Federal Court  Cour fédérale

Date: 20220317

Docket: IMM-350-21

Citation: 2022 FC 366

Ottawa, Ontario, March 17, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

YAO KAN SU
JIE MIN HUANG
WEI QIAN SU THROUGH HIS LITIGATION GUARDIAN YAO KAN SU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by a Senior Immigration Officer [Officer], dated January 7, 2021, refusing the Applicants' application for permanent residence on humanitarian and compassionate [H&C] grounds. [Decision] The Officer found the Applicants did

not have sufficient H&C considerations to grant an exemption under section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*].

II. Facts

[2] The Applicants are citizens of China. The Principal Applicant is 46-years old, his spouse is 44-years old, and together they have three children. Their son is 17-years old and he is included in this application as the Minor Applicant. They also have two Canadian born children: a son (age 8) and a daughter (age 5). The two Canadian children are not included in this application.

[3] The Applicants arrived in Canada in June 2012 and filed claims for refugee protection the same month. The Applicants were issued work permits in September 2013 and applied for extensions up until June 2020. Their refugee claims were refused in March 2019. The Applicants applied for leave at the Federal Court based on their refused refugee claims but leave was dismissed June 10, 2019. The Applicants applied for permanent residence on H&C grounds on October 22, 2019.

III. Decision under review

[4] The Officer was not satisfied the Applicants' H&C considerations justified an exemption under section 25(1) of the *IRPA* and dismissed their application on January 7, 2021. The H&C grounds raised were establishment, best interests of the child, and hardship upon return.

[5] Regarding establishment, the Officer acknowledged the spouse's efforts in trying to improve her language skills but noted both adult Applicants state they are unable to communicate in either English or French and accordingly found their efforts in trying to improve their language skills to be minimal. The Officer noted the Applicants' declarations of having community support from their family or friends but in my view, reasonably found insufficient evidence was produced to assign weight to these statements – there was very little evidence in fact on that point. The Officer acknowledged the Applicants' employment efforts but found their employment has been over a short period of time, was not persuaded by the evidence they have reasonably demonstrated a history of stable employment, and assigned their employment efforts little weight. Moreover, the Officer reasonably found the Applicants provided no evidence to demonstrate a pattern of sound financial management or self-sufficiency; they filed almost no evidence in this respect. Overall, the Officer found the Applicants' demonstrated a minimal degree of establishment.

[6] Regarding best interests of the child, the Officer acknowledged all three children rely on their parents for comfort and support but found there was insufficient objective evidence to indicate this dependency will be affected or will change should the children return to China with their parents. The Officer acknowledged the children are "enjoying our robust social services and quality of Canadian standard of living" and granted some weight to this factor. However, the Officer found the Applicants did not provide evidence to suggest these children would not be able to access adequate social services such as education or public health care in China. The Officer acknowledged the children's relocation to China could initially cause some difficulties, particularly for the Canadian born children and granted some weight to this factor. However, the

Officer also noted they would have their grandparents and other family members in China, thereby mitigating this factor to a degree. Moreover, the children would be returning to China accompanied by their parents who will likely continue to provide them with love, emotional and financial support. Overall, the Officer found the best interest of these children would be served as long as they are in their parents' care.

[7] Regarding hardship upon return, the Officer acknowledged the Applicants' refugee claims were denied in 2019. The Officer noted the evidence on matters pertaining to the Applicants being negatively perceived in China because of their resistance to Chinese land expropriation in 2011 and their fears of being arrested upon return based solely on their own narrative. There was no corroboration, such as summons or arrest warrants from authorities in China or persuasive testimonies from the Applicants' family in China. In fact, the Officer noted the Applicants each provided translated Notarial Certificates certifying that as of September 2019 they have no criminal record in China. The Officer acknowledged the 2011 article "Angry Chinese villagers protest land grabbing" but ultimately found the Applicants presented insufficient evidence that would reasonably establish them as being negatively perceived by the Chinese authorities and gave little weight to the Applicants' statements that such hardship exists for the Applicants in China. The Officer also reviewed the article titled "Missing, kidnapped and trafficked", acknowledging the evidence that kidnapping and trafficking occurs throughout the country but ultimately found this issue potentially affects every Chinese parent indiscriminately, and it was not sufficient to identify this hardship without applying it beyond the Applicants having children because in an H&C, relief must be given on individual circumstances, not general country conditions. The Officer gave this claim little weight.

IV. Issues

[8] The Applicants submit the issues are as follows:

A. Was the impugned Decision alert and alive to the best interests of the children?

B. Was the impugned Decision based on an internally coherent reasoning?

C. Did the impugned Decision unfairly challenge the Applicants' credibility without providing an opportunity for the Applicants to respond?

[9] The Respondent submits the issue is the reasonableness of the Decision.

[10] Respectfully, I submit the issues are:

A. Did the Officer breach procedural fairness?

B. Is the Decision reasonable?

V. Standard of Review

A. *Principle of Procedural Fairness*

[11] With regard to the first issue, questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12,

per Binnie J at para 43. That said, I note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': *Re:Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [per Rennie JA]. In this connection I also note the Federal Court of Appeal's recent decision holding judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[12] I also understand from the Supreme Court of Canada's teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions <u>other than a review related to a breach of natural justice and/or the duty of procedural fairness</u>), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that

> the legislature intended the standard of review to be reasonableness.
>
> [Emphasis added]

[13] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

B. *Reasonableness*

[14] With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to

> understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[15] In the words of the Supreme Court of Canada in *Vavilov*, a reviewing court must be satisfied the decision-maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
>
> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

> [Emphasis added]

[16] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
>
> [Emphasis added]

[17] Furthermore, *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The

> reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[18] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
>
> [Emphasis added]

[19] The Federal Court of Appeal recently held in *Doyle v Canada (Attorney General),* 2021 FCA 237 that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
>
> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

VI. Analysis

A. *Did the Officer breach procedural fairness*

[20] The Applicants submit the Officer dismissed the Principal Applicant's employment from 2014 to 2018 because there was a lack of corroborating evidence thereby amounting to a negative credibility finding. The Applicants submit that in doing so, the Officer unfairly challenged their credibility without providing an opportunity to respond. The Applicants submit basing the assessment of weight assigned to their employment on whether it was supported by evidence was not rational. Therefore, the Officer should not have reduced the weight given to their employment efforts.

[21] The Applicants cite to jurisprudence surrounding veiled credibility findings; however, I agree with the Respondent's submission that contrary to the Applicants' view, the Officer did not

make credibility findings regarding their employment history. In my respectful view, the Officer was simply assessing the weight to be given to the Principal Applicant's work from 2014-2018.

[22] In this connection the Applicants had filed no details or supplementary information. There was no information from his employer, no information as to salary or the nature of his work for the years 2014, 2015, 2016, 2017, and 2018. In my respectful view, the Officer did not doubt the Principal Applicant worked with the company but was not persuaded it added to his claim for employment-based establishment.

[23] In my view, the Officer reasonably considered the Applicants' establishment based on what very little evidence was available, which only related to his work from 2018 to the date of filing this H&C in 2019.

[24] There is no merit in the Applicants' argument otherwise. Respectfully, the Officer did not make veiled credibility findings. The Applicants are essentially asking this Court to reweigh the evidence to reach a different conclusion which is not the role of this Court on judicial review (*Vavilov* at para 125).

[25] I should add the Applicant submitted H&C Officers should be familiar with and reference specific country condition material favourable to H&C applicants notwithstanding, as here, the Applicants did not refer or rely on such evidence. I find this submission without merit. The onus of establishing whether an H&C exception is warranted lies with the applicant and if an applicant fails to adduce sufficient information, "he does so at his own peril". This law is well-settled by

this Court and, by the Federal Court and the Federal Court of Appeal: see *Khan v Canada (Citizenship and Immigration)*, 2020 FC 202 [per Roussel J] at para 7, citing *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 [per Nadon JA] at para 45 and *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 [per Evans JA] at paras 5, 8. While it might be different in cases where the same officer reviews an H&C and a PRRA that is not the case before the Court.

[26] Moreover, this Court recognizes the Officer's ability to "move immediately to an assessment of weight or probative value" without considering if evidence is credible, and faced with "the lack of specificity, the Officer's finding that there was a lack of evidence is not a veiled credibility finding", see *Arsu v Canada (Citizenship and Immigration)*, 2020 FC 617 [per McHaffie J] at para 41 [*Arsu*]; *Zhang v Canada (Citizenship and Immigration)*, 2020 FC 503 [per McDonald J] at paras 18-19.

B. *Is the Decision reasonable?*

(1) Best Interests of the Children

[27] The Applicants submit the Officer was not alert and alive to the best interests of the children, citing *Kolosovs v Canada (Citizenship and Immigration)*, 2008 FC 165 [per Campbell J] at paras 9-11. The Applicants submit the Officer based their Decision on two assumptions not supported by the record:

A. “I also note that the children are at the early stages of their academic career where the school programme is fairly universal and I am not persuaded that switching to a new curriculum at this time would likely cause an impediment to their education progress.” **[Decision page 13]**

B. “The applicants have provided birth certificates which demonstrates that they had access to medical resources in China…” **[Decision page 13]**

[28] Regarding the first statement, the Applicants submit the Officer does not refer to evidence attesting to how Canada’s and China’s education systems are universal and note the Minor Applicant is no longer in “the early states” of his academic career. The Applicants point to the Minor Applicant’s Provincial Report Card.

[29] Regarding the second statement, the Applicants submit the issuance of a birth certificate from China only applies to the Minor Applicant, because the Canadian-born children do not have Chinese status or identity documents. The Applicants point to their children’s birth certificates.

[30] The Applicants have not pointed to any relevant authorities to disprove the Officer’s statements. Respectfully, it is not the role of the Officer to fill in blanks left by the Applicants, (*Brambilla v Canada (Citizenship and Immigration),* 2018 FC 1137 [per Diner J] at para 19 [*Brambilla*]), which is what the Applicants are asking of the H&C officer. Again, the onus was ultimately on the Applicants to put their “best foot forward” (*Nhengu v Canada (Citizenship and Immigration),* 2018 FC 913 [per LeBlanc J as he then was] at para 6), which they failed to do.

[31] In the same view, the Applicants submit the Officer failed to address other factors affecting the children such as how the two Canadian-born children will be discriminated against by authorities and society in China as non-citizens, and how they will be affected by China's Two-Child Policy. The Applicants admit these arguments were not raised in their H&C application, but are discussed in the National Documentation Package [NDP] for China and therefore should have been considered by the H&C Officer.

[32] I disagree. As noted already, while the Applicants cite to such cases as refugee claimants and PRRAs, in effect expecting H&C Officers to have some knowledge of and to apply relevant country conditions not referred to or relied upon by the Applicants, that is not the law.

[33] Respectfully, the distinguishing factor in the case at bar is that the Applicants completely failed to raise either the issue of the Two-Child Policy in China or the treatment of non-citizen in their H&C application, nor did they cite to anything from the NDP in their submissions. In my respectful view, while the NDP is a publicly available document and therefore may be consulted by an officer, there is no legal obligation to do so in the H&C context (*Ocampo v Canada (Citizenship and Immigration)*, 2015 FC 1290 [per Martineau J] at para 16). Again, the onus was on the Applicants to link relevant country conditions to their own circumstances (*Taho v Canada (Citizenship and Immigration)*, 2020 FC 706 [per McHaffie J] at para 34) because "it is not the role of the Officer to fill in the blanks left by the Applicant" per Justice Diner in *Brambilla*, *supra* at paras 18-19.

[34] The Applicants further submit the Officer erred in their analysis of the risk of the children being kidnapped because they noted this is a country condition that "potentially affects every Chinese parent indiscriminately." In my view, while hardship may flow from general country conditions, this does not preclude the Officer "from assessing how an applicant's particular circumstances relate to the broader country condition evidence, in terms of the degree of risk or extent of harm they may be facing", see *Arsu, supra* at para 16. Here, the Officer was "not satisfied that the general conditions" in China were sufficient to warrant relief, a decision I find reasonable.

(2) Was the Decision based on internally coherent reasoning?

[35] Briefly, the Applicants submit the Officer found there was insufficient evidence to establish the Adult Applicants have a history of stable employment or sound financial management, but at the same time found the parents demonstrated capability to care and provide for their children. The Applicants submit this is a contradictory finding and is not based on an internally coherent and rational chain of analysis, citing *Vavilov* at para 15 and 85.

[36] I am unable to see such contradiction. With respect, the Officer found the parents "care greatly for their children's well-being" and they will likely continue to provide the children "with love, emotional and financial support to overcome any issues". This finding related to the Officer's finding, it would be in the children's best interests to stay with their parents if relocated to China.

VII. Conclusion

[37] In my respectful view, the Applicants have not shown that the decision of the Officer was unreasonable. In my view, the Decision is transparent, intelligible and justified based on the facts and law before the decision maker. Therefore judicial review must be dismissed.

VIII. Certified Question

[38] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-350-21

THIS COURT'S JUDGMENT is that judicial review is dismissed, no question of general importance is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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