Federal Court  Cour fédérale

Date: 20220218

Docket: IMM-202-21

Citation: 2022 FC 223

Toronto, Ontario, February 18, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

ZHANPENG LIU, ZIJUN WU, JUNYI LIU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision dated January 6, 2021, made by a senior immigration officer (the "officer") under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA*"). The decision denied the applicants' request for permanent residence based on humanitarian and compassionate circumstances. The applicants ask this Court to set aside the decision.

[2] For the reasons below, the application is dismissed.

I. Facts and Events Leading to this Application

[3] The adult applicants are citizens of China. The third applicant is their first son. They arrived in Canada in December 2015. The family includes a second son born in Canada in September 2016. As of the date of their application under subsection 25(1), the adult applicants were expecting their third child.

[4] The applicants filed a refugee claim, which was dismissed in June 2016 by the Refugee Protection Division. In October 2016, the Refugee Appeal Division dismissed their appeal.

[5] In 2016, the applicant, Mr Liu, obtained a work permit. He works as a chef at a restaurant.

[6] The applicants made an application for permanent residence on H&C grounds under subsection 25(1) of the *IRPA*. They also applied for a pre-removal risk assessment. Both applications were refused in April 2018.

[7] On October 30, 2019, the applicants submitted a second H&C application. The officer's decision on that second application is the subject of this judicial review application.

[8] The second H&C application was based on the applicants' establishment in Canada, the best interests of the children and adverse country conditions in China.

II. The H&C Decision under Review

[9] The officer provided lengthy reasons for the decision not to grant relief on an H&C basis. The reasons referred often to Mr Liu because he was the principal applicant on the H&C application.

[10] The officer found that Mr Liu's establishment in Canada was low. The officer considered evidence related to Mr Liu's employment as a chef, including a letter and an affidavit in support from the restaurant owner, which hold Mr Liu in high esteem. The officer recognized Ms Wu's community involvement and her role "at home taking care of the kids". The officer recognized that they had familial ties in Canada, including Mr Liu's sister and uncle and their respective families. The officer also read letters provided by family members. The officer found that there was insufficient evidence to demonstrate any emotional or financial interdependency that would negatively impact the applicants or the supporters if a separation were to occur.

[11] In addition, near the end of the assessment of establishment, the officer noted that Mr Liu "has had a few opportunities to regularize his status. Having been unsuccessful in these attempts, the applicant has not left Canada to this date. This leads me to draw a negative inference based on the applicant's unwillingness to abide by Canadian laws and voluntarily return to China."

[12] With respect to the best interests of the children ("BIOC"), the officer identified the 5-year-old applicant (born in China) and his brother (then aged four and a Canadian citizen). After listing the BIOC factors identified by the applicants, the officer accepted that the two children have spent all or a big part of their lives in Canada and would need to readjust if removed to China. The officer found that their parents would provide them with support both in Canada and

in China and as such, “the children’s emotional, social, cultural, and physical welfare will not be compromised”. The officer was unable to assess the argument that the adult applicants had violated China’s two-child policy due to an absence of evidence that a third child had joined the family.

[13] The officer considered whether the applicants’ second born child, Jonathan, would experience difficulties in finding schooling without renouncing his Canadian citizenship and whether any schooling could be affordable if the family returns to China. After reviewing articles and reports submitted by the applicants, the officer found that there was insufficient evidence to suggest that Jonathan does not currently hold Chinese nationality through his parents and would not be admissible to public education in China. The officer found that it was speculative that Mr Liu would be unemployed on return to China. The officer found no evidence that the children had any special needs. The officer thus concluded that there was insufficient evidence to suggest that removal from Canada would have a negative impact on the children’s education. Mindful that the children were still very young and would benefit from the presence of their parents, the officer concluded that the children’s best interests will not be negatively affected in the event of a refusal of the H & C application.

[14] Turning to country conditions, the officer noted Mr Liu’s education in China and early work career. Mr Liu borrowed money from his uncle and sister in Canada and additional money from friends and family in China, in order to get to Canada. The applicants maintained that they were expected to pay back the sums received from friends and family and that if they were to return to China, Mr Liu would not be able to secure employment and would be unable to repay the money. This would lead him to lose face and be isolated from the community, leading him to

fall into poverty. The officer assessed letters from Mr Liu's sister and uncle, which did not mention repayment of the considerable amounts they loaned to Mr Liu to help him and his family come to Canada. The officer found that the evidence suggested "their relationship is not at all tinted, and that if such amount was in fact given to the applicants, its reimbursement is not expected". In addition, Mr Liu had not provided any evidence that clearly demonstrated that the individuals in China were requesting or expecting reimbursement either.

[15] The officer considered submissions related to Mr Liu's employment prospects in China. The officer concluded that there was little evidence to suggest that the applicants would not be able to find employment or be unable to financially support themselves and their children if returned to China. The officer found that Mr Liu's experience in Canada may assist his job search in China.

[16] The officer stated that Mr Liu has clearly demonstrated that he was a resourceful and adaptable individual and that he could relocate anywhere in China that he selected. The officer recognized that although Mr Liu may face some difficulties after living in Canada for the past few years, he could re-establish himself in China where he is familiar with the language, culture and lifestyle.

III. Standard of Review

[17] The standard of review of the officer's H&C decision is reasonableness: *Kanthasamy*, at para 44; *Subramaniam v. Canada (Citizenship and Immigration)*, 2020 FCA 202, at paras 17-18. The reasonableness standard was described in *Vavilov*. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and

justified: *Vavilov*, at paras 12-13 and 15. The starting point is the reasons provided by the decision maker, which must be read holistically and contextually and in conjunction with the record that was before the decision maker: *Vavilov*, at paras 84, 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at paras 28-33.

[18] The Court's review considers both the reasoning process and the outcome: *Vavilov*, at paras 83 and 86. A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, at paras 24-35.

IV. Analysis

[19] In this Court, the applicants took two overall positions to challenge the reasonableness of the officer's decision:

A. First, the applicants contended that the officer failed to adopt an empathetic approach to the assessment of the application and failed to consider the matter globally as required by *Canada (Minister of Citizenship and Immigration) v Kanthasamy*, 2015 SCC 61, [2015] 3 SCR 909. According to the applicants, the officer exhibited a "profound misunderstanding of the case".

B. Second, the applicants submitted that the officer erred in law in the assessment of establishment, specifically by failing to follow the decisions in *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 and *Sebbe v Canada (Citizenship*

and Immigration), 2012 FC 813. The applicants maintained that the officer analyzed whether they could be re-established in China rather than assessing their establishment in Canada.

[20] The applicants expanded on these submissions at the hearing.

[21] The respondent submitted that the officer's decision did not lack empathy and properly considered all of the applicants' submissions according to the evidence. In addition, the respondent maintained that the officer's consideration of the applicants' establishment was reasonable.

[22] I will address the two issues in turn.

A. ***The Officer's Overall Approach to the H&C Application***

[23] The applicants contended that the officer failed to adopt an empathetic approach to the H&C application and failed to consider the matter "globally" as required by *Kanthasamy,* at paras 28 and 45. The applicants made a number of specific points to support their overall position, in an attempt to show that the officer conducted a segmented assessment of the applicant's situation and overall, exhibited a "profound misunderstanding" of his application for relief.

[24] While I agree that the officer was required to implement the requirements set out by the Supreme Court in *Kanthasamy*, I do not agree with the applicant's position that the officer failed

to do so. In my view, the officer exhibited a satisfactory understanding of the applicant's request for H&C relief. I find no sufficient reasons to justify intervention by this Court on judicial review. I will explain how I reached this conclusion.

[25] The officer found that the applicant's establishment in Canada was low. The applicants first criticized the officer's comment that the applicants had not established why the personal relationships that they had built in Canada could not be continued from abroad or through subsequent visits to Canada. The applicants submitted that this comment was unreasonable, illogical, not empathetic and cavalier, because it ignored the fact that once removed, the applicants could not return to Canada without an Authorization to Return. He noted that he was "under a removal order" but had not been directed to report for removal. According to the applicant, all the officer was doing was trying to undermine the applicant's assertions.

[26] In my opinion, the applicants' position reads too much into the officer's comment regarding subsequent visits to Canada. The sentences immediately before the impugned comment discussed the letters filed to support the H&C application. The officer found that the applicants has not provided sufficient evidence to demonstrate any emotional or financial interdependency with others if a separation were to occur, specifically through the letters filed—a conclusion that the applicants did not challenge in substance. Even if incorrect, the officer's comment is not so significant as to be a reviewable error: *Vavilov*, at para 101.

[27] A second area challenged by the applicants referred to a short passage near the end of the officer's consideration of establishment. The officer observed that the Mr Liu had had

opportunities to regularize his status. The officer stated that "[h]aving been unsuccessful in these attempts, the applicant has not left Canada to this date" and drew a negative inference based on the applicant's unwillingness to abide by Canadian laws and voluntarily return to China.

[28] The applicants argued that the negative inference drawn by the officer was used to dismiss all of the applicant's evidence of establishment and was "unempathetic to the point of raising a reasonable apprehension of bias". In my view, this submission overstated a possible concern about whether the officer focused improperly on the reasons why the applicant was seeking an exemption under *IRPA* subsection 25(1) to the point that it eclipsed the proper consideration of the factors showing the establishment in Canada: see *Sebbe*, at paras 21-24; *Lopez Bidart v. Canada (Citizenship and Immigration)*, 2020 FC 307, at para 32. However, considering this concern, I find that the officer's reasons contained no reviewable error. The officer's negative inference was open to the officer on these facts and did not fundamentally detract from the officer's otherwise proper assessment of establishment factors related to the applicants' life in Canada so as to raise a reviewable error. I do not agree that the officer's comments give rise to a reasonable apprehension of bias.

[29] On the BIOC, the applicants submitted that certain aspects of the officer's reasons (i) were dismissive and cavalier in the assessment of the interests of the applicant's children, (ii) unreasonably declined to assess the impact of the birth of the applicant's third child, and (iii) engaged in speculation. I will address each of these points.

[30] The applicants maintained that the officer was very cavalier in observing that the children would need to adjust to life in China and that their parents would be able to provide them with love, support and affection in both Canada and China so that their interests would not be compromised. I do not find this statement unreasonable, given that the children were 5 and 4 years old at the time.

[31] The applicants also argued that the officer unreasonably did not consider the birth of the third child and the resulting impact on the family of China's two-child policy. However, the applicants acknowledged that the evidence only indicated that they were expecting a child. They did not update the application to confirm the child's birth after his arrival in March 2020 and before the officer's decision more than 8 months later in January 2021. The onus to adduce and update the evidence is on the applicants and a failure to do so is at their peril: *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635, at paras 5 and 8.

[32] The applicants further submitted that the officer engaged in speculation about matters not within the officer's expertise, by finding that Jonathan may benefit from being listed in the family's hukou. Jonathan was born in Canada and therefore has Canadian citizenship from birth. The officer found that the applicants did not file objective evidence that Jonathan would encounter difficulties attending public schools and receiving other benefits unless he renounced his Canadian citizenship. The officer found that Mr Liu and his spouse had not "settled abroad" under the Nationality Law of the People's Republic of China, implying that their children would have Chinese nationality under that law. The officer found that there was insufficient evidence

that Jonathan did not hold Chinese nationality due to his parents' Chinese citizenship and therefore he could be educated in public schools in China.

[33] I do not agree with the applicants that the officer engaged in speculation. While the applicants may well be correct that the matter was not as simple as the officer thought, the officer's conclusion concerned the insufficiency of the applicant's evidence to support a BIOC concern about Jonathan's education in China, particularly whether he would suffer the hardship of an inferior education because the family would likely not afford to pay for better private schooling because Mr Liu would not find employment. The applicant's submissions to this Court did not establish that the officer's conclusion was untenable or that the officer fundamentally misapprehended or ignored critical evidence filed by the applicants in the H&C record: *Vavilov*, at paras 99-101, 105 and 126.

[34] The applicants criticized the officer's decision for speculating about the repayment of loans advanced to Mr Liu in China by his family and friends. The money enabled him and his family to leave China, about four years before the officer's decision. The officer noted that the supporting letters filed with the H&C application did not mention the repayment of the money or raise a concern that if the applicants returned to rural China, Mr Liu would be unable to repay the loans. Because the evidence was incomplete in relation to the advance and there was no evidence anyone had asked him to repay, the officer concluded that reimbursement of the money "was not expected" and it was unclear how the circumstances would add to the applicant's difficulties on returning to China.

[35] While the applicants contended that the officer engaged in “grossly inappropriate speculation” about the loans, I do not agree. The letters did not mention the loans or the need for repayment, which in my view would have formed a natural part of that evidence on the H&C application (both from the ‘lender’ perspective and from the applicant’s as borrower). In addition, the record disclosed no requests for repayment or any interim payments since the applicant’s arrival four years earlier. In my view, the applicants have not shown that the inferences made concerning the loans were not open to the officer on the evidentiary record or that the officer made a reviewable error in making the observations about the loans.

[36] Returning to the applicants’ overall submission, and considering the applicants’ position as a whole with the evidence on those issues above, I cannot conclude that the officer did not take the proper compassionate approach contemplated by *Kanthasamy*, or a global consideration of the evidence in the record. Even if another officer could have assessed the evidence in a different manner, or resolved some issues more to the applicant’s favour, I see no substantive basis to conclude that the officer failed to implement the legal standards established in *Kanthasamy* that constrained the H&C decision.

[37] In addition, I do not believe that the officer profoundly misunderstood the H&C application, as the applicants claimed.

[38] I therefore conclude that the applicants’ first overall submission cannot be sustained. He has not established that the officer’s H&C decision contained a reviewable error on the bases advanced.

B. ***Did the decision err in law on the assessment of establishment in Canada?***

[39] The applicants' second overall submission was that the officer erred in law in the assessment of establishment in Canada. As I understand the submission, the applicants contended that the officer analyzed whether the applicants could re-establish in China rather than assessing the strength of their establishment in Canada, contrary to this Court's decision in *Lauture*, at paras 19-26 (which cited *Sebbe*, at para 21).

[40] For two reasons, I do not agree. First, it is clear that the officer did expressly consider the applicants' establishment *in Canada*, including (under the heading "Establishment in Canada"): his position as chef at Sam's Congee Delights restaurant, and the supporting evidence from the restaurant owner; the family's volunteer activities with the Scarborough Chinese Canadian Association and the Association's activities in which his family participated; the applicants' financial circumstances, through tax returns, bank statements and insurance documents; and the familial and friendship ties enjoyed by the applicants in Canada.

[41] Second, the officer's analysis of establishment in Canada was not compromised by the passage emphasized by the applicant, which was at the end of the officer's reasons and more than three pages after the Establishment in Canada section. There, near the end of a section entitled "Risk and Adverse Country Conditions", the officer observed that the Mr Liu is a resourceful and adaptable individual who will be able to relocate anywhere he selects in China, likely find employment, is familiar with the Chinese language, culture and lifestyle and may

reunite with family there. In my view, the two parts of the officer's reasons are not contradictory (as the applicants contended) and did not offend the legal principles identified by the applicant.

V. Conclusion

[42] The application is therefore dismissed. Neither party raised a serious question to certify for appeal.

JUDGMENT in IMM-202-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act.*

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-202-21
STYLE OF CAUSE:	ZHANPENG LIU, ZIJUN WU, LIU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 19, 2022
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	FEBRUARY 18, 2022

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