Federal Court  Cour fédérale

Date: 20210820

Docket: IMM-7152-19

Citation: 2021 FC 857

Ottawa, Ontario, August 20, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

QIAN LIAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Qian Liao, is a Chinese citizen who arrived in Canada in August 2003 on a three-year study permit. She married Mr. Lee in 2005 and became a permanent resident [PR] in 2009. Ms. Liao divorced Mr. Lee in 2010 after obtaining PR status. She remarried in 2012 and has two children with her current husband.

[2] Ms. Liao's 2005 marriage to Mr. Lee was later found to have been a marriage of convenience and in 2014 she was determined to be inadmissible due to the misrepresentation. Ms. Liao departed Canada in February 2017. Her current husband remains in Canada.

[3] In February 2019, Ms. Liao applied for PR status from outside Canada. Recognizing she may have been ineligible for PR status, she requested that the visa officer [Officer] consider her eligibility for a Temporary Resident Permit [TRP] if the Officer was of the opinion that she remained inadmissible to Canada as a result of her misrepresentation.

[4] The Officer refused the PR Application. The decision letter [PR decision] states that due to the prior misrepresentation Ms. Liao is ineligible to apply for PR status until 2022 and concludes there to be insufficient humanitarian and compassionate grounds to overcome the inadmissibility. The decision letter also acknowledges the request for a TRP and instructs Ms. Liao to submit proof that required processing fees had been paid together with any additional evidence to allow for consideration of that TRP request.

[5] The TRP request was later refused [TRP decision].

[6] Pursuant to section 72 of the *Immigration and Refugee Protection Act* SC 2001, c 27 [IRPA], Ms. Liao now seeks judicial review of the Officer's November 14, 2019 TRP decision. In doing so, she argues the decision is unreasonable for a number of reasons. She also argues that the admissibility determination reached in the PR decision was unreasonable. Ms. Liao has not sought judicial review of the PR decision.

[7] For the reasons that follow, I decline to address the merits of the PR decision and specifically the admissibility determination; however, I am persuaded that the Court's intervention is warranted as the TRP decision is unreasonable.

II. The admissibility determination

[8] A significant portion of the arguments advanced in this Application focus on whether the Officer erred in concluding amendments to the IRPA that increased the inadmissibility period for misrepresentation from two years to five years and added a prohibition on applying for permanent residency during that period, applied in this circumstance (*Faster Removal of Foreign Criminals Act*, SC 2013, c 16 [FRFCA] amending section 40 of the IRPA). Ms. Liao was found to be inadmissible and an exclusion order issued in June 2014, prior to the FRFCA amendments coming into force in November 2014.

[9] Ms. Liao relies on the decision of Justice Nicholas McHaffie in *Zeng v Canada (Citizenship and Immigration)*, 2019 FC 1586, where Justice McHaffie considered this very issue. Applying a correctness standard of review, he engaged in a *de novo* statutory interpretation analysis of the relevant sections of the IRPA and the FRFCA. He concluded the FRFCA amendments were not intended to be retrospective and that they were of no application to an exclusion order issued prior to the coming into force of the FRFCA amendments (*Zeng* at para 55).

[10] Ms. Liao submits *Zeng* demonstrates that, by operation of law, she was not inadmissible and that the Officer's reference to the 2014 amendments in the TRP decision reflects an erroneous understanding of the law.

[11] The Respondent takes the position that the Officer's conclusion on the applicability of the FRFCA amendments is reviewable, following the decision of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65[*Vavilov*], against a standard of reasonableness. This distinguishes this matter from the pre-*Vavilov* decision in *Zeng*, where Justice McHaffie applied a correctness standard of review in concluding the amendments to section 40 of the IRPA did not have retrospective effect. The Respondent further submits that *Zeng* was wrongly decided.

[12] In oral submissions, Ms. Liao's counsel did not take issue with the Respondent's position that reasonableness is the appropriate standard of review in regard to this issue post-*Vavilov*. I agree. *Vavilov* teaches that reasonableness is the presumptive standard of review, that matters of statutory interpretation are not unique and that they, like other questions of law, may be evaluated on a reasonableness standard (paras 69 and 115). I also note that none of the reasons to derogate from the presumptive standard are present in this case (*Vavilov* at para 69).

[13] In applying a reasonableness standard of review to a question of statutory interpretation, it is not the Court's role to undertake a *de novo* analysis of the question or ask if the decision maker's interpretation is correct. Instead, the Court is required to examine the outcome of the

decision as a whole, including the decision maker's reasons in assessing whether the decision is reasonable.

[14] The inadmissibility determination that Ms. Liao now challenges was not made as part of the TRP decision. It was a determination that was made in deciding the PR Application. During oral submissions, the parties were asked to address whether this issue was properly before the Court.

[15] Having considered the parties' submissions, I am of the view the admissibility determination is not properly before the Court in this Application for two reasons.

[16] First, the period of inadmissibility was not determined as part of the TRP request. It was a determination made in considering the request for permanent residence. That an application for judicial review is limited to a single decision or order, unless the Court orders otherwise, is not controversial (Rule 302 of the *Federal Courts Rules* SOR/98-106 [Rules]). The PR and the TRP decisions are separate decisions, although closely linked. Being closely linked, they might well be treated as a single decision for the purposes of Rule 302 (*Conseil des Innus de Ekuanitshit c Canada (Pêches et Océans),* 2015 CF 1298 [*Conseil des Innus*]). However, Ms. Liao has not taken that position in this Application. The issue of retrospectivity was determined in considering the PR request, a decision that has not been challenged on judicial review.

[17] Secondly, and perhaps more importantly, the record as it relates to the PR decision and the retrospectivity determination is not complete. The record does include the PR decision letter,

but the Officer's underlying notes and any analysis they might include in respect of the finding that the 2014 amendments are to be retrospectively applied to the PR Application are not in the record. In the absence of the complete record, I am not in a position to assess the reasonableness of the Officer's retrospectivity decision.

[18] I therefore decline to consider the issue of retrospectivity and whether the Officer's interpretation of the FRFCA amendments is reasonable.

III. Issues and standard of review

[19] In challenging the TRP decision, Ms. Liao raises the following two additional issues:

A. Did the Officer fail to consider the TRP request in a proper manner, thereby violating her procedural fairness rights? and

B. Was the Officer's consideration of the best interests of the children reasonable?

[20] TRP determinations are reviewed against a standard of reasonableness (*Abdelrahman v Canada (Citizenship and Immigration)*, 2020 FC 1141 at paras 13-14), as are a decision maker's consideration of the best interests of any impacted children (*Sivalingam v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1078 at paras 23-25 [*Sivalingam*]).

[21] Counsel for the Respondent agrees that the TRP decision is reviewable on a reasonableness standard but argues the standard of "palpable and overriding error," described in

Housen v Nikolaisen, 2002 SCC 33, is to be applied where the Court considers the decision maker's factual inferences and resulting findings of fact. The Respondent cites and relies upon *Aldarwish v Canada (Citizenship and Immigration)*, 2019 FC 1265 [*Aldarwish*], at paragraphs 24 to 30 in support of this position.

[22] I note, as have my colleagues Justices Southcott, McHaffie and Manson, that *Aldarwish* was decided prior to *Vavilov* (*Sivalingam* at para 25; *Xiao v Canada (Citizenship and Immigration)*, 2021 FC 386 at paras 8-9; *AB v Canada (Citizenship and Immigration)*, 2020 FC 915 at paras 13-14). *Vavilov* has since confirmed that the presumptive standard of review of administrative decisions is reasonableness.

[23] The Respondent also takes issue with Ms. Liao's position that the first of the two issues raised engages questions of fairness. The Respondent submits, and I agree, that the issue raised relates to the Officer's treatment and consideration of the evidence in determining the TRP Application. I will review both issues on a reasonableness standard. In doing so, I note that the conclusions I reach below with respect to the first issue would not differ were I to view the issue as raising a question of fairness.

IV. Analysis

A. *The Officer properly considered the TRP request*

[24] In determining a TRP, an Officer is required to consider all of the relevant circumstances put forward by an Applicant (*Krasniqi v Canada (Citizenship and Immigration)*, 2018 FC 743 at paras 20-21).

[25] Ms. Liao argues that the Officer failed to engage in a fulsome analysis of all of the relevant circumstances, as none of the factors outlined in either the Humanitarian and Compassionate [H&C] or best interests of the children [BIOC] submissions in support of the TRP were considered. I disagree.

[26] A decision maker need not engage in a distinct analysis of a circumstance or issue raised where that very issue has been previously considered and there has been no material change in the underlying circumstances (*Ferraro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 801 at para 25; also see *Chen v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 760 at para 14 where reliance on a previous H&C analysis was found to be unreasonable when there had been a material change in the Applicant's circumstances). A decision maker's reasons are to be read in light of the "history and context of the proceedings in which they were rendered" (*Vavilov* at para 94).

[27] The Global Case Management System [GCMS] notes indicate the Officer considered the H&C submissions made in support of the TRP. The notes state that "[a] comprehensive

examination of H&C circumstances was made [in the PR Application] finding prior to cancelling the Application on the grounds that [section 40 of the IRPA] excludes it."

[28] In the absence of any material change in an Applicant's circumstances, the Officer's reliance on the prior and recently completed H&C analysis is not unreasonable or inconsistent with their obligation to engage in a fulsome analysis of the Applicant's circumstances.

B. *The assessment of the best interests of the children is unreasonable*

[29] A child's best interests, while not determinative, are to be given substantial weight where those interests are engaged in a decision making process under the IRPA. In *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], the Supreme Court states that the best interests of the child principle involves determining what will most likely be conducive to providing a child with an environment where that child has the best opportunity for receiving needed care and attention (at para 36 citing *MacGyver v Richards* (1995), 22 OR (3d) 481 (CA) at p 489). The focus of a BIOC analysis is not unusual, undeserved, or disproportionate hardship (*Kanthasamy* at para 33), it having been recognized that "[c]hildren will rarely, if ever, be deserving of any hardship" (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 9*).*

[30] The best interests of the children are considered in the GCSM notes supporting the TRP refusal, where the following is set out:

> So while the best interests of the children must be and have been fully considered, it may also be appropriate to consider that the client and sponsor made the decision to have these children in full

> knowledge of the fact that she had obtained PR status through misrepresentation, that Canada intended to remove her, and in the case of the second, that the MPM in Beijing had refused to grant her authorization to return.

[31] Although it is stated that the children's best interests have been fully considered, this is not reflected in the short analysis that follows. Instead, the Officer has considered the advisability of Ms. Liao's decision to have children given her circumstances. The implication is that any negative impact on the children's best interests does not warrant relief because of Ms. Liao's actions. The focus is not a consideration of the best environment for children, nor is the analysis sensitive or attentive to the needs or interests of the children and how those needs and interests might be impacted should the TRP be refused.

[32] The reference in the notes to the children's best interests having been fully considered might well be a reference to an analysis undertaken as part of the prior PR Application, but even if this is the case, it does not alter my view. First, as previously noted, the notes supporting the PR decision do not form part of the record before me. Even if one were to assume a reasonable assessment of the children's best interests had been separately undertaken and then relied upon in this instance, this is not enough to save the flawed analysis reflected in the TRP notes.

[33] The BIOC analysis is fundamentally flawed, rendering the decision unreasonable.

V. Conclusion and Certified Question

[34] The Application is granted and the matter returned for redetermination.

[35] At the conclusion of the hearing, parties indicated that the interpretation of the FRFCA amendments may warrant a request to certify a question of general importance. The parties requested, and I agreed, that it would be appropriate to provide an opportunity to make submissions after the Court's Judgment and Reasons had been provided. The parties will therefore advise the Court within five days of the date of this Judgment and Reasons if a question is to be proposed and, if so, to suggest a timeline for placing a proposed question and submissions before the Court.

JUDGMENT IN IMM-7152-19

THIS COURT'S JUDGMENT is that:

1. The Application is granted;
2. The matter is returned for redetermination by a different decision maker; and
3. The parties shall advise the Court within five (5) days of the date of this Judgment and Reasons if a question of general importance is to be proposed for certification and, if so, propose a suggested timetable for the filing of submissions

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7152-19
STYLE OF CAUSE:	QIAN LIAO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 17, 2021
JUDGMENT AND REASONS:	GLEESON J.
DATED:	AUGUST 20, 2021

APPEARANCES:

Wennie Lee	FOR THE APPLICANT
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lee & Company Immigration Advocacy and Litigation Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT