Federal Court  Cour fédérale

Date: 20131220

Docket: IMM-12029-12

Citation: 2013 FC 1277

Ottawa, Ontario, December 20, 2013

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

SHANGRONG LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application pursuant to s 72.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of a decision of Citizenship and Immigration Canada [CIC] dated August 24, 2012, refusing the applicant's request for permanent residence on humanitarian and compassionate [H&C] grounds. The applicant asks for CIC's decision to be quashed and for the matter to be remitted to CIC for re-consideration by a different officer.

[2] For the following reasons, the application is denied.

BACKGROUND

[3] The applicant, Mr Shangrong Li, is a 56-year old citizen of China, born in 1957. He traveled to Canada on a visitor visa, arriving at Pearson International Airport on June 10, 1999, and leaving his wife and two adult sons in China. He filed a claim for refugee protection, which was refused by the Refugee Protection Division [RPD] on August 3, 2000. Leave to seek judicial review of this negative decision was denied on August 29, 2000.

[4] The applicant also submitted a claim for permanent residence from within Canada in June 2003, which was denied on March 17, 2005. He filed a pre-removal risk assessment, which was refused on May 26, 2008.

[5] He submitted a request for exemption from the permanent resident visa requirement on H&C grounds on June 16, 2003, which was refused in March 2005.

[6] He subsequently submitted a second H&C application, and there is some ambiguity in the record and party submissions as to what was submitted and when. The applicant's record includes a completed Request for Exemption From Permanent Resident Visa Requirement form (IMM 5001 (08-2004) E), which is stamped as received by CIC on February 24, 2005. Volume 1 of the general documents includes a completed Application For Permanent Residence From Within Canada-Humanitarian and Compassionate Considerations form (IMM 5001 (12-2006) E), stamped as received by CIC on November 3, 2008. The applicant pleads that he submitted his application in

February 2005, and the respondent pleads that the application was received by CIC in November 2008.

[7] In any case, in his H&C application the applicant alleged that he would face persecution by the Chinese government if he were returned due to his anti-government, pro-human rights, pro-democracy and pro-freedom activities. He also alleged that he would face difficulty in China as a practicing Christian, and that he would not be able to attend an official registered church in China, which would constitute hardship in the form of religious persecution. Finally, he alleged that he would face difficulty because of his establishment in Canada.

DECISION UNDER REVIEW

[8] The Immigration Officer ("the Officer") reviewed the applicant's H&C application on two grounds – establishment in Canada and adverse country conditions – and concluded that the applicant had not demonstrated that he would face unusual and undeserved or disproportionate hardship upon return to China.

Establishment in Canada

[9] The Officer noted that a degree of establishment in Canada is to be expected of someone who has been in Canada for as long as the applicant, but nevertheless that may not amount to unusual and undeserved or disproportionate hardship.

[10] The Officer noted the applicant's work experience and his improvement of his English skills. He also observed that the applicant had submitted tax returns for the previous five years, and

made charitable donations. He also noted the applicant's membership in and involvement with a local church.

[11] The Officer also noted the positive letters of support from the applicant's friends and acquaintances.

[12] Ultimately, the Officer concluded, without providing any indication as to the evidence he relied upon, that the applicant had not integrated into Canadian society to the extent that his departure would cause an unusual and undeserved, or disproportionate hardship.

Adverse country conditions

[13] The Officer noted that the applicant has submitted that he will experience hardship because he will not be able to attend an official church in China because those churches are not truly Christian, and that if he attends an unregistered church, he will face hardship in the form of persecution.

[14] The Officer observed that the material submitted by the applicant demonstrates that there is persecution of pastors and religious leaders by the Chinese government, but not of people like the applicant, mere practicing Christians. There was no evidence that the applicant had been persecuted for his religious beliefs by the Chinese government in the past.

[15] Furthermore, the Officer noted that a 2007 China Aid Association report states that the applicant's region of origin, Liaoning, had the lowest rate of Christians detained or arrested across

19 provinces. He also noted that the Chinese government implements periodic crackdowns on unregistered churches, but that a US Department of State report does not contain information about unregistered Christians facing arrest and detention in Liaoning in 2010 or 2011.

[16] The Officer concluded that the applicant could choose to attend an unregistered Christian church upon return to China, and that he will not face unusual, undeserved or disproportionate hardship in the form of religious persecution.

Return to China

[17] The Officer noted that the applicant was born, raised and educated in China, and his wife, two sons and brother continue to reside in Liaoning, where he is from. There was no evidence demonstrating that he would not be able to support himself should be return to China, and it was reasonable to believe that his family in China would be able to provide assistance upon return.

ISSUES

[18] The issues raised in this matter are as follows:

1. Was the Officer required to request an update of his application from the applicant?
2. Does the failure by the Officer to provide adequate reasons explaining the rejection of the applicant's establishment argument constitute grounds for setting aside the decision?

STANDARD OF REVIEW

[19] The parties agree that the standard of review is reasonableness (see *Phathong v Canada (Citizenship and Immigration)*, 2010 FC 927 at paras 7, 10).

ANALYSIS

Issue #1: Was the Officer required to request an update of his application from the applicant?

[20] The applicant claims that the failure of the immigration officer to provide him with an opportunity to update the information contained in his H&C application of February 2005 constitutes a breach of natural justice.

[21] There is little merit in this argument inasmuch as the new evidence that the applicant wished to bring to the attention of the Officer was that he had separated from his wife in 1995. This information was not contained in his original application. In addition, the application contains a provision requiring the applicant to report changes to the answers on his application prior to being granted permanent resident status.

[22] Accordingly, there was no information for the applicant to update, given his failure to include accurate information on his marital status in his original application, which he chose not to bring to the attention of CIC until it suited him; see *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635 at paragraph 8:

> [8] HNC applicants have no right or legitimate expectation that they will be interviewed. And, since applicants have the onus of establishing the facts on which their claim rests, they omit pertinent information from their written submissions at their peril.

[23] I also reject the argument that there is any duty or legitimate expectation created by the conduct of other officers to provide an opportunity to applicants to update their information on the basis of insufficiency of information (see *Law v Canada (Citizenship and Immigration)*, 2009 FC 79 at para 18, citing *Melchor v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1327).

Issue #2: Does the failure by the Officer to provide adequate reasons explaining the rejection of the applicant's establishment argument constitute grounds for setting aside the decision?

[24] The respondent's counsel acknowledges that the main reason the applicant's application was rejected was that his establishment in Canada was not demonstrative of unusual and undeserved, or disproportionate hardship. I am aware of the jurisprudence cited by the applicant setting aside decisions on the basis of inadequacy of reasons, which failed to explain on the evidence provided why a finding of sufficient establishment was rejected (see *Tindale v Canada (Citizenship and Immigration)*, 2012 FC 236; *Adu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 565; *Pramauntanyath v Canada (Minister of Citizenship and Immigration)*, 2005 FC 604).

[25] Nevertheless, I am of the view that little weight may be given to evidence on establishment in circumstances where it results from the applicant's choice to remain in Canada without status, and not from circumstances beyond his control. In this regard, I rely upon the decision of Justice Mosley in *Singh v Canada (Citizenship and Immigration)*, 2011 FC 813, citing the decision of Justice de Montigny in *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356. Although the key issue in *Singh* and *Serda* was the fettering of the officer's discretion, the underlying reasoning strongly supports the proposition that little weight should be accorded to establishment when it results from the applicant's choice to remain in Canada. I quote from the decision of Justice Mosley at paragraph 10:

[10] The officer did not fetter his discretion or fail to consider the post-leave-decision evidence. Rather, the officer considered it and decided to give it no weight because it resulted from the applicant's choice to remain in Canada without status and not from circumstances beyond his control. As counsel for the applicant fairly acknowledged, the officer's reasons are commendably clear on this point.

[…]

[13] Although the officer did not consider the applicant's establishment in light of the fact that his application took almost five and a half years to process, this failure is not a reviewable error as the post-leave decision evidence does not change the outcome of the decision. In his consideration of the post-leave-decision establishment, the officer found that, had the establishment resulted from circumstances beyond the applicant's control, he would have accorded it "some positive weight." Notably, the officer stops short of saying that the evidence would lead to a different conclusion or that it would be determinative of his application. In any event, establishment is only one of the factors to be considered in assessing an H&C application, and the applicant's establishment following the leave decision does not appear to be sufficient to warrant H&C relief on its own.

[14] In my view, the decision in Serda v Canada (Minister of Citizenship and Immigration), 2006 FC 356 (CanLII), 2006 FC 356, 146 ACWS (3d) 1057 is determinative of this application. In that decision, Mr. Justice Yves de Montigny was faced with the same issue that is now before me – that is, whether the officer fettered her discretion in not considering evidence of establishment after the applicants became subject to a removal order. At paragraphs 19 to 24, Justice de Montigny found that:

> The Applicants, knowing that further time in Canada waiting for their legal processes to be completed would mean more alleged difficulty in returning to their home country, and knowing that they had been ordered to be removed, made the choice to stay anyway. This cannot be equated to a "prolonged inability to leave Canada", which is one of the situations where the Applicant's degree of establishment may be a factor to be considered pursuant to section 11.2 of the IP5 Manual.
>
> One of the cornerstones of the Immigration and Refugee Protection Act is the requirement that

> persons who wish to live permanently in Canada must, prior to their arrival in Canada, submit their application outside Canada and qualify for, and obtain, a permanent resident visa. Section 25 of the Act gives to the Minister the flexibility to approve deserving cases for processing within Canada. This is clearly meant to be an exceptional remedy […]
>
> It would obviously defeat the purpose of the Act if the longer an applicant was to live illegally in Canada, the better his or her chances were to be allowed to stay permanently, even though he or she would not otherwise qualify as a refugee or permanent resident. This circular argument was indeed considered by the H & C officer, but not accepted; it doesn't strike me as being an unreasonable conclusion. […]
>
> [I]t cannot be said that the exercise of all the legal recourses provided by the IRPA are circumstances beyond the control of the Applicant. A failed refugee claimant is certainly entitled to use all the legal remedies at his or her disposal, but he or she must do so knowing full well that the removal will be more painful if it eventually comes to it. […]

[Emphasis added]

[26] In the case at hand, the Officer noted that "unusual and undeserved hardship involves a hardship not anticipated by the Act or Regulations; and in most cases a hardship resulting from circumstances beyond the person's control". He also indicated that the analysis should discern whether the removal of the applicant to China would amount to unusual and undeserved or disproportionate hardship, in recognition that establishment was just one of the factors which had to be balanced against the personal circumstances of facing the applicant upon removal to China.

[27] While the Officer did not specifically indicate that little weight would be given to the degree of integration attained by the applicant, I find the conclusions of Justices Mosley and de Montigny

persuasive in requiring the Board to discount to some degree the fact that the accumulation of years in Canada upon which the applicant's establishment is based were a result of his decision to remain, and therefore not beyond his control.

[28] This factor must be considered with the unchallenged conclusions of the Officer that no adverse country conditions prevailed in China, in addition to the generally positive societal, working, family and emotional conditions facing the applicant upon return to a country where he was born, raised and educated.

[29] In consideration of both justification and outcome, I am satisfied that the Officer's decision meets the exigencies of reasonableness and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

CONCLUSION

[30] For the reasons given above, this application for judicial review is denied. No question was proposed for certification and none arises.

JUDGMENT

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

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-12029-12
STYLE OF CAUSE:	SHANGRONG LI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 10, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	ANNIS J.
DATED:	DECEMBER 20, 2013

APPEARANCES:

Donald M. Greenbaum	FOR THE APPLICANT
Christopher Ezrin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Donald M. Greenbaum, QC Barrister, Solicitor & Notary Public Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT