Date: 20081121

Docket: IMM-1054-08

Citation: 2008 FC 1303

Toronto, Ontario, November 21, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

YI PAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of an immigration officer's refusal, dated February 25, 2008, of the applicant's request for inland processing of her application for permanent residence, on humanitarian and compassionate grounds. For the reasons that follow, I dismiss her application.

Background

[2] Yi Pan is an unmarried 45-year-old Chinese national who has been in Canada without any immigration status since 1997. Between 1985 and 1997 she lived and worked legally in the United States. Her green card, permitting her to work legally in the United States, lapsed in 2004.

[3] Yi Pan's mother and sister live in Canada. Her elderly mother suffers from numerous diseases and afflictions, while her sister is a recent cancer survivor and suffers from reduced kidney function, lupus and several other disorders. Yi Pan has devoted the last 10 years caring for the two women and providing them with emotional support. Her sister is sponsoring Yi Pan's permanent residence application.

[4] In written submissions in support of her H&C application, Yi Pan emphasized her family members' health problems, their reliance on her assistance, and her absence of ties with China after having lived 22 years in North America. However, she does have a brother who still lives in China and she has stayed in regular contact with him. She also drew attention to her education obtained at the University of California at Los Angeles, and her work experience in United States. She filed letters from her sister's and mother's physicians, character references, and family photographs, among other documents in support of her application.

[5] On February 22, 2008, Yi Pan was interviewed over the phone by an immigration officer. She provided details as to her sister's occupation, her brother's situation in China and her means of

support. The letter refusing the application for inland processing on H&C grounds was issued three days later. The relevant portions of the decision under review are the following:

> I acknowledge that having her daughter with her would provide any mother great support at that age. However, the applicant has not provided sufficient evidence to show how her mother and sister are dependent on her. With the information presented before me I am not satisfied that it would cause unusual and undeserved or disproportionate hardship for the applicant to apply for permanent residence from outside Canada. …
>
> Ms. Pan states that she has no family members or friends in China and she would face extreme hardship to adjust to life in China if she were to leave Canada. Ms. Pan further states that her mother and sister would be depressed and upset to lose the person they have relied on for the past decade. I acknowledge the fact that returning to China may cause Ms. Pan considerable challenges, especially after having lived outside China for more than twenty years. However, as per information submitted in her initial application and then confirmed a telephone interview, Ms. Pan does have a brother in China. Ms. Pan admits that she is in contact with her brother and speaks to him on the phone on a regular basis, she stresses though that she and her brother have not lived together for a long time and that her brother is the only one supporting his family. I acknowledge that it would be difficult for Ms. Pan to return to China and re-establish herself, however, since she is currently being supported by her sister and mother financially, it can be safe to say that her sister and mother would continue to support her until she is able to support herself and establish herself in China.

[6] Ms. Pan submits that the decision is unreasonable and citing *Dunsmuir v. New Brunswick*, 2008 SCC 9, says that the officer’s decision-making fails the justification, transparency and intelligibility requirements set out by the Supreme Court of Canada.

Issue

[7] The applicant essentially raises a single issue: Whether the immigration officer properly weighed the evidence and properly exercised her discretion as required under section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

Analysis

[8] As submitted by counsel for the applicant, section 25(1) of the Act provides for relief, in limited circumstances, from the consequences of the strict application of the provisions of the Act, where the consequences to the applicant or her close family, cry out on humanitarian and compassionate grounds for such relief. As is the case here, it is sometimes invoked in favour of an exception to the requirement that applications for permanent residency are to be made from outside Canada. Section 25(1) reads as follows:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

> interests of a child directly
> affected, or by public policy
> considerations.

[9] The applicant submits that the officer erred in considering the H&C application in three respects. First, the officer focused the analysis of the hardship on the applicant and failed to consider the hardship imposed on the mother and sister of the applicant. Second, the officer failed to apply the objective test set out by the Immigration Appeal Board in *Chirwa v. Canada (Minister of Citizenship and Immigration)*, [1970] I.A.B.D. No. 1. Third, the officer's determination of the applicant's ability to survive in China was based on assumption and speculation and not on the evidence.

[10] The respondent submits that the officer carefully considered all the evidence presented and that the applicant is, in reality, asking this Court to reweigh the evidence that was before the officer.

[11] Section 25(1) of the Act provides that permanent residency status may be granted if the Minister is of the opinion "that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations".

[12] The applicant submits that regard must be had to the decision in *Chirwa* when determining whether there are humanitarian and compassionate considerations which should prompt the Minister

to permit an inland application. This is not the first time this submission has been made to this Court. Generally, it has been rejected.

[13] *Chirwa* involved an application under subsection 15(1)(b)(ii) of the *Immigration Appeal Board Act*, 1966-67 (Can.), c. 90, which provided that the Board might direct that the execution of a deportation order be stayed or quashed and that the person could be granted entry or landing having regard to “the existence of compassionate or humanitarian considerations” that in its opinion warranted the granting of special relief. In its examination of the issue, the Immigration Appeal Board made the following observation:

> 27 Section 15(1)(b)(ii) gives the Court discretionary power - the words "in the opinion of" used in the subsection make this quite clear. This discretion extends to the appellant and to other persons who are closely connected with him and who are directly affected by his fate. This discretion, however, is judicial discretion, i.e., it must be founded on evidence, and the wording of the section makes it quite clear that the test is objective and not subjective. Webster's New Collegiate Dictionary defines "compassion" (fr. com - pati, to bear, suffer) as "sorrow or pity excited by the distress or misfortunes of another, sympathy". The word "pity" is given as a synonym: "A feeling for the suffering of others". While this definition implies an element of subjectivity, since emotion is involved, it is clear that no judicial decision or finding, no matter how discretionary, can be based on emotion. The meaning of the words "compassionate considerations" in the context of s. 15(1)(b)(ii) must therefore be taken to be those facts, established by the evidence, 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. The Immigration Act and the Immigration Appeal Board Act are in pari materia. It is clear that in enacting s. 15(1)(b)(ii) Parliament intended to give this Court the power to mitigate the rigidity of the law in an appropriate case, but it is equally clear that Parliament did not intend s. 15(1)(b)(ii) of the

> Immigration Appeal Board Act to be applied so widely as to destroy the essentially exclusionary nature of the Immigration Act and Regulations.
>
> 28 The same arguments apply to the phrase "humanitarian considerations". Webster defines "humanitarianism" as "Regard for the interests of mankind, benevolence". "Humane" is defined as "Having feelings and inclinations creditable to man; kind, benevolent" - again a subjective word which is used objectively in the section.

[14] I concur with the observations of Justice Beaudry in *Qiu v. Canada (Minister of Citizenship and Immigration),* 2003 FCT 15, that this Court and the Immigration Officer are to be guided as to the meaning of humanitarian and compassionate grounds from the Supreme Court of Canada's decision in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. He writes:

> [41] Contrary to the submissions of the applicant, the Member was not required to apply *Chirwa, supra*, in rendering his decision. The concept of humanitarian and compassionate grounds has been the subject of a great deal of judicial treatment since the Immigration Appeal Board of the day rendered that decision. The exercise of the discretion of the Minister and the consideration of humanitarian and compassionate grounds was amply examined by the Supreme Court of Canada in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. This decision was followed by others which added to our collective understanding of these matters.

[15] In *Baker,* Madam Justice L'Heureux-Dubé pointed out that the Manual which the Minister prepares for the use by staff in processing section 25 applications is a good indicator of how the discretion given to the Minister is to be exercised. It is significant that the Manual provides that

humanitarian and compassionate considerations refer to “unusual and underserved” or “disproportionate” hardship being imposed on the applicant in relation to others who are being asked to leave Canada. As a consequence, as was noted by Justice Pelletier in *Irimie v. Canada (Minister of Citizenship and Immigration)*, 10 Imm. L.R. (3d) 206, [2000] F.C.J. No. 1906 (Q.L.), something more is required by way of hardship than those consequences that are inherent on being asked to leave a country in which one has resided for some time. This analysis does provide an objective basis for the required decision and, in my view, one that is more appropriate and more readily applicable than that expressed in *Chirwa*.

[16] The applicant further submitted that the *Chirwa* test is more appropriate when looking at the hardship that would befall the family members, in this case the mother and sister, who would be left behind in Canada without the support of the applicant. She submits that the hardship they will experience must also be examined and taken into consideration and, in so doing, the appropriate measure is not “unusual and underserved” or “disproportionate” hardship.

[17] In my view, absent a finding of dependency by her mother and sister, the hardship occasioned by the applicant’s removal, as difficult for the family as it will no doubt be, cannot be said to go beyond the natural hardship of family separation occasioned by the removal of a family member. The officer did consider the evidence presented and concluded that “the applicant has not provided sufficient evidence to show how her mother and sister are dependent on her”.

[18] I have examined the officer's conclusion that dependency was not established and find that it is a reasonable conclusion based on the record. The letters submitted from her family member's medical doctors do not establish that either her sister or mother are dependent on the applicant. Her mother's doctor writes that "it would be <u>advisable</u> for her to get a close relative to take care of her" (emphasis added). This is far from indicating either that such care is required or that it cannot be provided by someone other than a family member. In any event, as the respondent noted, even after the applicant's removal, the mother will still have one daughter remaining in Canada to provide family care, if needed. With respect to the sister, her doctor writes that she "should have someone or family member to assist her in her daily housework" The evidence before the officer was that the sister is engaged in full time employment and the assistance offered by the applicant involves helping her to attend her medical appointments. As such, the officer's conclusion that there is nothing in the evidence to establish a degree of dependency cannot be said to be an unreasonable finding.

[19] The applicant further submits that she will suffer undue or disproportionate hardship in returning to China after having been absent for more than 20 years. Undoubtedly there will be an adjustment; however, she does have family living in China – and more importantly family with whom she has maintained contact during her long absence from her home country. The officer also considered the applicant's education and experience and, in my view, reasonably concluded that she should be able to re-establish herself there within a reasonable time period. The applicant submits that the officer engaged in speculation when she concluded that the applicant's mother and sister would offer financial support to her until she re-established herself in China. Based on the fact that

they have financially supported the applicant for the last 10 years, that is not an unreasonable conclusion for the officer to have reached. In any event, the burden was on the applicant and she provided no evidence that there would not be financial support for her in China for the period until she re-established herself.

[20] Having reviewed all of the materials in the Certified Tribunal Record and the decision under review, I conclude that the decision is reasonable and fair based on the evidence presented. Counsel submitted that the officer failed to weigh the evidence on the "scales of sensitivity". I disagree. The officer looked and considered all the evidence offered by the applicant and, in my view, her decision was reasonable and met the test set out in *Dunsmuir*.

[21] The applicant submitted the following question for certification: Whether *Chirwa* is the more appropriate test to utilize when there are persons other than the applicant affected by the applicant's removal from Canada, rather than the undeserved, disproportionate or unusual hardship test in *Baker*, given that *Chirwa* was an interpretation given by a court.

[22] I am of the view that the question posed would not be dispositive of an appeal in this matter. First, there was no evidence of harm to the family members established here even on the C*hirwa* test and second, the decision turns on its unique facts. In any event, *Baker* makes it clear that it applies even when there are other family members left behind. Madam Justice L'Heureux-Dubé, with reference to the Manual's guidelines wrote: "they emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision

would impose upon the claimant or close family members, and should consider as an important factor the connections between family members" (emphasis added). Accordingly, the question posed will not be certified.

<u>JUDGMENT</u>

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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