Federal Court  Cour fédérale

Date: 20140805

Docket: IMM-2756-13

Citation: 2014 FC 778

Ottawa, Ontario, August 5, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

YU XUAN WENG, A MINOR, BY HER LITIGATION GUARDIAN WU SEN WENG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of a visa officer (Visa Officer) of the Hong Kong office of the Canadian Consulate Section dated March 21, 2013, in which the Visa Officer determined that pursuant to s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) there were insufficient humanitarian and compassionate (H&C) grounds to grant the Applicant permanent residence or an exemption from a family class exclusion arising

from s. 117(9)(d) the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPA Regulations).

Background

[2] The Applicant is a twelve year old minor child and is a citizen of China.

[3] In February 2001 the Applicant's mother submitted an application for permanent residence in Canada under the skilled worker class. She was an engineer and her husband, the Applicant's father, was an accountant, both were citizens of China and worked for state owned enterprises. Their first daughter, Angela, had been born on July 14, 1999. The Applicant's mother became pregnant again in the fall of 2001 which was contrary to China's one child policy. Her parents took steps to hide the pregnancy and the Applicant was born on July 20, 2002. The day after the Applicant's birth her parents arranged for her to be cared for by a family in a remote village where she stayed until she was 18 months old. Her mother then took her to live with her maternal grandparents. When she was three years old her paternal grandparents took over her care. Her parents registered her birth but did not change their hukou (household registration).

[4] The Applicant's parents immigrated to Canada together with her older sister on July 12, 2006. Her parents claim that their immigration consultant advised them not to update and declare the Applicant's birth in their permanent resident application as they could sponsor her once they were in Canada. They were also afraid that her birth would be discovered by the Chinese government if they made the declaration. Nor did they declare the Applicant as a

dependant when they arrived in Canada in July 2006. Soon after they landed they applied to sponsor the Applicant so that she could join them in Canada. After five years, on September 5, 2011, her application was denied.

[5] Meanwhile, the Applicant's parents had a third child, a son who was born in Canada on January 10, 2008. The Applicant's father and older sister became Canadian citizens. Her mother also wishes to do so but her travel back and forth to China to be with the Applicant has precluded this. The family has visited the Applicant on several occasions. They returned to China to be with her, staying there from 2009 to 2011. The Applicant's parents and sister returned to Canada in June 2011 to again try to resolve the matter of the Applicant's status. Her mother and sister returned to China in August 2011 to care for the Applicant.

[6] In December 2011 the Applicant's father made a second application to sponsor her on H&C grounds. In May 2012 he was advised that he was ineligible to be a sponsor as he had not declared the Applicant in his own permanent resident application. His sponsorship application would be considered only if the Visa Officer decided to process the Applicant's permanent residence application based on H&C grounds. The Visa Officer rejected the H&C application on March 21, 2013. That decision is the subject of this judicial review.

Decision Under Review

[7] The Visa Officer stated that he was not satisfied that sufficient H&C grounds existed to grant an exemption to the Applicant's s. 117(9)(d) exclusion. The Field Operations Support System (FOSS) notes recited the background facts of the Applicant and her family's status and

the reasons given by her parents for not disclosing her existence. The Visa Officer stated that the Applicant's parents had been informed on January 10, 2006, through the visa pick up letter, of the importance of advising the visa office of any changes to their family status before collecting their visas. Further, because of the moderate English proficiency of the Applicant's mother, it was implausible that she was unaware of this instruction. The Visa Officer noted that if the local Family Planning Commission had not known of or approved the Applicant's birth then her parents would not have been able to obtain a birth certificate, which they did within two weeks of her birth. With a birth certificate, she could be registered in the hukuo.

[8] The Visa Officer found that there was no evidence to indicate the level of financial support provided by the sponsor, that there was insufficient evidence that the Applicant is unable to continue her education in China, and, that there was "insufficient evidence… to demonstrate that the applicant suffers unusual and undeserved or disproportionate hardship as a result of the separation from the sponsor or as a result of the applicant residing in PRC." There was also no apparent impediment to the Applicant's family reuniting with her in China and, in fact, her mother and siblings had returned to China in 2009. The Applicant is living in the country in which she was born and raised and where she has family including her grandparents. The Visa Officer stated that there was insufficient evidence to demonstrate that the Applicant is unable to continue living with her relatives in China. Further, that he had fully reviewed the Applicant's H&C submissions and considered the best interests of the child, but was not satisfied that sufficient H&C grounds existed to grant an exemption request to overcome the Applicant's exclusion under s. 117(9)(d) of the IRPA Regulations and, therefore, refused the application.

Legislative Background

[9] Pursuant to s. 13(1) of the IRPA, a Canadian citizen or a permanent resident may, subject to the regulations, sponsor a foreign national who is a member of the family class. Subsection 117(1)(b) of the IRPA Regulations states that a foreign national dependant child of a sponsor is a member of the family class. However, pursuant to s. 117(9)(d), a foreign national shall not be considered to be a member of the family class by virtue of their relationship to the sponsor if the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

[10] Subsection 25(1) of the IRPA states that the Minister may, on the request of a foreign national outside of Canada who applies for permanent resident status, examine the circumstances surrounding the foreign national and may grant the foreign national permanent residence status or an exception from any applicable criteria or obligations of the IRPA if the Minister is of the opinion that it is justified by H&C considerations relating to the foreign national, taking into account the best interests of a child directly affected.

Issues

[11] I would frame the issues as follows:

1. Was the Visa Officer's decision reasonable?
2. Was the Applicant afforded a fair process?

Standard of Review

[12] A standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 57; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18 [*Kisana*]).

[13] The standard of review of a visa officer's H&C decision concerning issues of mixed fact and law, including the application of the best interests of the child analysis to the facts, is reasonableness (*Figueroa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 673 at para 24; *Hurtado v Canada (Minister of Citizenship and Immigration)*, 2007 FC 552 at para 7; *Husain v Canada (Minister of Citizenship and Immigration)*, 2011 FC 451 at paras 11-13 [*Husain*]).

[14] The standard of review for questions of procedural fairness is correctness (*George v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1240 at para 30; *Hamza v Canada (Minister of Citizenship and Immigration)*, 2013 FC 264 at para 13; *Kinobe v Canada (Minister of Citizenship and Immigration)*, 2011 FC 845 at para 25).

Positions of the Parties

Applicant's Position

[15] The Applicant submits, amongst other things, that the Visa Officer failed to consider her best interests as well as those of her siblings, made an unreasonable decision without regard to the evidence or the legislative objectives of the IRPA, and, failed to observe procedural fairness.

[16] More specifically, that the Visa Officer was not alive, alert and sensitive to the best interests of the three children involved in this matter and failed to consider their individual needs or the evidence submitted by the family. Further, that the Visa Officer wrongly applied the "undue hardship test" in assessing the best interests of the children, and failed to consider if it was in the Applicant's best interests to come to Canada to be with her family or the right of the Canadian children to remain in Canada. The Visa Officer also did not consider the evidence of the Applicant's family or human rights reports concerning the difficulties encountered by "illegal children" in China. Instead, the Visa Officer focused excessively on the non-disclosure of the Applicant in her parent's permanent resident applications, ignoring the fact that they had nothing to gain by the non-disclosure and that, had they disclosed her existence, they still would have been able to immigrate to Canada. There was also a breach of procedural fairness as the Visa Officer questioned the authenticity of the birth certificate yet failed to raise this with the Applicant's parents.

Respondent's Position

[17] The Respondent submits that there is no evidence that the Applicant has ever faced challenges in attending school in China nor is there evidence that her siblings, who it was alleged would be considered to be foreigners in China, would be barred from attending school there. Further, while the Applicant's parents and siblings may prefer life in Canada, the parents made a private decision to return to China to be closer to the Applicant. While the Applicant's parents asserted that not granting H&C relief would tear the family apart, the family is voluntarily living in China. Thus, there was no need for H&C relief. Further, the Visa Officer did not find the parents' fear of the violation of the one child policy to be credible and, therefore, the circumstances did not warrant the waiver of the s. 117(9)(d) bar.

[18] The Respondent submits, amongst other things, that while undeserved hardship may not be appropriate for assessing best interests of the child considerations, which the Respondent does not concede, such considerations must meet some threshold of hardship to warrant relief. In any event, the Visa Officer weighed the hardship that the Applicant would face in China against the benefits that she might receive should she obtain permanent residence in Canada, thereby demonstrating a best interests of the child analysis as required by the legislation. Further, the Visa Officer was not required to consider whether it was in her best interests to come to Canada as she is not a Canadian citizen. The question is whether the best interests considerations would favour her coming to Canada and whether they reach the appropriate threshold of hardship to warrant H&C relief. No reviewable error arose from the Visa Officer's analysis.

[19] The Respondent submits that there was also no error in failing to consider the best interests of the two Canadian siblings as they were not directly affected by the application. They can return to Canada at anytime. In any event, the assessment of the best interests of the child factors for the Applicant equally applies to the siblings. And, while the Applicant may have asserted that she will face a hardship, she did not adduce corresponding proof of this.

[20] The Visa Officer did not ignore the documentary evidence concerning unregistered children, rather, it was not put before the Visa Officer. And, in any event, the Visa Officer did not accept that the Applicant could not be registered in China. The Respondent submits that the Visa Officer cannot be faulted for considering the rationale of the parents' exclusion of the Applicant from their permanent resident applications as it is relevant to the merits of undue hardship as to the legitimacy of the decision and whether the decision to do so arose from factors beyond the Applicant's control. As to the family reunification objectives of the IRPA, this contention fails because the family is residing as a whole in China, family unity is therefore not at issue. As to procedural fairness, the Visa Officer had no concerns as to the authenticity of the birth certificate and, therefore, had no obligation to disclose it.

Analysis

Issue 1: Was the Visa Officer's decision reasonable?

[21] In my view, the Visa Officer may have applied the wrong legal test, in substance and in form, by requiring hardship that is "unusual and undeserved or disproportionate," rather than evaluating what was actually in the Applicant's best interests and weighing that against the other

H&C factors. However, what is apparent is that the Visa Officer reached a decision without regard to the evidence before him and, further, failed to account for the effect of the decision on the Applicant's siblings.

[22] The Respondent suggests that it is appropriate to apply a hardship analysis to the best interests of the child, in the sense of asking whether the hardship of having to obtain a visa from outside Canada would cause the applicant unusual and undeserved or disproportionate hardship. This is the general standard that applies to an H&C application (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 23, leave to appeal to SCC denied [2002] SCCA No 220; see also *Phyang v Canada (Minister of Citizenship and Immigration)*, 2014 FC 81 at para 17 [*Phyang*]).

[23] However, jurisprudence has held that it is unreasonable to import a hardship analysis when considering the best interests of the child (*Phyang*, above, at para 29; *Sinniah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1285 at paras 59-63; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 9 [*Hawthorne*]). As the Court noted in *Hawthorne*, above, at para 9, "children will rarely, if ever, be deserving of any hardship." There the correct test is described as being alert, alive and sensitive to the child's circumstances. Incorporating the "unusual, undeserved or disproportionate hardship" threshold into the analysis of the best interests of the child has been characterized in a number of decisions of this Court as an error in law (*Arulraj v Canada (Minister of Citizenship and Immigration)*, 2006 FC 529; *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 [*Williams*]).

[24] That said, an officer's use of the language of "hardship" does not necessarily mean that a threshold analysis was applied. The reviewing court must consider the substance of the decision to determine whether the officer applied an improper hardship threshold analysis (*Kisana*, above, at para 30, *Williams*, above; *Webb v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1060 at para 11).

[25] In the context of the consideration of the best interests of the child analysis, this case is factually somewhat unusual as the Applicant's parents and siblings are all either Canadian citizens or permanent residents and there is no question of removal (*Rezki v Canada (Minister of Citizenship and Immigration)* 2014 FC 492). However, as described by Justice Zinn in *Ali v Canada (Minister of Citizenship and Immigration)*, 2014 FC 469, in any case the degree of hardship to the child must be assessed and weighed:

> [10] Accordingly, part of the officer's task in determining what is in the best interests of the children is to assess the likely degree of hardship to the child if the child's parents are removed from Canada. Where the child too is subject to the removal order, the officer must also assess the hardship the child will suffer in being removed with the parents. Where the child has status to remain in Canada, as was the case in *Hawthorne*, but not the case here, the officer is also to consider the hardship if the child leaves with the parents. *In any case, the issue for the officer is to assess the degree of hardship to the child and weigh that hardship against the other relevant factors, the ultimate goal being to determine what is in the best interests of that child. At that stage, the interests of the child should be weighed against all of the other factors under consideration* to determine if removal constitutes "undue, undeserved, or disproportionate hardship."
>
> [Emphasis added]

[26] In my view, regardless of the test applied by the Visa Officer, the crucial error here was the failure to consider relevant evidence in the record which directly contradicted the Visa Officer's findings concerning the best interests of the Applicant.

[27] In that regard, it is true that a decision-maker is not under an obligation to mention all of the evidence in its decision. However, the more important the evidence that is not mentioned, the more willing a court may be to infer an erroneous finding of fact without regard to the evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ 1425 at paras 16-17).

[28] In the present case, the only evidence that the Visa Officer mentioned was the Applicant's birth certificate. He concluded that since the Applicant had a birth certificate, there was no impediment to registering her hukou. Therefore, there was insufficient evidence to show that there was an impediment to her education. The Visa Officer also stated that there was insufficient evidence to show that the Applicant would suffer unusual, undeserved or disproportionate hardship as a result of her separation from her family, that there was no impediment to her family reuniting with her in China, and, there was no evidence that the Applicant could not continue living with her relatives in China.

[29] However, there was evidence on the record which appears to clearly contradict the Visa Officer's findings and resultant conclusions. For example, the Visa Officer did not refer to the sworn statement from the Applicant's father and the letters from the Applicant and her sister. The Applicant's father's evidence directly contradicted the Visa Officer's conclusions that the

Applicant could register for her hukou, that there were no impediments to the family living together in China, and, that there was no evidence that the Applicant could not continue living with her relatives in China. It also described the family's intention to return to Canada, to join the Applicant's father here, and to live here permanently. The letter from the Applicant's sister, Angela, explained that she was struggling to adjust to life in China, her wish to return to Canada to attend high school but that she could not do so alone, and, spoke to the difficulties of having a divided family. The Visa Officer also did not refer to the letters from the Applicant and her mother.

[30] As the Visa Officer entirely failed to engage with this evidence, the decision is unreasonable on this basis (*Lin v Canada (Minister of Citizenship and Immigration)*, 2007 FC 314 at paras 18-19; *Park v Canada (Minister of Citizenship and Immigration)*, 2011 FC 564 at para 23; *Joe v Canada (Minister of Citizenship and Immigration)*, 2009 FC 116 at para 30). It is also of note that the Citizenship and Immigration Canada manual OP-4 *Processing of Applications under section 25 of IRPA* emphasizes that officers should consider all evidence related to the best interests of the child adduced on an H&C application.

[31] In my view, the Visa Officer also failed to address the best interests of the Applicant's siblings. The jurisprudence of this Court concerning children otherwise excluded from the family class by s. 117(9)(d) of the IRPA Regulations suggests that the Visa Officer must consider the scenario of the family being reunited in Canada when considering the best interests of the child (*Kobita v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1479 at para 53 [*Kobita*]; *Phyang*, above, at para 20). In *Husain*, above, at para 21, Justice Heneghan pointed

out that one of the IRPA's objectives, as found in s. 3(1)(d) of the IRPA, is family reunification in Canada. Therefore, in that case, where the child was excluded by the operation of s. 117(9)(d) of the IRPA Regulations, the Visa Officer should have addressed the possibility of the Applicant child and her parents being reunited in Canada (*Husain*, above, at paras 18-22). These decisions are consistent with *Kisana*, above, where the Federal Court of Appeal dealt with a child excluded by s. 117(9)(d) and indicated that an officer must determine whether the child's best interests, when weighed against other H&C factors, should allow them to enter Canada (*Kisana*, above, at para 38).

[32] Further, where more than one child is directly affected, the officer must consider their separate interests and needs (*Momcilovic v Canada (Minister of Citizenship and Immigration)*, 2005 FC 79 at para 53). Here, the Applicant's siblings are both Canadian children and, in my view, were directly affected by their sister's presence in China. As Canadian citizens being forced to move back to China with their parents, their situation was very different from that of their sister. They are dependent children, aged roughly 14 and 6, and cannot relocate to Canada at any time, as the Respondent suggests. Angela had lived most of her formative years in Canada. The evidence indicated that Angela was struggling in China, she wished to return to Canada, and, that the separation from her sister was difficult on her and the family. However, the Visa Officer did not mention that evidence. Nor did the Visa Officer mention her brother, Bryan, in the decision. Nor is there evidence to support the Respondent's assertion that the Canadian children were familiar with the language and culture of China, in particular the youngest who was born in Canada. The evidence also does not support the Respondent's

characterisation of the move of part of the family back to China as a voluntary and private decision.

[33] In my view the Visa Officer should have used the Applicant's potential life in Canada as a point of comparison in considering her best interests *(Hawthorne*, above, at para 41). Instead, the Visa Officer considered only the status quo of the Applicant's life in China, and whether there was any impediment to her remaining there.

[34] Finally, I would note that the jurisprudence cited by the Applicant affirms that when an applicant has been excluded pursuant to s. 117(9)(d) of the IRPA Regulations, it is an error for an officer to give undue weight to the misrepresentation (*Aggrey v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1425 at paras 8-9; *Kobita*, above, at para 35; *Phung v Canada (Minister of Citizenship and Immigration)*, 2012 FC 585 at paras 34-36 [*Phung*]*).* In *Sultana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 533 at para 25 [*Sultana*], Justice de Montigny noted the importance of a full consideration of H&C factors when an applicant is excluded by the operation of s. 117(9)(d) of the IRPA Regulations:

> [25] … the presence of section 25 in the IRPA has been found to guard against IRPA non-compliance with the international human rights instruments to which Canada is signatory due to paragraph 117(9)(*d*): *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 (CanLII), 2005 FCA 436, [2006] 3 F.C.R. 655, at paragraphs 102–109. If that provision is to be meaningful, immigration officers must do more than pay lip service to the H&C factors brought forward by an applicant, and must truly assess them with a view to deciding whether they are sufficient to counterbalance the harsh provision of paragraph 117(9)(*d*). As my colleague Justice Kelen noted in *Hurtado v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 552 (CanLII), 2007 FC 552, at paragraph 14, "if the applicant's misrepresentation were the only factor to be considered, there

> would be no room for discretion left to the Minister under section 25 of the Act." This is indeed recognized in the *Overseas Processing Manual (OP)*, Chapter OP 4: Processing of Applications under Section 25 of the IRPA, Appendix F, where officers are reminded that they should ensure "that their H&C assessments go beyond an explanation as to why applicants are described by R117(9)(d) to consider the positive factors an applicant has raised in support of his/her request for an exemption from R117(9)(d)."

[35] While the Visa Officer was not wrong to take into account the reasons for non-disclosure in the consideration of H&C grounds, the decision reads as though the "overriding consideration" was the failure to disclose (*Sultana*, above, at paras 30-31). More than half of the reasons simply recite the facts as to why the Applicant's parents did not disclose her on their applications. And, as noted above, the Visa Officer ignored or overlooked the evidence that supported key aspects of the Applicant's claim and then found that there was insufficient evidence of hardship. In my view, in these circumstances, as in *Phung*, above, at para 36 and *Sultana*, above, the Visa Officer's fixation on this factor prevented him from genuinely assessing the H&C considerations that the Applicant had raised.

[36] The Visa Officer also found that the Applicant's mother's explanation as to why her parents failed to declare the Applicant at the airport on landing was implausible, being that her mother's moderate level of English was sufficient for her to have understood that she needed to declare the Applicant. This appears to be a credibility finding which, while not decisive to the present application, further demonstrates that the Visa Officer was focused on the reasons why the parents did not declare the Applicant rather than on H&C considerations.

[37] Given my findings above and the conclusion that the decision was unreasonable, it is not necessary to consider the other matters raised by the parties in their submissions.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed, the decision is to be remitted to a different visa officer for reconsideration; and
2. No question of general importance was proposed or arises for certification.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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