Federal Court  Cour fédérale

Date: 20210630

Docket: IMM-6762-19

Citation: 2021 FC 690

Ottawa, Ontario, June 30, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

LINA RONG AND YONG LI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Lina Rong and Yong Li, are both citizens of China who have been in a common-law relationship since October 2010. Upon arriving in Canada in 2015, the Applicants sought refugee protection alleging fear of persecution in China for having violated China's family planning policies. The refugee claim was rejected.

[2] In 2017, the Applicants sought to be considered for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds. In a decision dated October 24, 2019 a senior immigration officer [the Officer] refused the H&C application.

[3] Pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, the Applicants seek judicial review of the Officer's negative H&C decision. They allege the Officer erred in three respects:

A. the consideration of the Applicants' evidence;

B. the consideration of the best interests of their Canadian-born child; and

C. the assessment of their establishment in Canada.

[4] Having considered the parties' written and oral submissions, I am not persuaded that the Court's intervention is warranted. The application is dismissed for the reasons that follow.

II. Background

A. *The Applicants' Circumstances*

[5] The Applicants allege that they have three children: two daughters in China and a son born after their arrival in Canada in 2015.

[6] They report their first daughter was born in November 2011 in South Korea. The birth reportedly occurred in South Korea because, as an unmarried couple, they could not obtain a birth permit in China. The Applicants report that after the birth, the female Applicant returned to

China with the child and after paying a fine, the child was registered on the household register [*hukou*] of the child's paternal grandparents. The Applicants state that their second daughter was born in hiding in China in December 2014 because they did not have a birth permit. A birth certificate could not be obtained and the second daughter was not listed on the grandparents' *hukou* at the time the Applicants submitted their refugee claim in Canada.

[7] The Applicants left China for Canada in January 2015, shortly after the birth of the second child. The two children remained in China with their grandparents. Upon arriving in Canada, the Applicants submitted refugee claims, reporting they feared forced sterilization for having violated family planning policies in China.

[8] The Refugee Protection Division of the Immigration and Refugee Board [RPD] rejected the claims finding them to have no credible basis.

B. *The RPD Decision*

[9] The RPD held that the Applicants failed to establish the existence of their daughters in China, a circumstance that not only undermined their credibility but was also fatal to their claim since they would not face a risk of forced sterilization. The RPD rejected DNA evidence submitted in support of their claim of parentage citing significant procedural irregularities in the collection of the samples.

[10] The RPD also found significant inconsistencies in respect of the Applicants' narrative relating to the birth of the first daughter, finding that the female Applicant could not have

travelled to Korea to give birth as reported. The RAD found the South Korean birth certificate was “unquestionably fraudulent” and then concluded the *hukou* showing the existence of a daughter born in Korea “must be fraudulent”. The RPD concluded that the Applicants had “created this false child in order to establish an asylum claim.”

[11] The RPD accepted that the female Applicant was pregnant at the time of the RPD hearing, but concluded this did not provide a basis for a sur place claim. The Applicants’ son was born in Canada in December 2015.

III. Decision under Review

[12] In seeking an exemption, on H&C grounds, from the requirement that applications for permanent residence be made from outside Canada, the Applicants again relied on the risk of forced sterilization in China for having three children out of wedlock. They also argued that the best interests of their Canadian-born child and their establishment in Canada militated in favour of granting H&C relief.

[13] The Applicants provided a new copy of the grandparents’ *hukou* that included an entry, added in 2016, for the child reportedly born in December 2014. In addition, they provided documentation demonstrating that a Chinese passport had been issued to this child in 2016.

[14] The Officer quotes extensively from the RPD’s decision detailing its credibility concerns. The Officer acknowledges the substantive differences between the assessment of refugee claims and that of H&C applications but concludes that the negative credibility findings of the RPD are

relevant where materially the same evidence is presented in support of an H&C application. The Officer then concludes the objective evidence is not sufficient to establish that the Applicants had two children in China and notes that despite having had more than three years to implement the proper procedure for DNA testing, the Applicants had not done so. The Officer held that the Applicants had not established that they would face anything more than a fine upon returning to China.

[15] The Officer acknowledged that it would be difficult for the Applicants' Canadian-born child to return to China, but ultimately held that the best interests of the child [BIOC] is not necessarily a determinative factor and that there was insufficient evidence to determine that the child's best interests would be compromised.

[16] In addition, the Officer held that the Applicants' establishment in Canada was not to an uncommon level and would not result in hardship if they were required to leave Canada to submit their permanent residence application. The Officer noted that the Applicants' resettlement in Canada demonstrated their ability to adapt. The Officer also canvassed the Applicants' skills, work experience, and supports in China, and noted that they had spent most of their lives there.

IV. Standard of Review

[17] As the Supreme Court of Canada noted in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16, 23 [*Vavilov*], the Court "starts with a presumption that reasonableness is the applicable standard whenever a court reviews

administrative decisions" except where legislative intent or the rule of law suggests otherwise. Neither of these exceptions applies here. The applicable standard of review is reasonableness.

[18] In applying the reasonableness standard, the Court must not assess the tribunal's reasons against a standard of perfection, but must ask if the decision under review "bears the hallmarks of reasonableness–justification, transparency and intelligibility–and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at paras 91, 99).

V. Analysis

A. *The Officer did not err in considering the evidence*

[19] The Applicants argue that the Officer ignored evidence that was not before the RPD of the existence of their daughters in China. This evidence consisted of an updated copy of their family's *hukou* listing the children and a passport issued in the name of their second daughter. They submit that the Officer relied exclusively on the RPD's analysis and focused on the lack of reliable DNA evidence, rather than the new documents submitted. Relying on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) [*Cepeda-Gutierrez*], they submit that the Court should infer that the *hukou* and passport evidence was ignored, evidence that was at the very heart of the H&C application.

[20] I disagree. The determinative finding of the RPD was not that the two children did not exist, but that the evidence before it "failed to establish that the [Applicants] are the parents of the two children back in China."

[21] The new evidence put before the Officer might well corroborate the existence of the two children in China, but it does not demonstrate parentage. The passport details the child's name, date and place of birth, sex, and nationality, it does not identify the holder's parents. Similarly, the updated *hukou* only identifies the two children as granddaughters of the head of the household. The same *hukou* also identifies a married daughter of the household. While the *hukou* provides evidence that the children exist and that they are grandchildren of the male Applicant's father, it does not demonstrate that the Applicants are the children's parents.

[22] The Officer benefits from the presumption that all of the evidence was considered and weighed and that presumption has not been displaced in this instance (*Basanti v Canada (Citizenship and Immigration)*, 2019 FC 1068 at para 24). As set out at para 15 of *Cepeda-Gutierrez*, this presumption may be displaced where a decision maker fails to address evidence that points to a conclusion that differs from that reached by the Officer. The updated *hukou* and passport do not point to a conclusion that differs from that reached by the Officer and therefore the failure to mention them does not lead to an inference that the Officer's finding was made without regard to the evidence.

B. *The Officer reasonably considered the best interests of the Applicants' Canadian-born child*

[23] The Applicants rely on *Bautista v Canada (Citizenship and Immigration)*, 2014 FC 1008 [*Bautista*], in arguing that the Officer erred by considering the adaptability of their Canadian-born son and his ability to overcome obstacles in relocating to China. They further submit that the Officer unreasonably adopted a "basic needs" and "disproportionate hardship" approach in finding that the child could survive in China, rather than looking at what was in his best interests. The Applicants also argue the Officer "had no regard to the personal circumstances of the son in Canada, apart from a finding that he is resilient" resulting in a decontextualized analysis.

[24] The Applicants argue and I agree, that the jurisprudence has held that the BIOC will only weigh in favour of the parents' removal from Canada in exceptional circumstances (*Bautista* at para 23). However, the jurisprudence also holds that the onus continues to be on the applicant to establish the circumstances of the child and that "the intensity and scope of a BIOC analysis …will depend on the length and strength of the applicant's submissions and on the evidence adduced" (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 37, see also para 16).

[25] In this instance, the Applicants have provided very little evidence of what was in the child's best interests and how those interests would be impacted by the removal of his parents. The limited evidence and submissions included a statement in the H&C application form that the son could "undergo the painful and unhuman experience of being the so-called 'ghost child', as many unregistered children are experincing [sic] in China to date." The accompanying relevant

documentary evidence regarding the son is limited to a day care receipt and subsidy form and his immunization record. In a March 15, 2019 letter to the CIC-Backlog Reduction Office, the Applicants stated:

> …for us to return to China we will have undue grief because we will have no place to live, no good medical care for our Canadian born child, face depression and adversity. The child will be uprooted from what he is accustom [*sic*] to, and adjust to a new environment where pollution rampant would be detriment [*sic*] to his health and upbringing.

[26] In addressing whether the child's basic needs would be met in China, the Officer was responding to the very concern identified by the Applicants in this submission. The Officer reasonably concluded that the evidence did not establish that the child's basic needs would not be met in China, a conclusion that was both responsive and reasonably available to the Officer.

[27] As was the case in *Yang v Canada (Citizenship and Immigration)*, 2018 FC 296, the basic needs analysis was not the entirety of the BIOC analysis undertaken in this case. The Officer considered the child's age and the time the Applicants had spent in China and reasonably concluded the Applicants and the child would have the benefit and support of friends, acquaintances and social networks if returned.

[28] In the absence of evidence demonstrating additional children in China, the Officer reasonably gave no weight to the claim that the son would be unable to be registered, becoming a ghost child.

[29] I also note the absence of any evidence in the record to suggest that the Applicants have any family in Canada or that their son has developed particularly strong bonds to anyone other than his parents. None of the letters of support provided by the Applicants describes any connection with the son. The Applicants did not present any evidence concerning language ability, friendships, community activities, or any other factors that could have been weighed in the BIOC analysis.

[30] It may well be that the child's interests would be better served should he remain in Canada. This was recognized by the Officer. The Officer's analysis also recognized that the BIOC was to be given significant weight in assessing the H&C application. The Officer nonetheless concluded, assessing the totality of the circumstances, that the H&C relief being sought was not warranted. This decision was not unreasonable.

C. *The Officer's analysis of the Applicants' establishment in Canada was reasonable*

[31] The Applicants argue that the Officer used their establishment in Canada as a basis to reject–instead of grant–their application. They argue that the Officer found that their ability to become established here was evidence of their adaptability and resourcefulness, which would allow them to overcome similar challenges in relocating to China and therefore favoured refusal of the H&C application. They argue that this is contrary to *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 [*Lauture*], which stands for the principle that an analysis of an applicant's degree of establishment should not be based on whether or not they can carry on similar activities in their country of origin. Instead an officer must examine "whether the

disruption of that establishment weighs in favour of granting the exemption" (*Lauture* at para 26, quoting *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 at para 21).

[32] The Officer acknowledged the Applicants' evidence of establishment, but concluded that it is not uncommon for those residing in Canada to demonstrate the indicia of establishment detailed by the Applicants and held that their establishment was not so entrenched that having to return to China and apply in the normal manner would cause a hardship. On this basis the Officer assigned establishment minimum weight, a conclusion that was reasonable, since "[t]he presence of establishment that is in line with reasonable expectations can hardly excite the desire to relieve the misfortunes of someone" (*De Sousa v Canada (Citizenship and Immigration)*, 2019 FC 818 at para 28).

[33] This finding of a common level of establishment, as it did in *Singh v Canada (Citizenship and Immigration)*, 2016 FC 1350, distinguishes these circumstances from *Lauture* where the officer viewed the applicants' establishment as remarkable and significant, and yet dismissed it (*Lauture* at para 21). In this instance, the Officer examined the Applicants' establishment, found it to be common and gave it little weight. The Officer then proceeded to address the Applicants' submissions with respect to the hardship they would encounter if required to return to China. As part of this analysis assessing the Applicants' demonstrated ability to establish themselves in this country, in the absence of any support network, was neither improper nor unreasonable.

VI. Conclusion

[34] The application is dismissed. The parties have not identified a question of general importance for certification, and none arises.

JUDGMENT IN IMM-6762-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6762-19
STYLE OF CAUSE:	LINA RONG AND YONG LI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 16, 2021
JUDGMENT AND REASONS:	GLEESON J.
DATED:	JUNE 30, 2021

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