Federal Court  Cour fédérale

Date: 20220715

Docket: IMM-5010-21

Citation: 2022 FC 1046

Toronto, Ontario, July 15, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

ZHUQI ZHOU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of a Senior Immigration Officer [Officer] dated July 2, 2021 [Decision], denying an application for permanent residence on humanitarian and compassionate [H&C] grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As set out further below, I find that the Applicant has not satisfied the high threshold necessary to establish a miscarriage of justice as required to show a breach of procedural fairness due to incompetent counsel. However, the Decision was unreasonable, as it failed to demonstrate that the Officer sufficiently engaged with the evidence submitted by the Applicant and to sufficiently explain why the application was refused. The application shall accordingly be referred back to a different officer for redetermination.

I. Background

[3] The Applicant, Zhuqi Zhou, is a citizen of China who came to Canada in 2001 to join his siblings and father. Mr. Zhou became a Christian shortly after he arrived to Canada. He has been active with his church and volunteers in the community.

[4] Mr. Zhou made a claim for refugee protection that was rejected in 2009. His application for leave for judicial review was dismissed.

[5] In 2012, Mr. Zhou made an application for permanent residence on H&C grounds and a Pre-Removal Risk Assessment [PRRA]. Both were refused. An application for leave for judicial review of the PRRA was dismissed.

[6] Mr. Zhou is now 70 years old. He has been unemployed while in Canada and was involved in two bike accidents that have left him with chronic pain and on disability benefits. This is the Applicant's second H&C application. It was prepared by an immigration consultant

who is the pastor of Mr. Zhou's church. Mr. Zhou alleges that his former consultant was incompetent in his representation, which led to the rejection of the H&C application.

[7] The Officer rejected Mr. Zhou's H&C application on July 2, 2021. In assessing establishment in Canada, the Officer acknowledged Mr. Zhou's activities with his church, his community volunteerism, and friendships. However, the Officer found that Mr. Zhou's establishment was typical for a person who had been in Canada for many years under similar circumstances. The Officer noted that Mr. Zhou had accumulated time in Canada since his first H&C application without the legal right to do so, and was aware that his removal from Canada could occur as a result of an enforceable removal order. The Officer concluded that Mr. Zhou's circumstances did not warrant granting an exemption under subsection 25(1) of the IRPA.

II. Issues and Standard of Review

[8] There are two issues raised by this application:

A. Was there a breach of procedural fairness due to the incompetency of the Applicant's former immigration consultant?

B. Was the Officer's Decision unreasonable?

[9] The competency of counsel relates to the Applicant's right to fully present his case, which is a question of procedural fairness: *Galyas v Canada (Citizenship and Immigration),* 2013 FC 250 [*Galyas*] at para 27. Questions of procedural fairness are best addressed by the correctness standard, although they are not strictly speaking subject to a standard of review analysis. Instead, such questions are to be reviewed from the perspective of whether the procedure followed by the decision-maker was fair and just: *Canadian Pacific Railway Company* v. *Canada (AG)*, 2018 FCA 69 at para 54; *Canadian Association of Refugee Lawyers*

v. Canada (Immigration, Refugees and Citizenship), 2020 FCA 196 at para 35; *Sangha v. Canada (Citizenship and Immigration)*, 2020 FC 95 at para 13.

[10] The substance of an Officer's H&C decision is reviewable on the reasonableness standard: *Raju v Canada (Citizenship and Immigration)*, 2022 FC 900 at para 4. None of the situations that rebut the presumption of reasonableness review for administrative decisions are present here: *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16-17.

[11] In conducting reasonableness review, the Court must determine whether the decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85-86; *Canada Post Corp* v *Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A reasonable decision, when read as a whole and taking into account the administrative setting, bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

III. Preliminary Matter – Style of Cause

[12] As a preliminary matter, I note that the style of cause for this proceeding has been amended to reflect the correct Respondent – The Minister of Citizenship and Immigration.

IV. Analysis

A. *Was there a breach of procedural fairness due to the incompetency of the Applicant's former immigration consultant?*

[13] The Applicant argues that his former consultant did not advise him of the criteria that needed to be met to receive an exemption on H&C grounds. He asserts that the consultant admittedly failed to ask for evidence to support the hardship he would face if returned to China, the best interests of his nieces and nephews [BIOC], and the Applicant's arguments relating to establishment in Canada. The Applicant asserts that these failures, along with the representative's failure to prepare any submissions in support of the application, constitute a breach of procedural fairness.

[14] The Respondent asserts that the threshold for relief for incompetent counsel is high, and that the Applicant has not demonstrated either incompetence or any prejudice from the actions of his representative. The Respondent contends that the fact that the former representative regrets not submitting more evidence does not amount to the extraordinary circumstances required to show a breach of natural justice. It notes the absence of any formal complaint to a regulatory body about the consultant's behaviour.

[15] The threshold for establishing a breach of procedural fairness due to incompetent representation is very high, and only applies in extraordinary circumstances: *Galyas* at para 83; *Huynh v Canada (Minister of Employment & Immigration)*, [1993] FCJ No 642, 1993

CarswellNat 107 (WL) (FCTD) at para 23. The three criteria an applicant must establish to support a breach of procedural fairness on the basis of incompetent representation are that:

> 1) the former counsel's acts or omissions constitute incompetence without the benefit and wisdom of hindsight;
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> 2) there is a reasonable probability that the outcome would have been different but for the alleged incompetence (i.e., the applicant has experienced prejudice as a result of the conduct amounting to a miscarriage of justice); and
>
> 3) the prior representative had a reasonable opportunity to respond to the allegation.
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> (*Galyas* at para 84; *R v GDB*, 2000 SCC 22 [*GDB*] at paras 27-29; *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 [*Memari*] at paras 33 and 36)

[16] There is an initial presumption that a representative's conduct falls within a wide range of what is considered reasonable professional conduct. The onus is on the Applicant to establish the acts or omissions are not the result of reasonable professional judgment. The wisdom of hindsight has no place in the analysis: *GDB* at para 27; *Nik v Canada (Citizenship and Immigration)*, 2022 FC 522 at para 24.

[17] The party making the allegation must show substantial prejudice to the individual and the prejudice must flow from the actions or inaction of the incompetent consultant. It must be shown that there is a reasonable probability that, but for those actions, the result of the proceeding would be different: *Jeffrey v Minister of Citizenship and Immigration*, 2006 FC 605 at para 9.

[18] In this case, the Applicant's former consultant submitted a declaration indicating that he assisted the Applicant with his application and advised him of what supporting documents to include. He notes certain deficiencies in the information requested of the Applicant and

submitted with the application, including relating to the Applicant's alleged inability to receive social assistance in China, and in relation to the Applicant's wife who resides in China and suffers from mental illness. The former consultant also indicates that he should have asked for additional documentation to support the Applicant's family ties in Canada, his relationship to his niece and nephews and his fiscal management. As stated in the former consultant's declaration:

> 10. The Applicant explained to me that he would not qualify for any pension in China because his extended absence from China.
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> 11. I know that the Chinese government does not provide such social assistance.
>
> 12. However, I did not think to include evidence of this in his application.
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> 13. The Applicant did explain to me that his wife is living in hardship in China because she has been struggling with mental illness.
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> 14. I did not request any supporting documents to prove this.
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> 15. I did not make submissions and I did not keep a copy of the applicant's file.
>
> 16. The Applicant is not close with his siblings in China and has a very close bond with his siblings and their families in Canada.
>
> 17. I understand now that I should have asked him to provide more photos of him with his family here, and more detail on how he helps his siblings to care for their children.
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> 18. Finally, I know that the Applicant would have been able to provide more evidence of good fiscal management had I asked him to do this but I did not think that this would be needed since he does not have a lot of money.
>
> 19. I wish I had done a better job with Elder Zhuqi Zhou's application for permanent residence on humanitarian and compassionate grounds.

[19] The Respondent argues that the critical issue in the analysis is prejudice. It asserts that despite the evidentiary concerns acknowledged by the Applicant's former consultant, the Applicant has not established that there was any additional evidence to support his claim that would have altered the Decision.

[20] The Respondent asserts that the circumstances here are distinguishable from those in *Kim v Canada (Citizenship and Immigration)*, 2012 FC 687 [*Kim*], referenced by the Applicant. In *Kim*, it was clear from the applicants' evidence that they had further evidence relating to financial establishment and that, but for the incompetence of counsel, the evidence would have been submitted with the application. In that case, the officer identified documentation going to financial establishment as being specifically lacking and important to the decision (paragraphs 17-24).

[21] The Applicant refers to *Galyas* for the proposition that there is no requirement to submit evidence to demonstrate that the result would have been different. However, in my view, *Galyas* is consistent with *Kim*; there must be some foundation to establish that the reliability of the result was compromised by the alleged misconduct and that additional evidence did exist. As stated at paragraph 88 of *Galyas*:

> [88] I am satisfied that incompetent representation, at least as regards the PIF, caused the RPD to find the Applicant was not credible with regard to his fear of persecution in Hungary and that the result could very well have been different had the Applicant been guided to prepare a PIF that met the expectations of the RPD. It is apparent from the RPD's reasons that it found the Applicant not to be credible after addressing each incident of persecution raised by the Applicant, and then finding it was not addressed in his PIF. I agree with the Applicant that the findings based on the inadequate PIF permeate the whole Decision. Further, the

> Applicant has made clear in his affidavit that he could have adduced additional evidence to support his claim if he had had proper guidance from former counsel.

[22] In this case, the Officer's reasons do not highlight a lack of evidence, nor do they indicate that the result of the H&C application would be any different if the Applicant submitted the evidence the consultant proposes he might have provided. There is no clear link between the Officer's reasons for refusal and the representative's alleged incompetent representation.

[23] Moreover, unlike *Galyas*, the Applicant has not submitted any evidence in the application to indicate that he could have adduced additional evidence to support his claim if he had further guidance from his former representative.

[24] As such, there is no basis for the Court to be able to conclude that the Applicant would be able to make out a BIOC claim with respect to his nieces and nephews, or that the Applicant's nieces and nephews are even of an age where the BIOC could be raised. Similarly, there is no basis to evaluate what further evidence on family ties was available and how it could have affected, if at all, the establishment analysis.

[25] It is reasonable to expect that the consultant could have obtained information relating to the availability of social assistance in China from country specific sources and provided other country condition evidence relevant to hardship. At a minimum, in my view this would have opened up the issue of hardship for consideration by the Officer. However, without any specific comments from the Officer, and any information about the scope and content of such country condition evidence it is unclear what, if any, impact the evidence would have had on the overall

outcome of the application. As such, I cannot conclude that the deficiencies noted in the consultant's declaration are so prejudicial that they rise to the level of a miscarriage of justice, manifesting in procedural unfairness.

[26] The Respondent asserts that the absence of a formal complaint to a regulatory body about the consultant's behaviour is also relevant in this case because there is a personal relationship between the consultant and the Applicant. The evidence indicates that the consultant is the Applicant's pastor and that he baptized the Applicant in 2005. Without a formal complaint, the inference proposed is that the admissions by the consultant are gratuitous and do not bear consequence.

[27] I note that the reporting aspect of an incompetence claim is premised on the concern that the former consultant be given notice and an opportunity to justify their conduct: *Basharat v Canada (Citizenship and Immigration)*, 2015 FC 559 at paras 14-15. There is no issue in this case that the former consultant was aware of the allegations of incompetence made and has responded to those allegations in his declaration. Further, there is no basis to doubt his sworn declaration or to dispute its credibility. However, I agree with the Respondent that the context of the declaration suggests that the comments made reflect a hindsight analysis of what evidence might have been filed to help the Applicant, rather than what evidence was omitted from the submission as a matter of incompetence.

[28] It is my view that the Applicant has not met the high threshold required to establish that there has been a miscarriage of justice as a result of the incompetence of his consultant.

B. *Was the Officer's Decision unreasonable?*

[29] The Applicant asserts, in the alternative, that the Officer erred in assessing his application by failing to provide sufficient reasons as to why the Applicant's family ties, the best interests of his nieces and nephews, and the hardship he would experience if returned to China were insufficient to warrant an H&C exemption.

[30] As noted by the Applicant, the Officer's reasons are brief, limiting the analysis to the Applicant's establishment, without consideration of the issues of family ties and hardship.

[31] The Officer notes in the Decision that the Applicant has "sustained injuries that continue to cause him discomfort and takes pain killers for relief. He relies on ODSP benefits for his support." However, the Officer does not consider how those injuries and benefits might be affected if the Applicant were to return to China, nor does the Officer comment on the Applicant's statement that if he were to return to China he would have neither pension nor medical benefits. While the evidence relating to these aspects is slim, I agree with the Applicant that the analysis nonetheless should have included a discussion of these factors in connection with the issue of hardship.

[32] Similarly, the Decision states only that "the applicant has three siblings residing in Canada with whom he shares close ties", without any analysis as to the impact of those family ties on establishment. While the Applicant indicated on his application that the BIOC was not applicable, the Applicant's family ties to his siblings and nieces and nephews are nonetheless

still relevant to his establishment. The Officer has not demonstrated that he considered the siblings' evidence and how it has factored into his establishment analysis.

[33] In my view, it was incumbent on the Officer to demonstrate by their reasons that the evidence submitted was taken into account and why it was insufficient to establish the H&C exemption requested. The failure to sufficiently do so, in my view renders the Decision unreasonable such that it should be sent back to another officer for redetermination.

[34] For these reasons, the application is allowed.

[35] No question of certification was raised by the parties and none arises in this case.

JUDGMENT IN IMM-5010-21

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to correctly identify the Respondent as The Minister of Citizenship and Immigration.

2. The application is allowed, the July 2, 2021 Decision is set aside, and the matter shall be referred back to another officer for redetermination.

3. There is no question for certification.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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