Federal Court Cour fédérale

Date: 20120719

Docket: IMM-7826-11

Citation: 2012 FC 904

Ottawa, Ontario, July 19, 2012

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

XUE MEI LI
QIAN HUI DENG

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants, Xue Mei Li [the Female Applicant] and Qian Hui Deng [the Male Applicant] [together, the Applicants], apply for judicial review of a decision of an Immigration Officer [the Officer] dated October 6, 2011 [the Decision] which denied their application for Humanitarian and Compassionate [H&C] relief under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. This application is made pursuant to subsection 72(1) of the Act.

[2] There was a dispute between the parties about the nature of the application made under subsection 25(1) of the IRPA. It reads:

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, 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 obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**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, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[3] Counsel for the Applicants said that he applied on his clients' behalf for an exemption from the IRPA permitting them to apply for permanent residence status from within Canada [the Exemption] and for the grant of permanent residence status. On the other hand, counsel for the Respondent said that the application was only for an Exemption.

[4] On reviewing the file, it is clear that the Applicants applied both for the Exemption and for permanent residence. They paid the requested fees and submitted application forms for permanent residence.

[5] Further correspondence from the Respondent repeatedly referred to the Applicants "application for permanent residence from within Canada" and this was the heading the Applicants' counsel used when he wrote sending in their applications and making submissions on their behalf for humanitarian and compassionate relief [the Submissions].

[6] This conclusion means that the Decision refused the Applicants both the Exemption and permanent residence status.

THE FACTS

[7] The Applicants are Chinese citizens whose son and only child, Shiming Deng [the Son], was a permanent resident in Canada. He committed suicide here in 2005 shortly after the Immigration and Refugee Board [the Board] issued a removal order against him.

[8] The Son came to Canada from China in 1999 and became a permanent resident following a sponsorship application by his then wife. He suffered from schizophrenia. In August 2004, he was convicted of aggravated assault and sentenced to one day in prison and three years of probation. He returned to China while on probation (with the consent of his probation officer) in November 2004**,** but returned to Canada in January 2005. He went back to China again shortly thereafter and stayed until October 26, 2005. On his return, the Son was questioned by a port of entry officer about his criminal conviction. He was referred to an admissibility hearing and his Chinese passport was seized.

[9] The admissibility hearing opened on November 14, 2005, but was adjourned for one week because the Son was unrepresented. At the conclusion of the first part of the hearing, the Son asked to have his passport returned so that he could return to China. This request was denied. The hearing

resumed on November 22, 2005 and the Board concluded that the Son was inadmissible and issued a deportation order. The Son committed suicide later that day.

[10] The Applicants claim that the RCMP failed to notify the Chinese consulate in a timely way about the Son's death. They did not learn of his passing until December 22, 2005. By that time, he had been buried.

[11] The Applicants traveled to Canada on January 18, 2007, to find out more about the events leading up to their Son's death. The Male Applicant filed an application in Federal Court on October 12, 2007 for leave and for judicial review of the decision to refer the Son to an admissibility hearing and to confiscate his passport. In his application for leave, the Male Applicant requested an extension of time to file the application. However, the extension was denied.

[12] The Male Applicant also filed a civil action in the Federal Court on November 22, 2007 claiming damages for negligence, abuse of power and breach of statutory duty in relation to the Son's death. This action was discontinued on September 29, 2010.

[13] On December 15, 2010, the Applicants filed an application for permanent residence from within Canada based on H&C grounds, because they want to reside near the Son's burial site and be buried in the same cemetery when they die.

THE DECISION

[14] The Officer found that the Applicants' circumstances do not constitute unusual and undeserved or disproportionate hardship.

[15] The Officer rejected the Applicants' submission that, had their son lived, he would have sponsored them under the Family Class, noting that "no one really knows if he would have sponsored them or not". The Officer observed that during his admissibility hearing, the Son had asked for his passport back so that he could relinquish his status [in Canada] and return to his parents in China. The Officer therefore concluded that he could not give the Applicants' submission about sponsorship "much weight".

[16] The Male Applicant also stated that he needed stay in Canada in order to hide the fact that the Son committed suicide. He had not informed his family and friends in China and feared that the information would reach his 90 year old mother and cause her death. However, the Officer noted that the Male Applicant had returned to China since the Son's death and therefore gave little weight to his alleged need to stay in Canada.

[17] The Officer considered the Applicants' submission that they could not disinter the Son and take his remains back to China due to cultural norms. However, the Officer was not satisfied that remaining in Canada would help the Applicants deal with their grief. She noted that counselling for the Female Applicant has been unsuccessful, and being near the Son's grave for almost five years

has not helped. Further, the Applicants have a support network of family in China but no relatives in Canada.

[18] The Officer observed that the Applicants would likely be granted visitors' visas in the future so that they could visit the gravesite and concluded that although the Applicants had demonstrated some level of establishment in Canada, it would not be a hardship for them to return to China.

THE ISSUE – Was hardship properly assessed?

[19] The Submissions show that the hardship faced by the Applicants is of two kinds. First, the continuing deep sorrow and grief caused by their Son's death and second, a feeling that, in some way, they are to blame and need to atone for his suicide by staying near his grave and eventually having themselves buried close by. In my view, paras 3 and 6 of the Decision show that the Officer considered both the Applicants' deep sorrow and their need for redemption.

[20] However, the Applicants say that all aspects of their alleged hardship were not addressed. The Submissions alleged that the Son's passport was wrongfully taken, that it was not returned when he asked for it and that he was sent to the admissibility hearing by an officer who lacked the authority to make that decision. It was also alleged that the RCMP failed to advise the Chinese consulate of his death before he was buried. None of these allegations were mentioned in the Decision.

[21] The Respondent does not accept that the passport was improperly seized and retained but does acknowledge that the admissibility hearing was convoked by an officer who lacked authority. However, the Respondent says that since there is no issue that the Son was criminally inadmissible, the error is immaterial because an admissibility hearing would eventually have been held. The Respondent also says that although it is unfortunate that his parents did not receive timely notice of the Son's death, there is nothing in the Submissions to suggest that the RCMP acted wrongfully.

DISCUSSION

[22] I do not accept the Applicants' submission that the Respondent wrongfully confiscated and held the Son's passport nor am I persuaded that calling him to a hearing was a material error given that a hearing was inevitable. On the other hand, I am also not persuaded by the Respondent's submission that the hardship faced by the Son is not relevant to his parents' application for H&C relief. The relevance is to the issue of whether the hardship they face (the grief and the need for redemption) is undeserved. In my view when the Officer referred to the "tragic way he lost his life" she was alluding to the circumstances of the suicide and the fact that it was beyond the Applicants' control. This meant that the Applicants' hardship was "undeserved".

[23] However, the Applicants want their Son's hardship (i.e. the reasons for his suicide) to be considered in another way. They are essentially saying to the Respondent that, since it contributed to their Son's suicide, their hardship is unusual and they should be granted permanent residence.

[24] However, since the allegations of wrongful conduct are unsubstantiated, this submission cannot succeed.

CONCLUSION

[25] I find that the Decision, which the Officer acknowledged was difficult, falls within a range of reasonable outcomes and, for that reason, the application is dismissed.

CERTIFICATION

[26] The Applicant has proposed two questions for certification under section 74 of the Act. I will deal with them in turn:

> (i) *When an applicant for permanent residence status in Canada is requesting discretionary relief on humanitarian and compassionate grounds because she clearly does not fall under an eligible class, as in the instant case and Tran v Canada (Citizenship and Immigration) 2007 FC 806, it is still necessary to determine first the issue of granting an exemption to the legislative requirement of applying from outside Canada?*

In my view, the answer to this question would not be dispositive in this case as the questions of the exemption and the permanent residence were both before the Officer.

> (ii) *As case law has held the test for granting a discretionary exemption to the legislative requirement of applying from outside Canada is concerned with hardship only during the application process, should a different test be adopted for an applicant whose hardship is the more long-term hardship of not receiving permanent residence status?*

This case was not disposed of on the basis of hardship to the date of the H&C application. The Officer clearly considered future hardship and the possibility of visitors' visas. Accordingly, the answer to this question would not be dispositive.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	LI et al v MCI
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APPEARANCES:

Lawrence Wong	FOR THE APPLICANT
Banafsheh Sokhansanj	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lawrence Wong & Associates Richmond, British Columbia	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT