Federal Court  Cour fédérale

Date: 20160212

Docket: IMM-2277-15

Citation: 2016 FC 194

Toronto, Ontario, February 12, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

YANG XIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of the decision of an Immigration Officer [Officer], dated March 16, 2015, rejecting the Applicant's application for a permanent resident visa as a member of the family class.

II. Background

[2] The Applicant, Xin Yang (age 17) is a citizen of China. The Applicant is the son of the sponsor, Bao Xhu Li (age 49), a citizen of Canada, and, of the co-signor of the sponsorship application, Xue Yun Gao (age 42), a permanent resident of Canada and a citizen of China. The Applicant was born out of wedlock in 1998 (as his biological parents, Mr. Li and Ms. Gao were, at the time of his birth, married to other partners).

[3] The Court has been provided with little information as to where the Applicant lived from the time of his birth, in 1998, until his alleged disappearance on October 17, 2003. The facts are also contradictory as to what happened on October 17, 2003, the day of the alleged disappearance. Mr. Li and Ms. Gao testified that the Applicant was playing in a park when he disappeared. They believed that he had fallen victim to a child trafficker; and, the next day they testified that they reported the disappearance of their son at a police station.

[4] A month after the Applicant's disappearance, Mr. Li fled China due to persecution; and, arrived to Canada on November 24, 2003. He claimed refugee status in Canada, which he successfully obtained; and, consequently, became a permanent resident in Canada. In his application for permanent residence, Mr. Li did not declare the Applicant as a non-accompanying family member.

[5] On October 8, 2006, Mr. Li and Ms. Gao married in China. Subsequently, in March 2007, Mr. Li sponsored his wife and two of his children from a previous marriage. Again, Ms. Gao did not declare the Applicant as a non-accompanying family member.

[6] In October 2008, Mr. Li and Ms. Gao were informed by friends in China that they had seen someone in their neighbourhood resembling the Applicant. Mr. Li and Ms. Gao traveled to China to see the Applicant; and, it was confirmed by a DNA test that they, in fact, were the biological parents of the Applicant. On October 2011, Mr. Li applied to sponsor the Applicant as a member of the family class.

[7] In a decision dated November 21, 2012, an Immigration Officer from the Canadian Consulate General in Hong Kong rejected the sponsorship application. The Applicant sought judicial review of that decision before this Court (see IMM-9820-12). Further to a settlement agreement between the parties, wherein the parties agreed that the sponsorship application would be assessed anew by a different officer, the Applicant discontinued his judicial review application on January 9, 2014.

[8] On November 10, 2014, the Officer informed the Applicant, in a Procedural Fairness Letter, of concerns regarding the application; and, provided the Applicant thirty days to address the concerns. On December 9, 2014, the Applicant answered the Procedural Fairness Letter and addressed the concerns raised by the Officer. In a decision dated March 16, 2015, the Officer rejected the application.

III. Impugned Decision

[9] In its decision, the Officer held that the Applicant was excluded as a member of a family class category, pursuant to paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, because Mr. Li and Ms. Gao had not declared the Applicant as a non-accompanying family member in their application for permanent residence. Thereafter, the Officer examined whether the Applicant's inadmissibility could be remedied by humanitarian and compassionate considerations, in accordance with subsection 25(1) of the IRPA.

[10] The Officer held that the trafficking incident would be a significant ground to grant a H&C application; but, given the insufficient evidence to substantiate the child trafficking incident, the Officer rejected the H&C application. Furthermore, the Officer held that there were insufficient grounds to grant the H&C application due to the following considerations:

- The Applicant was 16 years old at the time of the assessment;
- The Applicant is a healthy student who has been residing in his home country;
- There is no identified adverse impact on the Applicant as a child, including education or welfare, should the application be refused;
- There is insufficient evidence to substantiate the statement that the Applicant was trafficked and lost;
- There is little evidence to demonstrate the Applicant's dependency on the sponsor as to parent-child relationship for the past sixteen years; and,
- The sponsor and the co-signor, both his biological parents, chose to continue to reside in Canada after the Applicant was both lost and found.

(Certified Tribunal Record, March 16, 2015 Decision, at p 11)

IV. Position of the Parties

[11] The Applicant submits that the Officer breached procedural fairness by giving little weight to the Police Report without giving the Applicant notice of the concerns of the Officer and by failing to provide the Applicant with an opportunity to be heard. Moreover, by requesting the assistance of the Migration Integrity Unit at the Hong Kong Consulate, the Officer relied on external evidence to find that the Police Report lacked credibility, without providing notice to the Applicant. Secondly, the Applicant submits the Officer misapprehended the H&C assessment; with regard to the best interest of the child; specifically in light of *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*].

[12] Conversely, the Respondent submits that the Officer did not breach procedural fairness. The Officer did not find that the Police Report was not genuine; rather, the Officer held that the Police Report was not sufficient to substantiate the allegations of child trafficking. Moreover, the Applicant had already been notified in the March 2012 Procedural Fairness Letter of the Officer's concerns regarding the Police Report. Furthermore, the Officer did not rely on extrinsic evidence by consulting the Migration Integrity Unit at the Hong Kong Consulate to assist him in determining that police reports dated from 2003, as they would still be available to the Applicant. Secondly, the Respondent submits that the Officer reasonably considered the best interests of the child, even in light of *Kanthasamy*, above.

V. Issues

1. Did the Officer breach procedural fairness by failing to allow the Applicant an opportunity to respond to the Officer's concerns with regard to the Police Report; and, by relying on evidence provided by the Migration Integrity Unit to make a determination with regard to the Police Report?
2. Did the Officer reasonably consider the best interests of the child in the assessment of the application on humanitarian and compassionate grounds?

VI. Standard of Review

[13] Firstly, determinations as to whether a Visa Officer breached procedural fairness must be reviewed under the standard of correctness (*Negm v Canada (Minister of Citizenship and Immigration)*, 2015 FC 272 at para 33; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

[14] Secondly, officers determinations on humanitarian and compassionate grounds are reviewable on the standard of reasonableness (*Kanthasamy*, above at para 44; *Faisal v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1078).

VII. Analysis

A. *No breach of procedural fairness*

[15] An Applicant may not turn a blind eye on findings made by a first Visa Officer; who informed him of a deficiency in the evidence submitted by the Applicant; and, later argue that a

different officer, who reaches the very same conclusions in respect of the very same evidence, breached procedural fairness because that officer did not disclose his concerns regarding the lacunae in evidence. This is, in essence, what happened in the present case.

[16] The Applicant argues that the new Visa Officer breached procedural fairness by failing to allow the Applicant an opportunity to respond to concerns regarding the authenticity or credibility of the Police Report. Furthermore, according to the Applicant, the new Visa Officer would have also breached procedural fairness by relying on extrinsic evidence, namely by seeking assistance from the Migration Integrity Unit, to conclude that the Police Report lacked credibility without notification to the Applicant and without providing him with an opportunity to respond. Both arguments are rejected.

[17] The original Officer's notes, which are part of the November 21, 2012 decision, reveal that the Officer had concerns about the Police Report, and sought the expertise of the Migration Integrity Unit:

> I do not find the child trafficking story to be credible for the following reasons:
>
> - the [Sponsor] should be able to provide a copy of the October 18, 2003 police report, if such a report was actually made; I consulted with our MIU unit in HK, and they have confirmed that in the past applicants have been able to produce such reports, which we are then able to verify in some cases; I give little weight to the 2011-06-10 statement on file, produced 8 years after the event […].
>
> (Applicant's Record, Officer's notes dated November 21, 2012, at p 86)

[18] The Applicant had knowledge of these notes, as they were part of the Applicant's record for the judicial review of the first decision (see IMM-9820-12).

[19] The notes of the new Visa Officer, which are part of the currently reviewed decision, are very similar to those of the original officer in the November 2012 decision:

> However, I am not satisfied that the child trafficking incident is credible for the following reasons:
>
> - The Guxi Police certificate dated 10 June 2011 was submitted on file. It was produced 8 years after 2003. No other substantiating evidence was provided. Thus, I give little weight to this document.
>
> - The sponsor should be able to provide supporting evidence such as a copy of the 18 October 2003 police report, if such a report was actually filed when PA was lost; through my consultation with our MIU unit in Hong Kong office, they confirmed that in past experience, PRC applicants have been able to produce such reports, which we are then able to verify the authenticity of the reports […].
>
> (Applicant's Record, Officer's notes dated November 10, 2014, at p 11)

[20] In reassessing the sponsorship application, a different Visa Officer could rely on materials and evidence from the first decision; as long as the officer did not consider himself or herself bound or fettered by previous decisions (*Jie v Canada (Minister of Citizenship and Immigration)*, 158 FTR 253 at para 7). More specifically, procedural fairness dictates that a decision by an officer be made with all the evidence, including the evidence before the original officer (*Abusaninah v Canada (Minister of Citizenship and Immigration)*, 2015 FC 234 at para 47; *Huang v Canada (Minister of Citizenship and Immigration)*, 2009 FC 135 at para 21).

[21] Given the fact that the Applicant could have reasonably known, based on the November 21, 2012 notes from the original decision-maker, that the Police Report dated June 10, 2011, was given little weight; the Applicant was aware that a different officer may have concerns in regard to the very same Police Report. Nevertheless, the Applicant turned a blind eye on that fact; and later, in light of the new decision, argues that he was blindsided by the lack of notice of the Officer's concerns.

[22] Consequently, the Court finds that a diligent applicant would have known that the concerns of the original decision-maker regarding the June 10, 2011 Police Report could also be raised anew by a different officer. The Applicant was given an opportunity to submit new evidence following the settlement agreement of his original application; but decided not to do so.

[23] The same conclusion must be reached regarding the use of extrinsic evidence by the Officer, namely, the assistance provided by the Migration Integrity Unit. The general rule, with regard to the use of "novel and significant" extrinsic information, on which an officer relied to arrive to his or her decision, is that an applicant could not reasonably anticipate the use of such information by the officer (see *Arteaga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 778 at para 24). In the present case, given the November 2012 notes, the Applicant had knowledge of the reliance on the Migration Integrity Unit expertise by the original officer. The Applicant could have reasonably anticipated that the new Visa Officer would also rely on the very same information. Thus, no breach of procedural fairness occurred.

B. *Reasonable assessment of the best interests of the child*

[24] It is true, as submitted by the Applicant, that family reunification is an objective of the IRPA; but most significant is the sustenance of the integrity of the Canadian immigration regime.

[25] The Officer's notes leave little doubts; had the Officer believed the child trafficking incident was genuine, the Applicant would have a strong H&C application; however, the Officer held that the Applicant, the sponsor and the co-signor failed to demonstrate that the trafficking incident took place.

[26] This conclusion of the Officer is reasonable. There appear to be important gaps and incoherencies in the Applicant's narrative. Indeed, little information is available regarding who cared for the Applicant from his birth, in 1998, until his alleged abduction, in October 2003; and, there is little evidence to substantiate the trafficking incident – although the Applicant and the sponsor were aware of the Officer's concerns.

[27] Moreover, it appears that Mr. Li and Ms. Gao lacked integrity throughout the sponsorship application, even changing their story during the process once they were informed by the Officer, in the Procedural Fairness Letter dated November 10, 2014, of the implausibility of their assertions:

> Sponsor and co-signer not only failed to comply with their onus to be truthful and credible in their own applications for permanent residence in Canada – by failing to disclose PR which resulted in PA's exclusion. Their weak credibility is further enfeebled by the fact that the withheld that PA was ever "adopted" by their good friends, in order to receive interests (such as education). The

> "adoption" was only to circumvent local government requirements and was not genuine.
>
> (Applicant's Record, Officer's notes, p 10)

[28] In light of those inconsistencies, it is difficult for an officer to assess the best interests of the child – how can an officer identify the best interests of a child if the narrative provided by the parties lacks veracity? Nonetheless, the Officer persevered and identified, based on the entirety of the evidence, the best interests of the child. It appears from the Officer's decision and notes that the Officer was alert, alive and sensitive to the best interests of the Child (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75); and, did reasonably identify and examine the best interests of the child as directed by the Supreme Court in *Kanthasamy*, above.

VIII. Conclusion

[29] Consequently, the application for judicial review is dismissed.

JUDGMENT

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

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2277-15
STYLE OF CAUSE:	YANG XIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 11, 2016
JUDGMENT AND REASONS:	SHORE J.
DATED:	FEBRUARY 12, 2016

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