Federal Court  Cour fédérale

Date: 20170316

Docket: IMM-4368-16

Citation: 2017 FC 287

Ottawa, Ontario, March 16, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

BOTANG LIANG
YUSHAN YAO

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of a Senior Immigration Officer ("Officer") of Immigration, Refugees and Citizenship Canada dated August 12, 2016, declining the Applicants' request for permanent residence on humanitarian and compassionate grounds ("H&C") pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

[2] For the reasons that follow, this application for judicial review is dismissed.

Background

[3] The Applicants are citizens of China. Mr. Liang ("Principal Applicant") and Ms. Yao ("Female Applicant") claim that they are at risk of persecution in China because they are practitioners of Falun Gong. Accordingly, they arranged to enter Canada using a "snakehead", arriving in August 2012. They subsequently entered into a relationship, married in August 2014 and have a son, Jacky, who was born in Canada in March 2015. The Principal Applicant claimed refugee protection on September 24, 2012; his claim was denied by the Refugee Protection Division ("RPD") on March 24, 2014, and leave and judicial review of that decision was denied by this Court on January 27, 2015. The Female Applicant claimed refugee protection on September 26, 2012; her claim was denied by the RPD on September 30, 2014, however, leave and judicial review of that decision was granted and this Court determined, on September 21, 2015, that the RPD's decision must be re-determined by a differently constituted RPD panel. It appears that the Applicants' claims were not heard together by the RPD because, while for the purpose of gaining entry into Canada they posed as newlyweds, the Applicants claim that they actually did not know each other in China, went their separate ways upon arrival in Canada and only later crossed paths again and began a relationship.

[4] The Applicants submitted their H&C application on August 7, 2015. The Officer denied the application on August 12, 2016, at which time the RPD had not yet re-determined the Female Applicant's refugee claim. This is the judicial review of the August 12, 2016 H&C decision.

Decision Under Review

[5] The Officer noted the Applicants' submission that they would suffer hardship if returned to China because they are Falun Gong practitioners, which was the same basis for their refugee claims and the Principal Applicant's pre-removal risk assessment, and that discrimination or adverse country conditions upon return to China, degree of establishment in Canada, the best interests of the child and ties or residency in any other country were the factors to be considered on the H&C application.

[6] With respect to the Principal Applicant, the Officer noted several factual findings made by the RPD including its determination that the Principal Applicant's claim lacked credibility, that he was not wanted by the Chinese Public Security Bureau ("PSB") for the practice of Falun Gong in China and was not a Falun Gong practitioner in China. Further, that the Principal Applicant is not a genuine Falun Gong practitioner in Canada and that he can return to China without fear of persecution in that he would not be perceived as a genuine Falun Gong practitioner by any authority in China.

[7] The Officer acknowledged the Principal Applicant's submission that he will incur hardship in China as a Falun Gong practitioner and that his evidence included letters from fellow practitioners in Canada stating that they regularly practice Falun Gong with the Principal Applicant at Milliken Park in Toronto. However, the Officer found that this was essentially the same information that was before the RPD and it did not overcome its finding that the Principal Applicant is not a genuine Falun Gong practitioner. The Principal Applicant also submitted a

letter from his father in China, dated 2014, indicating that the PSB continued to search for the Principal Applicant and that his father could not obtain corroborating documents, including a medical note and arrest warrant. The Officer found that the letter did not say that the Principal Applicant's father, or other family members in China, incurred hardship from the PSB due to his Falun Gong activities. Nor was there evidence that the Principal Applicant's father or others had been visited by the PSB looking for the Principal Applicant since 2014. The Officer found that the evidence provided by the Principal Applicant did not support that he faces hardship in China because of his Falun Gong beliefs to the extent that an exemption was justified.

[8] As to the Female Applicant, the Officer first noted that her RPD decision had been sent back for re-determination and, at the time of the Officer's assessment, that there was no indication that a decision had been made. The Officer noted evidence from the Female Applicant's friends that she attends weekly Falun Gong practices at Milliken Park in Toronto as well as updated photographs of the Applicants which they asserted showed them engaged in Falun Gong related demonstrations and other activities. However, the Officer held that, as also noted by the RPD, such participation does not make one a genuine Falun Gong practitioner. Regardless, the Applicants did not submit that the Chinese authorities were aware that they participated on an unknown date in Falun Gong activities in Canada or that such information would have been communicated to the authorities in China. The evidence provided by the Applicants did not support that the Chinese authorities were aware of their activities in Canada, that they are otherwise interested in the Applicants or that they would incur hardship in China due to their Falun Gong activities in Canada. Further, no evidence was provided by the Female

Applicant to show that the PSB had been interested in her whereabouts since her departure from China in 2012.

[9] The Officer also noted that, according to the documentary evidence, as of 2015 Chinese authorities continue to harass, detain and sentence family members and others in China who have contact or affiliation with Falun Gong practitioners but that the Applicants' evidence did not support that their family members have been exposed to such treatment. As a result, it was reasonable to expect that the Chinese authorities were not aware of whether the Applicants are Falun Gong adherents in Canada or China and, therefore, that they would not incur hardship upon return to China.

[10] As to establishment, the Officer reviewed the evidence but concluded that it did not support that the Applicants had established themselves in Canada to an extent that severing their ties will result in hardship that was not anticipated by the law or was beyond their control.

[11] The Officer also concluded that having Jacky return to China with the Applicants would not adversely impact his best interests such that an exemption was warranted. In particular, because the Applicants had not provided corroborating evidence that they are of interest to Chinese authorities because of their Falun Gong activities, the Officer also found that the related claimed risks to Jacky were speculative and unsupported. Further, that the objective evidence showed that Jacky would be recognized as a Chinese citizen through his parents' citizenship and, while China does not recognize dual citizenship, the evidence did not show that Jacky would be

required to formally renounce his Canadian citizenship in order to register as a Chinese citizen to access education, social, medical and other services.

[12] Overall, the Officer concluded that having weighed all the facts and factors, an exemption was not warranted.

Issues and Standard of Review

[13] Although in their written submission the Applicants listed many issues, some of which were stated as being matters of procedural fairness, in my view this application raises only one issue, being whether the Officer's decision is reasonable.

[14] The standard of review of the decision of an H&C officer is reasonableness (*Basaki v Canada (Citizenship and Immigration)*, 2015 FC 166 at para 18 ("*Basaki*"); *Richard v Canada (Citizenship and Immigration)*, 2016 FC 1420 at para 14). Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

Applicants' Position

[15] The Applicants submit that the Female Applicant's claim in respect of her activities in China and fear of returning to China was ignored by the Officer and, therefore, no assessment of

any unusual, undeserved or disproportionate hardship was conducted in that regard. The Officer was required to consider and weigh all the relevant evidence, including facts adduced in refugee determination proceedings (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*"), but failed to do so.

[16] The Applicants submit that the Officer erred by treating Justice O'Reilly's decision, requiring the RPD to re-determine the Female Applicant's refugee claim, as a neutral factor. By doing so, the Officer failed to assess the underlying facts of the Female Applicant's claim in China in the overall assessment of her claim. Thus, important evidence of country conditions and the resulting hardship to the Female Applicant if she were returned to China were not considered (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17 (FCTD) ("*Cepeda-Gutierrez*"); *Tsiklauri v Canada (Citizenship and Immigration)*, 2016 FC 812 at para 14). Failing to assess and appreciate her refugee claim in China caused the Officer to commit further errors in the assessment of the Female Applicant's *sur place* claim in Canada, leading the Officer to conclude that she was not a genuine Falun Gong practitioner in Canada. The Officer did not separate the analysis of the *sur place* claim of the Principal Applicant and the Female Applicant and treated both claims as one. The Applicants say that this was unreasonable given that Justice O'Reilly had determined that the Female Applicant's refugee claim should be re-determined.

[17] The Applicants submit that the Officer should have waited until the re-determination of the Female Applicant's claim by the RPD and then reviewed the reasons given by the RPD to see if the factual matrix had changed as regards to her claim for refugee protection. Or, the Officer

should have assessed the H&C claim on the basis of the facts as asserted by the Female Applicant regarding her alleged persecution in China in the context of Justice O'Reilly's decision, which found several of the RPD's adverse conclusions unwarranted.

[18] The Applicants submit that the effect of the Officer's failure to wait until the re-determination of the Female Applicant's claim for refugee protection was that the relative positions of the Principal Applicant and their child were not properly factored in. In particular, had the Officer waited, one of several relevant scenarios might have played out. If the Female Applicant is granted refugee protection, she will be able to remain in Canada with her child and the Principal Applicant's H&C claim would then be stronger as he would face the prospect of separation from his wife and Canadian-born child. Alternatively, if the Female Applicant's claim is denied but on facts that are more favourable to her, such that she is recognized as a Falun Gong practitioner but not one who the Chinese authorities are pursuing, then the position of their child changes because Jacky then faces the prospect of returning to China with a parent who is recognized as a Falun Gong practitioner thereby increasing the risk to him of adverse conditions.

Respondent's Position

[19] The Respondent submits that the Officer's decision is reasonable. The Officer reviewed all of the evidence submitted in support of the Applicants' H&C application and found that it did not support that the Chinese authorities were aware of their Falun Gong activities in Canada or that they are otherwise interested in the Applicants. The Female Applicant did not provide evidence to support that the PSB has been interested in her since her departure from China in

2012. Nor did the Applicants advance persuasive evidence demonstrating that they would be subjected to hardship in China to the extent that it would justify an exemption under H&C considerations or that they would have difficulty re-adjusting to life in China. Ultimately, the Applicants did not meet their burden of showing that an H&C exemption is warranted and are asking the Court to now re-weigh the evidence.

[20] The Respondent submits that there was no requirement for the Officer to wait for a decision to be made on the RPD's re-determination and nor should the Officer speculate as to the outcome of that decision. Here the Officer properly considered the evidence that was before him or her and reasonably found that an exemption was not warranted. The Applicants' arguments about the various speculative scenarios involving the re-determination of the RPD claim have no merit on the H&C application and have no bearing on the evidence they supported in their H&C application. The Officer also noted that no decision had been made by the RPD at the time of the writing of the decision. No violation of procedural fairness arises.

Analysis

[21] I would first point out that nothing turns on the content of Justice O'Reilly's decision returning the Female Applicant's refugee protection claim to the RPD for re-determination. On judicial review of a decision of the RPD, the role of this Court is to assess the procedural fairness and/or reasonableness of that decision. Thus, while Justice O'Reilly found that several of the RPD's credibility and plausibility findings were unsupported by the evidence, this resulted only in the finding that the RPD's decision was unreasonable and, therefore, that the matter was to be remitted back to the RPD for re-determination. This Court did not, and does not, make

credibility or factual findings pertaining to claims for refugee status. Thus, as to the Applicants' submission that the Officer should have assessed the H&C claim in the context of Justice O'Reilly's finding that several of the RPD's adverse conclusions were unwarranted, this has no merit to the extent that the Applicants are suggesting that Justice O'Reilly's decision served to support the Female Applicant's allegations in her refugee claim.

[22] Second, when appearing before me, counsel for both parties agreed that on the particular facts of this matter, the Officer was not precluded pursuant to s 25(1.2)(b) of the IRPA or otherwise, from rendering the H&C decision while the RPD's re-determination of the Female Applicant's claim was pending. More specifically, counsel for the Respondent submitted that s 25(1.2)(b) of the IRPA did not apply because, at the time of the submission of the H&C application in August 2015, Justice O'Reilly's decision in respect of the Female Applicant's refugee claim had not yet been rendered. And, in any event, the H&C application is based on the status of the Principal Applicant who did not have a pending refugee claim. Further, that the Female Applicant had the option of severing her application. Counsel for the Applicants did not take issue with this. I would also note that s 25(1.2)(b) of the IRPA was not raised as a concern in the H&C application or subsequent updates made to it.

[23] Subsection 25(1) of the IRPA states that the Minister may grant a foreign national permanent resident status, or an exemption from any applicable criteria or obligations of the IRPA, if the Minister is of the opinion that it is justified by H&C considerations, taking into account the best interests of a child directly affected. This relieves an applicant, on the basis of hardship, from having to leave Canada to apply for permanent residence through the normal

channels (*Shrestha v Canada (Citizenship and Immigration)*, 2016 FC 1370 at para 11; *Rocha v Canada (Citizenship and Immigration)*, 2015 FC 1070 at para 16; *Basaki* at para 20). An H&C exemption is an exceptional and discretionary remedy (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15; *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 15 ("*Semana*")) and the onus of establishing that an H&C exemption is warranted lies with the applicant (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45; *Adams v Canada (Citizenship and Immigration)*, 2009 FC 1193 at para 29; *Semana* at para 16; *D'Aguiar-Juman v Canada (Citizenship and Immigration)*, 2016 FC 6 at para 9).

[24] In *Kanthasamy*, the Supreme Court of Canada summarized the principles that are to guide an Officer's discretion in granting an H&C application. It also stated that there will inevitably be some hardship associated with being required to leave Canada, however, this alone will generally not be sufficient to warrant relief on H&C grounds (at para 23). What will warrant relief under s 25(1) will vary depending on the facts and context of each case and officers making such decisions must substantively consider and weigh all of the relevant facts and factors before them (*Kanthasamy* at paras 25 and 33; also see *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 33). The Supreme Court of Canada also revisited the best interests of the child analysis required by s 25(1) finding that officers must be alert, alive and sensitive to the best interest of the child, afford them significant weight, examine them in light of all of the evidence, and take into account the context of the child's personal circumstances (*Kanthasamy* at paras 23-27 and 35-39).

[25] In this matter, the Applicants primarily take issue with the Officer's H&C analysis on the basis that the Officer did not take into consideration the impact that the pending re-determination by the RPD of the Female Applicant's claim will have on the hardship analysis. In that regard, they submit that *Kanthasamy* is significant because it imposes a broader test, in that all relevant factors must be considered by an H&C officer, and the outstanding RPD re-determination was such a factor. Further, because the *Kanthasamy* best interest of the child analysis confirms that there should be no hardship to children.

[26] On the latter point, I do not agree with the Applicants that *Kanthasamy* stands for the proposition that the analysis of hardship does not form part of the best interest of the child analysis or that any degree of hardship to a child would necessitate a positive H&C determination. In *Estaphane v Canada (Citizenship and Immigration)*, 2016 FC 851, Justice Southcott stated that *Kanthasamy* prohibits employing the threshold of "unusual and undeserved hardship" in considering the best interests of a child, in effect, thereby requiring demonstration that the hardship imposed on a child reaches a certain level. However, that *Kanthasamy* does not prohibit consideration of hardship that a child may face as a result of circumstances under consideration. In fact, often such hardship that is argued by an applicant to support a particular result being in the best interests of a child (at para 34).

[27] Here the Officer was required to consider all of the evidence before him or her and to weigh all of the relevant facts and factors in order to determine if an exemption on H&C grounds was warranted.

[28] I am satisfied that the Officer's reasons demonstrate that he or she considered all of the factors advanced by the Applicants in support of their H&C grounds. In particular, the Officer addressed their submissions concerning the hardships they and their Canadian child would face in China given their profiles as Falun Gong practitioners. The Officer also considered their establishment in Canada and weighed this against their family and ties to China. The Officer also addressed in some detail the best interests of the child. The Officer identified that Jacky would have the love and support of both his parents and grandparents in China and that the documentary evidence showed that he would have access to education and social services as he could seek Chinese citizenship through his parents. As the Officer did not find that there was sufficient evidence to show that the Applicants were of interest to Chinese authorities because of their Falun Gong activities either in China or Canada, the Officer did not find that Jacky's best interests would be compromised based on the evidence advanced concerning the hardships faced by children of Falun Gong practitioners.

[29] The Officer also specifically considered the Female Applicant and the evidence she adduced in support of the H&C claim. It is significant that the Officer did not rely on the RPD's decision concerning the Principal Applicant when considering the Female Applicant's submissions and the evidence submitted in support of the H&C application. And, with respect to the Principal Applicant, the Officer referred to the RPD's negative credibility findings including its finding that he was not a Falun Gong practitioner in China and is not a genuine Falun Gong practitioner in Canada, and found that the evidence submitted in support of the H&C application did not overcome those findings.

[30] As to the outstanding re-determination by the RPD of the Female Applicant's claim, this was acknowledged by the Officer who then went on to assess her evidence provided in support of the H&C application. I am not convinced by the Applicants' submission that the Officer was required to consider, as a factor in the H&C assessment, the various potential outcomes of the RPD's re-determination.

[31] While an officer can consider an RPD decision and the underlying facts adduced in that proceeding, an H&C application is not determined by or dependent upon the findings of the RPD (*Kanthasamy* at para 51). And, in this situation, while it may have been preferable to have awaited the outcome of the RPD's re-determination, the parties agree that the Officer was not required to do so. Thus, what the Applicants seek is that the Officer, as part of the H&C assessment, speculate as to the possible outcomes of the RPD's re-determination and factor this speculation into his or her decision. I cannot see how this can be so. What if the Officer were to speculate that the RPD would again reject the Female Applicant's claim and then utilize that as a factor in his or her decision? Clearly that would be unreasonable. Similarly, speculation that the Female Applicant's claim would succeed, in whole or in part, must also be unreasonable. I would also note that pursuant to s 25(1.3) of the IRPA when examining an H&C request, an officer may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under s 96 or a person in need of protection under s 97(1), but must consider elements related to the hardships that affect the foreign national (also see *Kanthasamy* at paras 24 and 51). In these circumstances, no error arises from the Officer's failure to speculate as to the outcome of the Female Applicant's claim prior to rendering a decision.

[32] The Applicants also assert that the Officer ignored the evidence submitted in support of the Female Applicant's claim that she is at risk because she is a Falun Gong practitioner. However, the Officer noted that the Female Applicant's submissions included letters from friends informing that she attends weekly Falun Gong practices at Milliken Park as well as several updated photos which the Applicants asserted were of them engaging in Falun Gong demonstrations and exercises and distributing Falun Gong materials. The Officer stated that the photos had been reviewed but, as noted by the RPD, such participation does not make one a genuine Falun Gong practitioner. The Officer found that the photos did not necessarily support that the Applicants are genuine Falun Gong practitioners in Canada or that they were in China. Regardless, the Applicants had not informed that the Chinese authorities are aware that they participated on an unknown date in Falun Gong activities in Canada or that such information would be communicated to the authorities in China. There was no evidence provided to show that the Applicants were photographed by Chinese officials or were approached by them.

[33] Further, that country condition documentation showed that, as of 2015, Chinese authorities continue to harass, detain and sentence the parents and family members of those who have contact or are affiliated with Falun Gong practitioners. However, that the Applicants' evidence did not support that their family members or friends had been exposed to such treatment. The Officer found that the evidence provided by the Applicants did not support that the Chinese authorities are aware of their activities in Canada, that they are otherwise interested in the Applicants or that the Applicants would incur hardship in China due to their Falun Gong activities in Canada. Further, that the Female Applicant had not provided evidence to support that the PSB has been interested in her whereabouts since her departure from China in 2012.

[34] The Officer concluded that the Applicants had not advanced persuasive evidence demonstrating that they would be subjected to hardship in China to the extent that it would justify an exemption on H&C grounds.

[35] It is true that the Officer does not explicitly mention every document submitted with the H&C application, which included an affidavit of the Female Applicant. However, there is a presumption that the Officer considered all of the evidence (*Pusuma v Canada (Citizenship and Immigration)*, 2015 FC 658 at para 56; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The presumption is rebuttable where an officer fails to address critical evidence that contradicts conclusions made by the officer and the reviewing Court determines that its omission means that the officer did not have regard to the material before him or her (*Cepeda-Gutierrez* at paras 14-17; *Andrade v Canada (Citizenship and Immigration)* 2012 FC 1490 at paras 8-10). The Female Applicant's affidavit describes her claim that she practiced Falun Gong in China, that in June 2016 the PSB went to her parents' home when she was not there and told her father that she was to report to them. Her father told her the other members of her group had been arrested and that she should go into hiding. She did this for two months before fleeing China, her parents told her the PSB had continued to look for her during that time. The affidavit also speaks to her concern about her son's future in China based on her belief that he has no status there and may face persecution because the PSB knows his parents are Falun Gong practitioners. All of this information was also included in the written submissions of counsel accompanying the H&C application.

[36] While the Officer did not explicitly refer to the Female Applicant's evidence that the PSB had looked for her while she was in hiding for two months in 2012, the Officer did state that the Female Applicant had not provided any evidence to support that the PSB was interested in her whereabouts since she left China in 2012. This is correct and her affidavit, dated April 22, 2015, does not address this. This finding by the Officer also implies that the Officer was aware that the Female Applicant claimed that the PSB had been looking for her prior to her leaving China, indeed, it was the very reason why she claims that she left. The only evidence addressing any continued interest by the PSB was from the Principal Applicant's father, concerning the Principal Applicant, which the Officer addressed.

[37] The Officer found, after noting a lack of evidence that the Applicants' family members have been targeted because of the Applicants' Falun Gong activities, that it was reasonable to expect that the Chinese authorities were not aware that the Applicants are Falun Gong adherents in Canada or China and, therefore, they would not incur hardship upon return to China. Thus, on its face, this appears to contradict the Female Applicant's evidence that the PSB was looking for her in China in relation to her practice of Falun Gong. However, viewing the decision in whole and this finding in context, in my view, it is apparent that the Officer was aware that the Female Applicant claimed that the PSB had looked for her in China but was primarily concerned with the insufficiency of evidence provided by the Female Applicant supporting a continued interest by the PSB or a new interest arising from her activities in Canada. The Officer also noted the Female Applicant's evidence that she had been practicing Falun Gong in Canada but reasonably discounted this evidence on the basis that this does not necessarily mean that the Applicants are Falun Gong practitioners in Canada or in China. And, as noted above, the Officer also

considered her evidence and assertions as to hardship in addition to, but distinct from the adverse credibility findings that had been made by the RPD with respect to the Principal Applicant which he had not overcome with the evidence submitted in support of the H&C application. For these reasons I do not accept the Applicants' submission that the Officer ignored the Female Applicant's evidence when reaching his or her decision.

[38] In my view, the decision explains how and why the Officer arrived at his or her conclusion that an H&C exemption was not warranted, being that the Applicants failed to satisfy their evidentiary burden. The decision is intelligible, justified and transparent and it falls within the range of possible, acceptable outcomes that are defensible on the facts and the law. Accordingly, this Court will not intervene.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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