Federal Court  Cour fédérale

Date: 20220315

Docket: IMM-4306-20

Citation: 2022 FC 341

Toronto, Ontario, March 15, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

DAN LIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a 28-year-old Chinese citizen who arrived in Canada without her parents at the age of 15 and claimed asylum, citing a fear of persecution on account of her Christianity. The Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) determined that she was neither a Convention refugee, nor a person in need of protection, citing the Applicant's credibility as determinative. A subsequent Pre-removal risk assessment (PRRA)

application was refused and leave for judicial review was denied by the Federal Court in both the RPD and PRRA decisions.

[2] On January 16, 2019, the Applicant applied to be exempted from the requirement to apply for permanent residence from abroad on humanitarian and compassionate (H&C) grounds. The Applicant now seeks judicial review of the refusal of her H&C application, which will be dismissed for the reasons that follow.

I. H&C Decision under Review

[3] In a decision dated September 1, 2020 (the Decision), a senior immigration officer (the Officer) noted that the Applicant had cited her establishment in Canada, bests interests of the child (BIOC), and adverse country conditions as the factors in support of her application.

[4] With respect to establishment, the Officer noted that the Applicant has remained consistently in Canada since she arrived in 2008, and accepted that the Applicant completed her high school education, subsequently found employment as a server and cashier in a sushi restaurant, and remained financially self-sufficient during her time in Canada, noting corroborating tax documents, an employment letter, and evidence of a business partnership.

[5] The Officer then acknowledged the Applicant's assertion in her application that she has been in a conjugal relationship with a same sex partner since 2015 and that she is involved in the LGBT community. The Officer observed that while it would have been reasonable to expect evidence to corroborate these assertions, there was no accompanying information about her

partner or evidence of their relationship, no letter of support, and no evidence of any participation in LGBT activities while in Canada provided in support of the application. The Officer similarly found that while the Applicant asserted that she attends church in Canada, it was reasonable to expect her religious involvement to be corroborated and there was no accompanying evidence or details to support this assertion.

[6] The Officer noted that the Applicant's friends lived in different cities and that they likely maintained contact by phone or internet already, and determined these relationships could therefore be maintained from a distance.

[7] The Officer concluded the establishment analysis as follows:

> I acknowledge that the applicant has resided in Canada for approximately 12 years was employed for most of those years, and while I recognize that the applicant likely has obtained a level of establishment in Canada, I find that her establishment is at a level that would be expected of a person in her circumstances to obtain. In light of the evidence proffered, I give the factors for establishment some weight.

[8] Turning to BIOC, the Officer acknowledged that the Applicant assists her friends with their childcare needs from time to time, noting that she was not the primary caregiver. The Officer gave little weight to BIOC considerations, finding insufficient evidence that the children's best interests would be compromised by the Applicant's departure.

[9] Turning to adverse country conditions, the Officer noted the Applicant's assertions that she would be subject to discrimination by Chinese authorities due to her sexual orientation. However, returning to the absence of evidence of her sexual orientation or of her relationship,

the Officer found the factor not to be significant and attributed little weight. Similarly, the Officer found the assertion that the Applicant's mother would force her to marry a Chinese man was also not corroborated, and that she was now an adult who had lived independently from her parents for over a decade. Absent any evidence to suggest her mother could compel her to marry, the Officer gave the consideration little weight.

[10] As for the Applicant's statements that she would not be able to practice her Christian faith in China, the Officer noted that this had been considered and rejected by the RPD and in her PRRA. The Officer noted the absence of any evidence to corroborate her church attendance in Canada and found that corroboration would have been reasonable to expect. The Officer acknowledged that while not bound by the RPD and PRRA decisions, those findings would nonetheless be given considerable weight.

[11] The Officer remarked that the Applicant still has family in China, who might offer some care and support upon her return, and found she now had adaptable skills and knowledge obtained in Canada.

[12] Based on the considerations of these various elements, the Officer was unsatisfied that the H&C considerations warranted an exemption pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

II. Analysis

[13] The Parties agree that the default reasonableness standard outlined in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], applies to an H&C decision, consistent with the standard previously followed for H&C review (see *Bhalla v. Canada (Citizenship and Immigration)*, 2019 FC 1638 [*Bhalla*]; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]). A court conducting reasonableness review scrutinizes the decision maker's decision in search of the hallmarks of reasonableness – justification, transparency and intelligibility – to determine whether it is justified in relation to the relevant factual and legal constraints that brought the decision to bear (*Vavilov*, at para 99). Both the outcome and the reasoning process must be reasonable (*Vavilov*, at para 83).

[14] While H&C decisions are exceptional and highly discretionary, warranting significant deference (*Miyir v. Canada (Citizenship and Immigration)*, 2018 FC 73, at para 12), officers must "substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy*, at para 25, emphasis in original). Where elements are overlooked, particularly central compassionate planks, the balancing will necessarily be deficient because those gaps in the reasons prevent the Court from knowing whether, if properly considered, the officer would have assigned positive, negative or neutral weight (*Bhalla*, at paras 21 and 28).

[15] The only issue in this application is whether the Officer's Decision was reasonable. The Applicant submits that three components of the Decision failed to meet this standard - the Officer's assessment of (1) hardship, (2) BIOC, and (3) establishment.

(1) *Hardship*

[16] The Applicant argues that the Officer's hardship assessment is unreasonable because the Officer discounted her evidence that she is a lesbian on the ground that her claim was not corroborated, and because the Officer failed to assess the hardship that would befall her because of her Christian religion.

(a) *Sexual orientation*

[17] With respect to her sexual orientation, the Applicant relies on *Chekroun v. Canada (Citizenship and Immigration)*, 2013 FC 737 [*Chekroun*] at para 62-63 for the principle that it is an error for an officer to doubt the truthfulness of an applicant's affidavit attesting to their sexual orientation, without first identifying inconsistencies, contradictions or implausibility in the sworn evidence.

[18] The Applicant relies also on the principle articulated in *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA) [*Maldonado*] – relied on by the Court in *Chekroun* at para 65 – whereby a presumption of truth attaches to sworn testimony unless there is a valid reason to doubt it. The Applicant recognizes this principle was articulated in the refugee context, but notes that it has been reiterated and applied in the H&C context in *Gonzalez v. Canada (Citizenship and Immigration)*, 2015 FC 382 [*Gonzalez*] at para 41 and *Westmore v. Canada (Citizenship and Immigration)*, 2012 FC 1023 [*Westmore*] at paras 44-45.

[19] The Applicant submits that her immigration consultant's submissions were incorporated in her H&C application, and that signing the declaration on the form was analogous to providing sworn evidence, given her accompanying affidavit of interpretation.

[20] I do not find the Applicants submissions to be persuasive in light of the dearth of evidence that the Applicant provided in support of her case. *Maldonado*'s importance is fundamental to refugee law. However, the presumption of truthfulness that attaches to sworn testimony articulated in that case cannot be stretched so far as to polish an H&C application with the veneer of completeness, when central aspects being asserted are supported only by bare assertions and bereft of salient details.

[21] Requiring blanket acceptance of all bare assertions would have the effect of immunizing such applications from scrutiny on the basis of reasonable concerns as to the sufficiency of evidence presented. As Justice Grammond has noted, "evidence that stands alone may not be sufficient. Of course, there is no accepted manner of quantifying credibility, probative value and weight. Thus, it is impossible to describe in advance what "amount" of evidence is "sufficient."" (*Magonza v. Canada (Citizenship and Immigration*), 2019 FC 14 [*Magonza*] at para 33).

[22] H&C applicants must put their best foot forward and it is not the role of the Officer to fill in the blanks left by the applicant (*Brambilla v. Canada (Citizenship and Immigration)*, 2018 FC 1137 at para 19; *Singh v. Canada (Citizenship and Immigration)*, 2022 FC 339 at paras 24-37). H&C applicants are not entitled to expect and interview, and those who fail to submit supporting

or corroborating documentation without any sworn statement setting out why, do so at their peril (*Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 8-9).

[23] In this case, the immigration consultant that represented the Applicant provided little in the way of documentary support from the Applicant or those around her in support of the cornerstones of her H&C application.

[24] Rather, the Applicant relied entirely on the immigration consultant's prolix, disjointed, and at times unintelligible submissions, two short statements from which constituted the sum total of any reference to her sexual orientation appearing in the application. The Applicant herself made no sworn statement, such as in an Affidavit or Statutory Declaration, as to her sexual orientation, nor was any mention made of it by any of her friends' or third party support letters. The terse statements of her immigration consultant do not fill the gap of the lack of her own testimony, even if his submissions were translated to her through an interpreter.

[25] In both cases that the Applicant's counsel directed me to, which relied on *Maldonado* in an H&C context (*Gonzalez* and *Westmore*), the Applicants had themselves given statements explaining their hardship. In both *Gonzalez*, as well as *Chekroun* (which was in the PRRA context), the applicants' evidence was given by way of an affidavit and supporting third party statements. In *Westmore*, Justice Russell found that the officer had ignored information appearing in several places on the application form and that the officer in that case had failed to explain why the evidence that was provided in the forms was insufficient.

[26] Here, the Officer acknowledged the objective country condition evidence the Applicant presented in support of discrimination that an LGBT person could face at the hands of Chinese authorities. However, the Officer highlighted that the Applicant provided no evidence or details regarding her current relationship or her sexual orientation, or how her mother could compel her to marry. The Applicant had also previously been found not to be credible, albeit some time ago and on a different issue, but this necessarily informs the context in which the observation as to sufficiency was made.

[27] These are reasonable findings. The absence of a sworn statement by the Applicant herself was compounded by the fact that no details were provided of her relationship, nor did she provide any explanation for the dearth of evidence. The closest thing to evidence of the Applicant's sexual orientation are the following statements made by her counsel in his covering submissions, reproduced verbatim:

> Dan Lin was attracted to the same-sex partner from 2015. She has a conjugal relationship with a same-sex partner which is not able to practice in China. (January 10, 2019 submission)
>
> Ms. Dan is in a conjugal relationship with her same sex partner. Also, as she is continuously involved with LGBT community in Canada, Ms. Dan Lin would be a victim of discrimination by the Chinese authorities if she returns to China (June 18, 2019, submission)
>
> Furthermore, Ms. Dan Lin's mother is proposing Dan Lin to marry a Chinese man but she already has a relationship with a same-sex partner in Canada." (January 10, 2019 submission)

[28] This Court recently held that an Applicant cannot rely on the presumption of truthfulness of a sworn statement without providing sufficient evidence to support the key elements of a claim (*Barros Barros v. Canada (Citizenship and Immigration)*, 2022 FC 9 [*Barros Barros*] at

para 50; citing *Magonza*, at para 34, and other cases). The recent comments of Justice Kane in *Barros Barros* are also propos:

> [50] Relying on the presumption of truthfulness of a sworn statement does not avoid the need to provide sufficient evidence to support the key elements of a claim for protection. The RPD did not need to doubt the truthfulness of Mr. Barros' testimony to conclude that this testimony was insufficient to establish his claim that he continued to be pursued by Los Urabeños. As noted in *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 34, "[d]eciding whether the evidence is sufficient is a practical judgment made on a case-by-case basis." In addition, evidence may be found insufficient if it has little probative value, is uncorroborated, or lacks detail (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at paras 26–28; *Azzam v Canada (Citizenship and Immigration)*, 2019 FC 549 at para 33).

[29] I am aware of, and sensitive to, the difficulties inherent to establishing one's sexual orientation and the danger of imposing a standard of evidence that would make it unnecessarily onerous to do so (*JKL c. Canada (Citoyenneté et Immigration)*, 2021 CF 1166 [*JKL*]). However, where a person is asserting their sexual orientation as a central factor to be considered in support of an H&C claim, it is reasonable to expect some accompanying statement from the individual claiming to be a member of the LGBT community, or some supporting evidence from a partner, friends, family or others before giving any weight to a bare assertion, particularly one that is tendered by a third party -- in this case her immigration consultant, and adopted by the claimant.

[30] In *JKL*, the Applicant successfully challenged the decision of a PRRA officer who, on the basis of "insufficient evidence" of the applicant's sexual orientation, denied an application without a hearing. Yet, the *JKL* applicant had provided a detailed affidavit, as well as pictures with her former girlfriend, and a support letter from a local non-profit attesting to her sexual orientation. Furthermore, in *JKL*, the applicant was ineligible to be referred to the RPD, and had

never previously had a risk assessment. The deeply subjective nature of sexual orientation and the evidentiary challenge this can create as compared to other objectively verifiable facts or attributes was acknowledged, per the following comments of *JKL* at paras 34-36:

> [TRANSLATION]
>
> [34] It should be kept in mind that sexual orientation, when it must be established, does not lend itself easily to being proven by objective evidence in the same way as a contract, a diagnosis or nationality. It is internal to the person and deeply subjective by its very nature. This can, and indeed does, give rise to misrepresentations, for which immigration officials must be vigilant.
>
> [35] However, the mere existence of false claims cannot be allowed to raise the evidentiary threshold for these issues so high as to put them beyond the reach of deserving applicants, particularly when the result, the removal of individuals to an environment where they will be exposed to serious risks of discrimination and violence, may be catastrophic.
>
> [36] If an affidavit is insufficient and needs to be tested, so be it; there are established ways to do this. But to reject it out of hand in the absence of contradictory evidence, inconsistencies or lack of detail, without giving the person concerned a single opportunity to be heard, is not reasonable in the circumstances of this case.

[31] Unlike in *JKL*, however, there was nothing in this case other than the immigration consultant's bare assertion that the applicant was in a same-sex relationship. This is also in marked distinction to *Chekroun*, which I have been asked by the Applicant to follow.

[32] Furthermore, the applicant had ample time to either gather evidence, or explain why she could not do so. At the time of the H&C filing, she had lived in Canada for over a decade. She also had a full hearing before the RPD, who rejected her asylum claim on the basis of the credibility of her testimony with regard to her alleged religious practices in China (her refugee

claim, submitted when she was a minor, did not raise sexual orientation). In addition, she had a PRRA, which was also rejected and refused leave for judicial review, just as had occurred two years prior in her attempt to challenge her refugee claim refusal. In light of all of that, it was the Applicant's onus to put her best foot forward in her H&C application.

[33] I find the present circumstances to resemble *Ferguson v. Canada (Citizenship and Immigration)*, 2008 FC 1067 [*Ferguson*] more than the cases relied on by the Applicant. In *Ferguson*, Justice Zinn held it was reasonable for a PRRA officer to conclude that a statement by the applicant's former counsel, without supporting or corroborative evidence, was not probative under the circumstances. Justice Zinn accepted, as I do, that there are circumstances where a statement by a representative can be considered evidence, such as here given (i) the statement was connected through a Certificate of translation, and (ii) the language contained in the immigration forms regarding the truth of the information contained in the Application.

[34] However, it is reasonable that, like *Ferguson*, without more, the Officer placed little reliance and weight on the bare statement from the Applicant's immigration consultant. Deference is owed to the Officer's assessment of the weight, which, in the circumstances, was justified.

[35] I am not prepared to accept the Applicant's argument that by signing her H&C application forms, which incorporated her consultant's arguments, his assertion as to her sexual orientation can be treated equally to sworn testimony, and, consequently, that by finding the

statement insufficient, the Officer necessarily impugned her credibility. Such a finding would be inappropriate, particularly in the context of an H&C application for all the reasons noted above.

[36] As a result, contrary to the Applicant's assertions, and considering the unique context of H&C applications, where it is reasonable to expect that an assertion, sworn or otherwise, be corroborated, the Applicant is not entitled to expect an opportunity to reinforce it before a conclusion of insufficiency is drawn. This is in contrast to the refugee context, where a claimant may be entitled to an opportunity to provide an explanation for failing to provide corroborative evidence (*Senadheerage v. Canada (Citizenship and Immigration)*, 2020 FC 968 at para 36).

[37] Here, the Officer transparently and intelligibly found that insufficient evidence had been tendered to give any meaningful weight to the Applicant's assertions regarding her relationship, her sexual orientation or her forced marriage.

(b) *Religion*

[38] The Applicant also asserts that it was unreasonable for the Officer to fail to properly assess the hardship she would face in China on account of her Christianity. Similarly, the Applicant submits that her representative's statements about her religious practices in Canada were incorporated into her application by her signed declaration and that it was unreasonable not to provide a valid reason for discounting her claim of Christianity and attending Church in Canada, and to defer to RPD and PRRA decisions that addressed only past religious activity.

[39] I will not repeat my comments above as to the requisite deference to be paid to the Officer regarding the weighing of H&C factors and evidence, particularly in the face of an application the Officer had reasonably observed was not substantiated with details or evidence.

[40] In fact, the Officer's reliance on the previous history of the Applicant regarding her faith renders the decision more reasonable, not less. The fact that the Applicant has previously been found to have not provided credible testimony to the RPD regarding her religious activity necessarily forms part of the context informing the Officer's decision. Indeed, the Officer considered this, and noted that the Applicant was a minor at the time, which I agree is relevant. The Officer also noted that when she provided new evidence at her PRRA hearing, it was found to have little probative value and attributed little weight. The Officer also noted these prior decisions were not binding.

[41] It is not surprising or unreasonable, in light of the above, that to be convinced of the Applicant's current religious activities, the Officer would have a heightened expectation of evidence to substantiate her religious activities in Canada and to overcome past weaknesses. The record as to her religious activity was equally barren as regarding her other claims of hardship. Therefore, I cannot agree that the outcome or the reasoning process of the Officer was unjustified or unreasonable given her failure to provide, at minimum, her own statement, relying only on that of her immigration consultant instead.

(2) *Best interests of the child*

[42] The Applicant submits that the Officer's BIOC assessment was unreasonable because it assumed the Applicant's engagement with children had to meet a certain threshold to grant an exemption, instead of – as the law requires – conducting a global assessment where BIOC considerations may be positive but need not be determinative (*Kanthasamy*, at para 33).

[43] Further, the Applicant submits that the Officer's finding that the bond established between the Applicant and the children in question could be maintained was unreasonable to expect in the case of young children. According to the Applicant, it was unreasonable to consider that technology could replace "the touch, contact, immediacy and tenderness necessary to maintain an emotional bond." The Applicant cited a pair of Nova Scotia family law cases where BIOC considerations were at play in custody determinations where young children would be separated geographically from their parents (*Prest v. Cole*, 2003 NSSC 243 at para 40; *A.D.P. v. T.E.W.*, 2005 NSFC 22 at para 23).

[44] Once again, I am unable to agree with the Applicant. The sum total of supporting third party evidence regarding BIOC is the following statement from her friend:

> I have my second baby four months ago, I gone through a hard time with new born baby, she was a good helper to me. On her day off, she came to spent time with my kids, she helped me feed my baby and play Lego with my elder son, its really touched my heart.

[45] The Officer clearly articulated that, despite her bond with her friend's children, their primary caregivers were still there to give them love and support. Consequently, insufficient evidence had been provided to warrant giving weight to the BIOC factor of the analysis.

Contrary to the Applicant's suggestion, the Officer specifically noted that this factor was not necessarily determinative on its own.

[46] Furthermore, the Officer's finding that the Applicant's bond with the children could be maintained was clearly contextual to the limited role the Applicant played in the lives of the children in question and is not analogous to the relationship between a young child and their primary caregiver. The Officer's BIOC findings were justified, transparent and intelligible, particularly in light of the Applicant's failure to finish her own statement.

(3) *Establishment*

[47] Finally, the Applicant submits that the Officer unreasonably discounted her level of establishment by noting that it was equivalent to what would be expected of an individual under the circumstances, without explaining why it was insufficient or what would have been acceptable or justified. In support, the Applicant cites *Baco v. Canada (Citizenship and Immigration)*, 2017 FC 694 [*Baco*] at para 18, where the Court found an officer to have erred by focusing on an expected level of establishment without providing an explanation as to why it was insufficient or what would have been acceptable or adequate (see also *Chandidas v. Canada (Citizenship and Immigration)*, 2013 FC 258 [*Chandidas*] at para 80). The Applicant submits that the Officer committed the same error as in *Baco* and *Chandidas* by failing to indicate what degree of establishment would be expected of an individual in her circumstances.

[48] The Respondent submits that the jurisprudence of the Court is mixed on this issue. For example, some cases hold that it is reasonable for an H&C officer to consider whether applicants

have established “the existence or likely existence of misfortunes or other H&C considerations that are greater than those typically faced by others who apply for permanent residence in Canada” (*Huang v. Canada (Citizenship and Immigration)*, 2019 FC 265 at para 19; *Lin v. Canada (Citizenship and Immigration)*, 2021 FC 1452 at para 41). Other cases have criticized this articulation of the standard as unsupported by *Kanthasamy* which, while it describes a s 25 exemption as exceptional, does not stand for the principle that the applicant in question must demonstrate exceptional misfortune, relative to others (*Zhang v. Canada (Citizenship and Immigration)*, 2021 FC 1482 at paras 20-24; *Damian v. Canada (Citizenship and Immigration)*, 2019 FC 1158 at para 21).

[49] I do not propose to resolve any incongruity in the case law, nor do I think it is necessary to do so in the present case. Rather, I would simply note that while there may be multiple possible interpretations of the Officer’s conclusion, reproduced at paragraph 6 of these Reasons above, it is not apparent to me that the Officer discounted the Applicant’s level of establishment or imposed any particular standard on the level that was required. Nor did the Officer fail to provide justification for this observation.

[50] To the contrary, the Officer attributed some weight to the establishment factors cited by the Applicant, notably the 12 years she has spent in Canada, her integration in her community, her stable employment as a server and cashier, and her financial self-sufficiency. To the extent that the Officer was not implying that more was required of her, or faulting the Applicant for failing to meet some other unstated standard, the Officer’s comment does not run afoul of any of the jurisprudence outlined above. Indeed, having found and articulated why the Applicant had

attained the level that might be expected of someone in her circumstances, it was not unreasonable for the Officer to refrain from speculating about what might have rendered her establishment extraordinary.

[51] Ultimately, the positive establishment was not sufficient on its own to outweigh weaknesses in the other elements the Applicant raised. Indeed, establishment alone has been held by this Court to be insufficient to justify granting H&C relief (*Ntsima v. Canada (Citizenship and Immigration)*, 2021 FC 1254 at para 11; *Zlotosz v. Canada (Citizenship and Immigration)*, 2017 FC 724 at para 35).

III. Conclusion

[52] In light of the above, the application will be dismissed.

JUDGMENT in file IMM-4306-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No questions for certification were proposed and I agree that none arise.

3. No costs will be issued.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4306-20
STYLE OF CAUSE:	DAN LIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 3, 2022
JUDGMENT AND REASONS:	DINER J.
DATED:	MARCH 15, 2022

APPEARANCES:

Steven Blakey	FOR THE APPLICANT
Kevin Doyle	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Steven Blakey Lorne Waldman P.C. Toronto, Ontario	FOR THE APPLICANT
Deputy Attorney General of Canada	FOR THE RESPONDENT