRPA]". The discretion to grant H&C relief is exercised in order to "mitigate the rigidity of the law in an appropriate case": *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at paragraph 19.

[26] The meaning of the phrase "humanitarian and compassionate considerations" has been described as being that which "would excite in a reasonable man 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": *Kanthasamy* at paragraph 13.

[27] What warrants H&C relief under s. 25(1) will vary depending on the facts and context of each case. Officers making such decisions must substantively consider and weigh all of the relevant facts and factors before them: *Kanthasamy* at paragraphs 25 and 33.

[28] With these principles in mind, I turn to the arguments of the parties on the merits of the Decision and the reasons provided by the Officer.

A. *No Extrinsic Evidence*

[29] The Officer accepted the Applicants' documentary evidence that older women face discrimination in employment in China. However, the Officer found that the Principal Applicant did not link the adverse country conditions with her personal circumstances.

[30] The Officer noted that while the Principal Applicant stated that she wanted to continue working, she did not state whether she was in receipt of a pension in China or state the amount of her pension. Further, she did not describe her financial circumstances prior to arriving in Canada. The Officer found it was reasonable to expect the Principal Applicant to describe how she was able to live in China for approximately four years, despite being retired, and not working.

[31] The Officer concluded that the Principal Applicant was likely in receipt of a pension in China based on their review of two documents: an article from the South China Morning Post

entitled “China to roll out plans to raise retirement age within two years to cope with ageing population” and a country profile from the Organization for Economic Co-operation and Development [OECD] entitled “Pensions at a Glance 2017”.

[32] Based on the Principal Applicant’s receipt of a pension in China, the Officer assigned little weight to the allegation that she would likely suffer gender and age discrimination in employment in China.

[33] The Applicants acknowledge that the Officer was not obligated to apprise them of concerns that arose directly from the requirements of *IRPA*. However, the Applicants rely on *Nabin v Canada (Citizenship and Immigration)*, 2008 FC 200 [*Nabin*] for the exception to this rule – that an officer should “give notice of concerns about filed materials where there are concerns about the credibility, accuracy, or genuineness of the information submitted or extrinsic evidence arises with respect to that information.”

[34] The Respondent submits that the jurisprudence relied upon by the Principal Applicant, particularly *Nabin*, is distinguishable as it was concerned with the credibility or veracity of documents, which is not an issue in this application.

[35] I agree with the Respondent that the law is clear: an Officer has no obligation to provide an applicant with the opportunity to respond unless the extrinsic evidence is novel or significant. Evidence is not considered “extrinsic” if it is a matter of public record and it is readily and easily

available to the public: *Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 705 at paragraph 33.

[36] In this case it was not a breach of procedural fairness for the Officer to rely on the South China Morning Post article and the OECD Report which were released in 2015 and 2017, respectively. It is not clear if the OECD Report was released before or after the Applicants filed their H&C application in April 2017. However, even if the Report was released after, the Officer did not have an obligation to disclose the Report, as it did not show a change in conditions. The Report simply describes the pension system in China and does not state that pension eligibility requirements have changed.

[37] The information in the two documents was not novel nor was it extrinsic; it was readily publicly available and did not relate to changes in general country conditions: *Holder v Canada (Citizenship and Immigration)*, 2012 FC 337 at paragraph 28.

[38] The Applicants also argued that even if the evidence was not extrinsic, the Officer's reasons show that they were fully aware of the Principal Applicant's wish to continue working. The Officer referred to and accepted her documentation pointing to discrimination against women, especially older women, in China.

[39] The Officer noted that the Principal Applicant retired at age 53 and stayed in China as a retiree, not working. The Officer's concern with the evidence was that the Principal Applicant did not describe her personal circumstances in terms of her retirement and desire to work. She

did not state whether she was in receipt of a pension from China, nor did she describe her financial circumstances before she arrived in Canada.

[40] As the Principal Applicant failed to provide a link, the Officer was not persuaded that she would be affected by what was described in the country condition documents.

[41] There is no merit to the Principal Applicant's claim that the Officer made a negative finding without regard to her evidence about desiring to work in China. The Officer examined the evidence presented by the Principal Applicant and then reasonably found that it was not sufficient to prove what she now alleges it substantiated.

B. *No Legitimate Expectation*

[42] The Applicants argue that the Instructions on Procedural Fairness [Fairness Guideline] published on the Respondent's website provides a more generous definition of "extrinsic evidence" and states that an applicant must be advised of evidence that is relied upon that is not received from the Applicants. The Applicants state the wording in the Fairness Guideline created a legitimate expectation that they would be given an opportunity to respond to the online evidence that the Officer relied upon.

[43] The Applicants rely on jurisprudence of this Court and the Supreme Court of Canada to argue that while the Fairness Guideline is not binding, it has been held that it ought to be followed in certain cases. The cases relied upon by the Applicants involved guidelines that set out detailed and comprehensive procedures in the nature of a code for processing applications.

That is not the case here. The Fairness Guidelines provide high-level information regarding the right to be heard and other procedural matters. They do not purport to be a procedural code, nor are they detailed or thorough enough to be mistaken for one on the facts of this case.

[44] The Applicants have not persuaded me that the Officer relied on extrinsic evidence or that they held a legitimate expectation that the Fairness Guidelines, cast in broad general terms, were meant to change the jurisprudential definition of when evidence is "extrinsic".

C. *Reasonableness of the Decision*

[45] The Applicants argue that the Decision is unreasonable because some key factors were assigned no weight or an unknown amount of weight by the Officer. According to the Applicants, the Officer did not specify the amount of weight they gave to the best interests of the grandchildren; the establishment of the Principal Applicant; and the establishment of Mingxi.

(1) The Grandchildren

[46] The Applicants argue that the Officer erred in failing to specify the amount of weight given to the interests of the grandchildren. The Applicants rely on *Kanthasamy* for the principle that the Best Interests of the Child [BIOC] must be ""well identified and defined" and examined "with a great deal of attention" in light of all the evidence."

[47] The Officer did identify and set out the best interests of the grandchildren as articulated by counsel for the Applicants. The Officer also acknowledged that the Principal Applicant wished to maintain the bond she had with the grandchildren and that she enjoys health benefits

from taking care of her grandson. The Officer indicated that the evidence from the eldest son, Ray, was that the Applicants visit his family about once a week.

[48] The Officer accepted and gave weight to the documentation that grandchildren who have close bonds with their grandparents have greater health and emotional benefits. The Officer balanced that finding against an article indicating that grandparent involvement is not a determinative factor for raising emotionally healthy children, and that the grandchildren's parents were able to provide economic and emotional support. The Officer also acknowledged that there were other ways to stay in touch with the grandchildren either through visits or technology.

[49] The Officer concluded that there was little evidence that negative psychological effects would arise from the lack of the Principal Applicant grandmother raising her grandchildren. That conclusion is justified, transparent and intelligible. The reasons show how and why the Officer arrived at that conclusion. It is supported by the evidence and the law. It is reasonable.

[50] The Applicants also argue that the Officer erred by considering "hardship" when assessing the best interests of her grandchildren. The Applicants argue that it was an error for the Officer to move beyond considering the grandchildren's best interests and instead consider whether the children could adjust to life without the Applicants.

[51] In *Kanthasamy* the Supreme Court did not eliminate the notion that hardship is a factor to be considered. Rather, it found that weight should be given to "to *all* relevant humanitarian and compassionate considerations": *Kanthsamy* at paragraph 33.

[52] In this case, the Officer considered a number of humanitarian and compassionate factors. These included that the Principal Applicant had not shown she was sufficiently established in Canada and did not have substantial ties to her employment; her relationship with her grandchildren; the lack of evidence that her son was receiving on-going psychological therapy in Canada; observing that he was old enough not to have to associate with his father; and that remaining in Canada had not been due to reasons beyond the Principal Applicant's control.

[53] The Officer acknowledged that the best interests of children are only one factor and do not outweigh all other factors. On reviewing the Decision and considering the submissions and evidence before the Officer, I am not able to find on the evidence and the law that the Officer's assessment of the BIOC of either the grandchildren or the Principal Applicant's son was an unreasonable.

(2) Weighing the Evidence

[54] The Applicants also submit that the Officer erred by concluding that the BIOC considerations were not sufficient to outweigh the negative considerations without explaining why that was the finding.

[55] There are two problems with this argument.

[56] One problem, as already mentioned, is that a BIOC analysis is not determinative of the outcome of an H&C application; it is but one factor, and does not trump other factors: *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at paragraph 28.

[57] The other problem is that it is not the role of the Court to re-weigh the evidence before the Officer, even if the Court might have arrived at a different determination: *Douglas v Canada (Citizenship and Immigration)*, 2017 FC 703 at paragraph 42. In fact, absent exceptional circumstances, a reviewing court will not interfere with the factual findings of a decision maker who is required to assess and evaluate the evidence: *Vavilov* at paragraph 125.

[58] The Officer is required to show that they were alert, alive and sensitive to the BIOC of the Principal Applicant's son and grandchildren. The Officer was required to and did weigh those BIOCs against other evidence, as set out above. There is no ground upon which this Court should interfere to re-weigh the evidence.

(3) Failure to mention evidence

[59] The Applicants also argue that the Officer failed to consider or mention key factors, including the objectives of the *IRPA*, and the Applicants' lack of family relationships in China, rendering the decision unreasonable.

[60] A decision-maker however is not required to refer to all the evidence. The Officer is presumed to have weighed and considered all of the evidence unless the contrary is shown: *Sing v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at paragraph 90.

[61] There is no doubt that the Officer would be aware of the objectives of the *IRPA* and the fact that the Principal Applicant is estranged from her sisters in China is in the record. There is no reason to believe the Officer overlooked the evidence. Given that the focus of the submissions to the Officer were on the immediate family in Canada and the ability of the Principal Applicant to work in China, there is no reason to believe that mentioning the objectives of the *IRPA* or the estrangement of the two sisters were "key factors" or that they would have had more than a superficial or peripheral effect on the merits of the Decision.

[62] The Principal Applicant also argues that the Officer failed to address her 2018 tax return, in which she declared that she did not receive any foreign pension money in 2018.

[63] The Respondent argues that the tax return is not relevant, since the Officer's finding was that the Principal Applicant failed to provide evidence about her financial situation *prior* to her arrival in Canada. I agree that the 2018 tax return has no impact on the reasonableness of the Decision.

[64] The Decision as a whole is to be considered when assessing reasonableness. Any shortcoming in the Decision must be serious; it must be more than merely superficial or peripheral to the merits of the decision: *Vavilov* at paragraph 100.

[65] I am unable to find any such shortcomings.

VIII. Conclusion

[66] For all the reasons set out above, I find that the Applicants have not met their onus to show the Decision is unreasonable.

[67] The Officer provided an internally coherent and rational chain of analysis that is justified in relation to the facts and law. As a result, I am required when applying a reasonableness review to defer to the decision under review: *Vavilov* at paragraph 85.

[68] Reasonableness review allows that there may be more than one reasonable outcome. In *Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 [*Zlotosz*], Mr. Justice Diner accepted and found that "the exercise of H&C discretion ultimately requires a subjective analysis. In other words, another officer might have concluded differently by weighing the evidence differently": *Zlotosz* at paragraph 18.

[69] Although in some instances I may not have arrived at the same conclusions as the Officer, my role is to review the Decision. The Supreme Court has stated very clearly that when conducting judicial review a Court is to refrain from deciding the issue afresh. I am to consider only whether the Decision, including the rationale for it and the outcome to which it led, is unreasonable: *Vavilov* at paragraph 83.

[70] This application is dismissed, without costs. There is no question for certification. The issue of the failure to consider the TRP will be sent to another Officer for determination.

JUDGMENT IN IMM-2888-19

THIS COURT'S JUDGMENT is that:

1. The undetermined issue of the Temporary Residence Permit is remitted to a different Officer for decision;

2. Paragraph 15, including subparagraphs 15(a) to (h), are struck from the Applicant's affidavit dated June 24, 2019;

3. Otherwise, the application is dismissed.

4. There is no serious question of general importance for certification.

5. No costs are awarded.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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