Federal Court  Cour fédérale

Date: 20100527

Docket: IMM-5320-09

Citation: 2010 FC 580

Ottawa, Ontario, May 27, 2010

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

BAOJU XIE, HUIJIUAN JIANG AND XIE MOY LY JIANG

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of the decision of immigration officer S. Neufeld, dated September 9, 2009, wherein the Applicant's application for permanent residence on Humanitarian and Compassionate grounds ("H&C") pursuant to section 25(1) of the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27 ("*IRPA*") was rejected.

[2] For the reasons that follow, I have come to the conclusion that the officer did not make any error that would justify the intervention of this Court. As a result, I am of the opinion that this application for judicial review ought to be dismissed.

I. The facts

[3] The Applicants, Baoju Xie and Huijiuan Jiang, are husband and wife and citizens of China. They first had a son, and then a daughter, Xiaoyin, who was born in 1983. Because of China's one child policy, they were fined as a result of having that second child.

[4] In order to pay that fine, which was quite substantial, the principal Applicant Baoju moved to Peru, where his parents were residing. The rest of the family eventually followed him in 1986, because they continued to face difficulties in China. They claim that Xiaoyin was a non-status person with no rights or benefits, as a result of her being a second child. In 1991, the principal Applicant and his wife had a third child, Xie Moy Ly Jiang; as she was born in Peru, she is a citizen of that country.

[5] Baoju Xie and Huijiuan Jiang owned and operated a restaurant in Peru. They stated that they were subjected to extortion and harassment. They also alleged that when they complained to the police, they were told to go back to China. As a result, the Applicants Baoju and Huijiuan closed down their business in 2004, and accompanied their eldest daughter Xiaoyin to Canada where she had obtained a student visa. Their son remained in Peru, while their youngest daughter came with them to Canada.

[6] One month after their arrival in Canada, in April 2004, the three Applicants claimed refugee status based on racial discrimination and harassment. On August 1, 2006, the Immigration and Refugee Board (the "IRB" or the "Board") refused their application. The Board excluded the Applicants Baoju and Huijiuan from claiming refugee protection pursuant to Article 1E of the Convention because of their status as permanent residents of Peru at that time. In response to the concern that the Applicants might have lost their permanent resident status in Peru as a result of leaving that country, the Board held, based on the documentary evidence, that while residency obligations in Peru must be fulfilled to maintain residency status and while such status may be lost as a result of a lapse, an individual could re-apply to the competent authorities to reinstate his or her status as a permanent resident.

[7] Moreover, the Board found that the documentary evidence failed to show that Chinese nationals living in Peru faced persecution, torture or cruel or unusual treatment or punishment because of their race. It was the Board's conclusion that the Applicants' allegations of repeated victimization was, on a balance of probability, a product of their status as business owners, and as such, could be remedied by a change in occupation.

[8] The Board also found that there was no persuasive evidence that the principal Applicant's daughter, Xie Moy Ly Jiang, who is a citizen of Peru, faced a well-founded fear of persecution in Peru, or that she was a person in need of protection. It was the tribunal's conclusion that the

Applicants' allegation, that she would be targeted in the future by criminals because of her race, was speculative and not grounded in facts or in any of the documentary evidence.

[9] In May and June 2007 respectively, the Applicants submitted their H&C applications (which included their eldest daughter Xiaoyin) and their Pre-Removal Risk Assessment (PRRA) to Citizenship and Immigration Canada (CIC). Both applications were rejected in September 2009.

[10] The Applicants Baoju and Huijiuan were removed to China on December 5, 2009, while their daughter Xie Moy Ly was removed to Peru on December 7, 2009.

II. The impugned decision

[11] The immigration officer first set out the criteria for an exemption on H&C grounds: an applicant has the onus to satisfy the decision-maker that his personal circumstances are such that the hardship of not being granted the requested exemption would be unusual and undeserved, or disproportionate. The officer then addressed the different factors raised by the Applicants.

[12] First, the officer reviewed the family's history and status in China and Peru, and considered the possible hardship faced by the Applicants in returning either to China or to Peru. With respect to Peru, the immigration officer explained that the Applicants provided insufficient information to indicate whether Mr. Baoju and Ms. Huijiuan could regain their permanent resident status, which has probably lapsed because of their lengthy absence. The officer also stated that it is not clear whether the principal Applicant's eldest son and parents are still living in Peru as was the case at the

time of their refugee claim. He then relied on the 2008 U.S. Department of State Country Report on Human Rights Practices in Peru, introduced by the Applicants, to conclude there are no reported societal abuses or discrimination, and that the laws of Peru provide for many human rights. On that basis, he found that the Applicants did not establish that they would face hardship in Peru as a result of discrimination. Furthermore, the immigration officer found that, although the criminality rate is high in Peru, adequate police protection will be available for the Applicants.

[13] With respect to the Applicants' fear of returning to China as a result of the one-child policy, the immigration officer concluded that the fear had no basis. In fact, the officer explained that the eldest daughter, whose birth was the reason for the Applicants' departure from China, is now over 26 years old and has already benefited from an education in both Peru and Canada. Moreover, both daughters are now adults and no evidence supports the claim that they will continue to face hardship in China due to family planning policy.

[14] The immigration officer also outlined that the youngest daughter is a Peruvian citizen. He recognized, based on a document entitled Citizenship Laws of the World, that a child cannot obtain Chinese citizenship by descent if the child has acquired the citizenship of the parent's new country. Nevertheless, he concluded that the youngest daughter may seek Chinese citizenship by naturalization with the support of close relatives she has in China. On that basis, he determined that the Applicants would face no hardship in China.

[15] As for establishment in Canada, the immigration officer accepted that the Applicants have presented evidence to indicate a measure of establishment. He acknowledged a head injury suffered by Ms. Huijiuan, but explained that he had insufficient information as to whether her recovery or potential litigation would require her to return to or stay in Canada. After reviewing the Applicants' employment and educational histories, the officer concluded that the evidence does not demonstrate a sufficient degree of establishment in Canada to cause an unusual, undeserved or disproportionate hardship if the Applicants were to be removed.

[16] Turning to the best interests of the children, the officer stated that there is insufficient information to support the view that either of the two daughters would face hardship upon their return to Peru or China. Furthermore, the eldest daughter has submitted an application for permanent residence in Canada as a skilled worker in which she indicated a measure of independence from her family as an adult.

[17] Finally, the immigration officer found that there is no indication that the Applicants would face difficulties trying to reintegrate into Peruvian or Chinese society. They have been independent and self-sufficient in the past and they have family who could assist them with their reintegration in Peru or China. As a result, he concluded that the assessed factors do not demonstrate that the Applicants' personal circumstances justify an exemption for reasons of unusual and undeserved or disproportionate hardship if they are to be returned to their country of nationality.

III. The issues

[18] This application for judicial review raises essentially four issues:

a. What is the appropriate standard of review?
b. Did the immigration officer apply the wrong legal test for the purposes of an H&C?
c. Did the immigration officer breach his duty of procedural fairness by relying on extrinsic evidence?
d. Did the immigration officer err in his assessment of the evidence?

IV. The analysis

A. *The Appropriate Standard of Review*

[19] The determination by an officer of the appropriate legal test for an H&C application and its distinction from the PRRA threshold is a legal issue reviewable according to the correctness standard: *Selvarasa v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1125, [2008] F.C.J. No. 1396 at para. 15; *Thalang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 340, at para. 6.

[20] When it comes to the assessment of the evidence, considerable deference should be accorded to H&C officers. Given the discretionary nature of an H&C decision and its factual intensity, the deferential standard of reasonableness applies: *Selvarasa* at para. 15; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, at para. 53. Review on the reasonableness standard requires the Court to inquire into the qualities that make a decision reasonable, which include both the process and the outcome. Reasonableness is concerned principally with the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within the range of acceptable outcomes that are defensible in fact and in law: *Dunsmui* at para. 47.

[21] Finally, as for the issue of breach of procedural fairness, it is well established that the applicable standard of review is that of correctness: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour))*, 2003 SCC 29, [2003] S.C.J. No. 28 at para.100; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056 at para.54.

B. *The Legal Test for an H&C*

[22] Counsel for the Applicants submitted that the immigration officer erroneously applied the PRRA test to the H&C application. To support this argument, the Applicants identified a passage in the H&C decision dealing with the situation in Peru that is identical to the equivalent passage in the PRRA decision, the only difference being the use of the word "hardship" in the H&C decision as opposed to the word "risk" in the PRRA decision. Moreover, the Applicants contended that the immigration officer rejected their hardship arguments vis-à-vis Peru primarily on the basis of a finding of adequate police protection, which is relevant to a PRRA decision but not to an H&C evaluation.

[23] It is well established that it is a reviewable error of law for an immigration officer to consider an H&C application against PRRA standards:

> A risk assessment in an H&C application must be assessed according to the standard of whether the risk factors amount to unusual, undeserved or disproportionate hardship and not according to the higher standard in a Pre-Removal Risk Assessment.
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> *Gallardo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 554, [2007] F.C.J. No. 749 at para. 12.

[24] However, this does not mean that no risk assessment should be undertaken in the course of an H&C determination. On the contrary, it is possible that certain risk factors which do not meet the higher threshold of a PRRA may nevertheless be relevant in assessing hardship in the context of an H&C application:

> There may well be risk considerations which are relevant to an application for permanent residence from within Canada which fall well below the higher threshold of risk to life or cruel and unusual punishment.
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> *Pinter v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 296, at para. 5.

[25] When looking at the decision as a whole, I am unable to find that the officer erred with respect to the legal test to be applied. He started his decision by quoting from CIC IP5 Manual (Immigrants Applications in Canada made on Humanitarian or Compassionate Grounds) the definitions of "unusual and undeserved" or "disproportionate" hardship. He then went through the different factors to be considered in such an application, such as hardship or sanctions upon return to Peru or China, degree of establishment in Canada, best interest of the children, spousal, family or personal relationships that would create hardship if severed, etc.. Indeed, the officer addressed all of the Applicants' concerns, as he had to. Risk upon return to Peru was very much part of the

Applicants' submissions, and the officer was not only justified but required to look at this factor and to go beyond it to assess hardship. As he stated:

> I have considered the applicants' H&C and PRRA applications and submissions in this decision as risk has been cited. However, I recognize that the threshold is one of hardship for an H&C application and not section 96 or 97 of the *Immigration and Refugee Protection Act* (IRPA). This H&C has been assessed on the basis of unusual and undeserved, or disproportionate hardship.
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> H&C decision, Certified Tribunal Record, p. 8.

[26] A careful reading of the officer's decision reveals that he was clearly aware of the test and that he applied it throughout his decision. He dealt with risk because it was raised by the Applicants, and he assessed it through the lens of hardship. He also considered the issue of discrimination, which is clearly more relevant to an H&C than to a PRRA. Considered as a whole, I am satisfied that he made no mistake and applied the correct test under section 25 of *IRPA*.

C. *Procedural Fairness*

[27] The Applicants submitted that the officer breached procedural fairness by relying on extrinsic documentary evidence without giving them an opportunity to respond. The documents at issue are the 2008 U.S. Department of State Report dated February 25, 2009, an IRB document dated March 6, 2008 discussing crime rates in Peru, and a U.S. government report entitled "Citizenship Laws of the World", which is part of a non-commercial collection of information.

[28] Firstly, the U.S. Department of State Report was provided to the officer by the Applicants themselves. Moreover, both that document and the IRB research document (which is part of the IRB national documentation package) are publicly available documents that can be accessed online.

[29] The Court of Appeal has held that an immigration officer may rely on publicly available documents in making his or her decision. Fairness does not require an immigration officer to disclose documents of this nature in advance of determining the matter. These documents should only be disclosed where they are novel and where they show changes in the general country conditions that may affect the decision: see *Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461 (C.A.), at paras. 26-27.

[30] Evidence that is part of the IRB documentation package on country conditions has been held to satisfy this condition: *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 838, [2004] F.C.J. No. 1033 at paras. 2-5. Similarly, the "Citizenship Laws of the World" document is a report prepared by a reliable governmental entity on country conditions. As such, I believe that it fulfills the conditions set out in *Mancia*: see, by way of analogy, *Sinnasamy v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 67, [2008] F.C.J. No. 77 at paras. 36-39.

[31] In any event, even if the immigration officer made an error by not disclosing this last document to the Applicants prior to making his decision, it would be futile to send the matter back for redetermination. The outcome of the H&C application would have remained the same even if

the document had been disclosed to the Applicants by the officer. Xie Moy Ly Jiang could still return to Peru, her country of citizenship, even if she does not have legal status in China.

D. *The Officer's Overall Assessment of the Evidence*

[32] The Applicants submitted that the immigration officer's decision is unreasonable for many different reasons. First, the Applicants submitted that the impugned decision is reviewable because the immigration officer did not deal with evidence that goes to the issues raised by the Applicants, and because the officer found that the Applicants had not provided evidence with respect to certain elements when in fact they had. More specifically, the Applicants contended that the officer ignored relevant evidence about another case where a child was born in New Zealand to Chinese parents. The child's application for H&C was rejected by the Respondent, but the Court granted the judicial review because dual citizenship is not possible in China and because the child had no status in China. According to the Applicants, this case was very relevant to Xie Moy's situation, and the officer's silence would indicate that he gave no consideration to that case.

[33] It is well recognized that administrative tribunals do not have to refer to every piece of evidence that is contrary to their findings, and to explain how they dealt with it. However, they have the obligation to address evidence that is very relevant to the applicants' claim or that appears to contradict the agency's findings of fact: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, at paras. 16-17 (F.C.A.).

[34] In the decision referred to by the Applicants (*Joe (Litigation guardian of) v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 116), [2009] F.C.J. No. 176, the application for judicial review of the H&C decision was granted on two grounds. First, the Court found that the applicant did not have legal status in China, and that as a consequence the officer erred in using China as the country of reference for his decision as opposed to New Zealand, as previously determined by the RPD and the PRRA decisions. Second, the Court determined that the officer disregarded the best interest of the minor applicant.

[35] In the case at bar, the officer's findings do not squarely contradict the *Joe* decision. The officer indirectly admitted that Xie Moy does not presently have status in China, because she was born in Peru. He simply suggested she could become a citizen by naturalization. If he assessed the hardship she would face in returning to China, it was merely out of an abundance of caution. With respect to the best interest of a child, the situation is also different from the one in *Joe*. In that case, the Court not only found that the officer erred by assessing hardship in a country where the minor child had no status, but also noted that the child had not lived in her country of citizenship since she was a baby, that she had no remaining relatives there, and that she had a naturalized Canadian grandmother taking care of her in Canada. Xie Moy Ly's situation is much different. She has no relatives in Canada who have permanent status, whereas her grandparents and her older brother appear to live in Peru; there is no evidence that these relatives are no longer living in Peru. Moreover, Xie Moy Ly was born and lived in Peru all her life before coming to Canada.

[36] Finally, the decision in *Joe* is not what is commonly referred to as evidence. It is a jurisprudential precedent where the Court made findings of fact and law based on the evidence before it. Even if it was established in that case that dual citizenship is not permitted in China and that a child born to Chinese parents outside of China has no status in that country, that does not mean that applicants can introduce the *Joe* decision in their applications instead of bringing their own evidence about their specific situations and their country conditions at the relevant time.

[37] The Applicants also alleged that the officer selectively used the documentary evidence, by taking information out of context and by ignoring contradictory evidence. The Applicants explained that the officer cited out of context the 2008 U.S. Department of State Country Report on Human Rights Practices, Peru, dated February 25, 2009 (the "Report") by stating that "there were no reports of societal abuses, or discrimination". It is true that this exact same wording exists in the Report in the section dealing with freedom of religion and anti-Semitic acts. However, there is no indication that the officer quoted this passage verbatim from the Report. Despite a general statement that although the law prohibits discrimination, discrimination persisted, found under the heading "Discrimination, Societal Abuses, and Trafficking in Persons", the Report notes that the only incidents of discrimination against national, racial or ethnic minorities pertain to Afro-Peruvians and indigenous people. There is no report of discrimination or societal abuses against people of Chinese ethnicity or of Asian descent. In this light, I do not believe the officer selectively used the Report.

[38] The Applicants also submitted that the officer ignored the evidence in the Report about the lack of training and the corruption of police forces in Peru. A careful reading of the officer's reasons shows that he addressed similar evidence contradicting his finding of adequate police protection. The relevant paragraph of his reasons in this respect reads as follows:

> In an Immigration and Refugee Board of Canada (IRB) research document dated 06 March 2008, it was noted that Peru has one of the highest reported crime rates in Latin America. In contrast, in this same document, Freedom House was quoted to indicate that the incidence of crime is low in Peru. The Peruvian National Police is an amalgamation of three former enforcement agencies and is credited with several, recent, major, achievements in countering crime. Absent evidence to the contrary, I am satisfied that there is adequate police protection for the applicants in Peru.
>
> Certified Tribunal Record, p. 9

[39] It is worth noting that the officer did not rely on the Report dated February 25, 2009 by the U.S. Department of State, but on another document not produced by the Applicants. The officer's reasons indicate, in my view, that he had contradictory evidence in front of him on that matter. He chose to rely on certain pieces of information more than on others and explained his choice. In doing so, he exercised his discretion in weighing the evidence, which is at the core of his jurisdiction. There is no reason to justify the intervention of this Court in this regard.

[39] The Applicants' third argument is that the officer failed to take into account the best interests of the child, Xie Moy, if her parents were subjected to removal. Having stated that Xie Moy cannot acquire Chinese citizenship, the officer nevertheless continued to assume that she would somehow become a citizen of China simply because she would have close relatives living there, thereby side-stepping the issue of hardship Xie Moy would face as a non-status person in

China. Alternatively, the officer's decision effectively forced Xie Moy to return to Peru by herself and to be separated from her parents indefinitely. The officer did not see any hardship in this separation simply because Xie Moy had crossed the 18-year-old threshold into adulthood.

[40] In light of the evidence before him, the officer's finding that Xie Moy would not face hardship upon return to Peru was reasonable. As already mentioned, Xie Moy is 18 years of age, she has Peruvian citizenship, and based on the information in the Applicants' PRRA application, she has a brother and living grandparents in Peru. Alternatively, there is no evidence she could not acquire Chinese citizenship, or that she would still bear the consequences of the one-child policy of that country even after having reached the age of majority. The assessment of these factors reasonably led the officer to conclude that Xie Moy would not suffer unusual, undeserved or disproportionate hardship if returned to Peru. The Applicants' arguments would amount to reweighing the evidence.

[41] It must be kept in mind that an H&C exemption from applying for permanent residence from abroad is a discretionary decision: *Gautam v. Canada (Minister of Citizenship and Immigration)* (1999), 167 F.T.R. 124, at para. 10. There is no doubt that the removal of the Applicants causes them hardship. But this is not the test. Although unfortunate, their situation does not amount to unusual or undeserved as contemplated by the *IRPA*. As stated by Justice Pelletier in *Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. (3d) 206:

> [12] If one then turns to the comments about unusual or undeserved which appear in the Manual, one concludes that unusual and undeserved is in relation to others who are being asked to leave Canada. It would seem to follow that the hardship which would

> trigger the exercise of discretion on humanitarian and compassionate grounds should be something other than that which is inherent in being asked to leave after one has been in place for a period of time. Thus, the fact that one would be leaving behind friends, perhaps family, employment or a residence would not necessarily be enough to justify the exercise of discretion.
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> See also: *Pashulya* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 1275, at para. 43.

[42] For all of the foregoing reasons, I am of the view that this application for judicial review must be dismissed. No question is certified.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed. No question is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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