Federal Court  Cour fédérale

Date: 20211201

Docket: IMM-5917-20

Citation: 2021 FC 1334

Ottawa, Ontario, December 1, 2021

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

HUI YI XIAO AND QI YING JIANG

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Principal Applicant, Hui Yi Xiao, and her husband, Qi Ying Jiang, seek judicial review of the decision of a senior immigration officer [Officer], dated July 29, 2020, refusing to grant them an exemption, based on humanitarian and compassionate [H&C] considerations, from the requirement of having to apply for permanent residence from outside Canada.

[2] The Applicants are citizens of China. They came to Canada in March 2011 and claimed refugee protection. The Refugee Protection Division [RPD] dismissed their claim in November 2013. Leave to challenge the decision was granted, but their application for judicial review was dismissed on the merits by this Court in April 2015.

[3] In March 2018, the Applicants submitted an application for permanent residence from within Canada on H&C considerations, pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Their application was based on their establishment in Canada, the best interests of their two (2) Canadian-born children, and the adverse country conditions in China as they fear forced sterilization and other penalties should they be removed.

[4] On July 29, 2020, the Officer refused their application after determining that the H&C considerations submitted were insufficient to justify the exemption requested.

[5] The Applicants seek judicial review of the Officer's decision. They submit that the Officer: (1) failed to adequately assess the best interests of the children; (2) engaged in a selective analysis of the country condition reports without regard to other parts of the evidence that contradicted their findings; (3) misconstrued or ignored relevant evidence with respect to the Applicants' desire to have additional children; and (4) applied the wrong legal test by conflating the hardship and establishment factors.

II. Analysis

[6] The parties agree that the decision to grant or refuse an exemption on H&C considerations is reviewable on a standard of reasonableness (*Canada (Citizenship and*

Immigration) v Vavilov, 2019 SCC 65 at paras 10, 16, 17 [*Vavilov*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 10, 44 [*Kanthasamy*]. When conducting a reasonableness review, the Court's focus is on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). It must ask itself "whether the decision 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 para 99). The burden is on the party challenging the decision to show that it is unreasonable and the Court "must be satisfied that any shortcomings or flaws relied on […] are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

A. *Best Interests of the Children*

[7] The Applicants argue that the Officer's analysis regarding the children's ability to maintain both Chinese and Canadian citizenship is unintelligible and unreasonable. In their H&C application, the Applicants submitted that, due to China's requirement that its citizens hold only one citizenship, to obtain *hukou*, and therefore access social benefits, their children, who were five (5) and eight (8) years old at the time, would have to renounce their Canadian citizenship. While agreeing with this, the Officer inexplicably determined that there was insufficient information to conclude that Canada would cease to view the children as Canadian citizens, or that they would not have the option to reassume their Canadian citizenship in the future when they become adults. The Applicants refer to *Ma v Canada (Citizenship and Immigration)*, 2019 FC 108 at paragraphs 19 to 21 [*Ma*], to support the inherent contradiction in the Officer's reasoning.

[8] The Applicants are misconstruing the Officer's findings. The Officer did not find that the children could maintain both Canadian and Chinese citizenship. The Officer acknowledged that China's nationality law does not recognize dual nationality for any Chinese citizen and found, based on the information submitted by the Applicants, that both children would be eligible to obtain Chinese citizenship through their parents. With this citizenship, they would be entitled to reside permanently in China with their parents and access benefits, such as education and healthcare. While acknowledging that China would not formally recognize the children's Canadian citizenship, the Officer noted that the Applicants had submitted insufficient information to demonstrate the long-term effect of adopting Chinese citizenship on their Canadian citizenship.

[9] Contrary to the Applicants' submissions, the Officer did not conclude that their children would have the option to reassume their Canadian citizenship in the future. The Officer was simply acknowledging the submissions made by the Applicants in their H&C application that the children would have to renounce their Canadian citizenship to live in China permanently and would "only have chance to re-apply their Canadian Citizenships back when they reach age 18".

[10] The circumstances in this case appear to be different from those in *Ma*, where the Court found it difficult to discern the analysis by which the Officer arrived at the conclusion that "although China does not recognize dual citizenship, the children would not be prevented from accessing their Canadian citizenship in the future" (*Ma* at para 20). The reasons before me demonstrate that the Officer considered the potential loss of Canadian citizenship. The Officer engaged with the Applicants' evidence and submissions. The Officer did not conclude that the

Applicants' children could access their Canadian citizenship after losing it, only that there was insufficient information that they would not be able to reinstate their status in the future.

[11] The Applicants argued at the hearing that the Officer should have known that it would not be possible for the children to do so. While this may be true, like the Officer, the Court has no evidence to that effect and the Applicants did not support their argument with any case law. While the Court is mindful that immigration officers have specialized knowledge and expertise, the burden lies with the Applicants to put their best foot forward.

[12] The Applicants also argue that the Officer inherently focussed on hardship when assessing the best interests of the children. They contend that the Officer did not consider the benefit of the Applicants' non-removal from Canada on their children.

[13] I disagree.

[14] In *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 [*Hawthorne*], the Federal Court of Appeal stated the following:

> [5] The officer does not assess the best interests of the child in a vacuum. The officer may be presumed to know that living in Canada can offer a child many opportunities and that, as a general rule, a child living in Canada with her parent is better off than a child living in Canada without her parent. The inquiry of the officer, it seems to me, is predicated on the premise, which need not be stated in the reasons, that the officer will end up finding, absent exceptional circumstances, that the "child's best interests" factor will play in favour of the non-removal of the parent. […]
>
> [6] To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial - such a finding will be a given in all but a very few, unusual cases.

> For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent.

[15] I agree that the assessment of the best interests of the children is not a test of whether the child would face "unusual or undeserved or disproportionate hardship", or whether a particular threshold of hardship has been met (*Kanthasamy* at paras 23, 59-60; *Hawthorne* at para 9; *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 at paras 64-67). However, that being said, considerations of hardship remain relevant in the assessment of the best interests of the children, especially where hardship is raised by the Applicants (*Mebrahtom v Canada (Citizenship and Immigration)*, 2020 FC 821 at para 14).

[16] Moreover, even if the Officer does not explicitly state that it would be in the children's best interests to stay in Canada with their parents, it is necessarily implied and need not be stated in the Officer's reasons (*Hawthorne* at para 5).

[17] The Officer's findings were directly responsive to the Applicants' submissions and their evidence. The Officer considered that the children attended daycare and kindergarten, that they had made friends here and further noted their participation in school activities. The Officer also considered their loss of Canadian citizenship should they leave. While acknowledging that there would be an adjustment period for the children if they move to China, the Officer ultimately found that the best interests of the children were to remain with their parents. In reaching this conclusion, the Officer considered the children's young age, the fact that their first language was

Cantonese, their access to the support of their parents and the presence of an older brother and grandparents who still reside in China.

[18] It is a well-established principle that the best interests of the children are an important factor, but not a determinative one. It is to be weighed together with all other relevant factors (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at paras 24, 39 [*Kisana*]).

[19] The Applicants have failed to persuade me that the Officer substituted the best interests of the children analysis with a hardship analysis, or that their assessment is flawed. I am also not satisfied, upon review of the decision, that the Officer lacked empathy in regards to the Applicants' circumstances.

B. *Selective Reading of the Country Conditions Evidence*

[20] The Applicants allege that the Officer made a selective analysis of the evidence on adverse country conditions, ignoring parts that contradicted their findings. By doing so, the Officer's conclusion that the Applicants would not likely be at risk of forcible sterilization if removed to China is unreasonable. The Officer's conclusion that the children would be able to obtain *hukous*, and thus access public services, is similarly unreasonable.

[21] Officers are presumed to have reviewed all the evidence presented before them – they are also not required to refer to each document submitted (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ no 598 (FCA) (QL); *Hassan v Canada (Minister of Employment and Immigration)*, [1992] FCJ no 260 (FCA) (QL)).

[22] I have considered the documents cited by the Applicants. The Officer provided sufficient and detailed arguments to justify their findings. In my view, the Applicants are asking the Court to reassess the evidence considered by the Officer, which is not its role under judicial review (*Vavilov* at para 125). Therefore, this argument must fail.

C. *Evidence Misconstrued Regarding the Applicants' View on Family Planning*

[23] The Applicants submit that the Officer misconstrued or ignored relevant evidence with respect to their desire to have children. They also claim that the Officer's finding that the Principal Applicant did not have her intrauterine device [IUD] removed when she came to Canada is equally unintelligible and unreasonable, as it ignores the fact that the Applicants had two (2) sons after arriving in Canada, one of whom was born a few days after the RPD hearing.

[24] While I agree with the Applicants that the Principal Applicant was biologically capable of bearing children, the Officer could reasonably find that their desire to have more children was speculative. The Officer noted that the Applicants had not provided affidavits regarding their plans for their family. There were no medical reports showing that the Principal Applicant was pregnant or had been attempting to have more children. At the time of the decision, it had been six (6) years since the Applicants had their last child. With the exception of their counsel's statement, the Applicants had produced no evidence to demonstrate their desire to have more children.

[25] Regarding the issue of the IUD, it was not an error for the Officer to consider the RPD's finding on this issue and to point out that the Principal Applicant had seemingly never raised an

objection about the IUD while she was in China, nor had she provided evidence of having it removed when she came to Canada. While I agree that the birth of her second child a few days after the RPD hearing would seem to suggest that she had the IUD removed after arriving in Canada, I am not persuaded that this error is sufficiently central or significant to render the decision unreasonable (*Vavilov* at para 100). The Officer's comment was made in the context of examining the personal experiences of the Applicants or their family and friends with regard to China's family planning policies.

D. *Wrong Test on Establishment*

[26] The Applicants submit that the Officer applied the wrong test when considering their level of establishment in Canada through a lens of hardship.

[27] This argument is without merit.

[28] The Officer considered all aspects of the Applicants' establishment. The Officer gave positive consideration to the amount of time the Applicants had spent in Canada, their employment, their financial status, and their assets and social relationships built in Canada. The Officer gave negative consideration to the fact that the Applicants had made little effort to learn English or French since coming to Canada and that there was little information regarding how they supported themselves in the first five (5) years. Overall, the Officer found their level of establishment to be moderate. The Applicants have failed to persuade me that the Officer considered the Applicant's establishment through a hardship lens.

[29] It is important to recall that an H&C exemption under subsection 25(1) of the IRPA is an exceptional and discretionary remedy (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15). The onus of establishing that such exemption is warranted lies with the applicant (*Kisana* at para 45).

[30] I am satisfied that the Officer considered and weighed all the factors raised by the Applicants. In light of the evidence and submissions presented, the Officer could reasonably find that they did not justify an exemption from the requirement of having to apply for permanent residence from outside Canada. The Applicants may disagree with the Officer's overall assessment of the evidence and the weight given to each H&C factor. However, it is not open to this Court to reweigh the evidence and attribute a different level of importance to the relevant H&C factors in this application (*Kisana* at para 24).

[31] To conclude, the Applicants have failed to demonstrate a reviewable error in the Officer's decision. When read holistically and contextually, I am satisfied that the Officer's decision meets the reasonableness standard set out in *Vavilov*.

[32] Accordingly, the application for judicial review is dismissed. No questions of general importance were proposed for certification and I agree that none arise.

JUDGMENT in IMM-5917-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5917-20
STYLE OF CAUSE:	HUI YI XIAO ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 16, 2021
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	DECEMBER 1, 2021

APPEARANCES:

Jia Wei Chen Joanne Lau	FOR THE APPLICANTS
Pathima Prashad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Chinese and Southeast Asian Legal Clinic Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT