Federal Court  Cour fédérale

Date: 20120524

Docket: IMM-7489-11

Citation: 2012 FC 638

Ottawa, Ontario, May 24, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

ZIXIANG ZHOU, QUIAN YI FENG
WEN FENG ZHOU (minor),
CHU LIN ZHOU (minor),
by their Litigation Guardian ZIXIANG ZHOU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek judicial review of a decision of Senior Immigration Officer J. Luneau (Officer), dated August 22, 2011, refusing the applicants' application for permanent residence on humanitarian and compassionate (H&C) grounds pursuant to section 25 of *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). For the reasons that follow, the application is dismissed.

Facts

[2] The applicants are a family from China: Zixiang Zhou (principal applicant); his wife, Qian Yi Feng (female applicant); their daughter, Chu Lin Zhou; and their son, Wen Feng Zhou. The applicants left China and came to Canada in 2003. They state that they fled because of fear of persecution based on the principal applicant's practice of Falun Gong and the family's violation of the one-child policy. The applicants made a claim for refugee protection which was refused in 2005 primarily based on credibility concerns.

[3] The applicants submitted their H&C application in 2006 and submitted updated forms and documents in December 2010. Their H&C application was based on the following allegations of hardship:

1. The principal applicant feared persecution because of his practice of Falun Gong;
2. The applicants feared their son would not be able to lead a normal life because he was born without a permit and was therefore not included in their Household Registration (*hukou*);
3. Applying for permanent residence from abroad would interfere with their establishment in Canada, including their employment and the children's education.

[4] By decision dated August 22, 2011, the Officer refused the applicants' H&C applications. In the Notes to File, the Officer recounted the applicants' allegations and submissions. The Officer noted that the allegations regarding the principal applicant's practice of Falun Gong had been considered and rejected by the Refugee Protection Division (RPD).

[5] The Officer found there was insufficient evidence that the principal applicant practiced Falun Gong, either in China or in Canada, or that he had been persecuted for Falun Gong practice in China. The Officer noted that the applicants submitted a letter stating that the female applicant had practiced Christianity while in China, for which she had been persecuted, and that she continued to practice while in Canada. The Officer noted that the female applicant had not actually alleged any risk on this basis and that she had never previously indicated that she was a practicing Christian. Because of these contradictions and the absence of any other evidence to corroborate her allegations, the Officer accorded very little probative value to the evidence regarding the female applicant's practice of Christianity.

[6] The Officer also found that the applicants had presented no evidence that they were wanted by the authorities for compulsory sterilization because of the birth of their son. The Officer noted that the RPD had rejected this allegation. Since there was objective documentary evidence that the son could be included in the *hukou* through payment of a fine, the Officer found it unlikely the son would face a risk of discrimination.

[7] Finally, regarding the applicants' establishment, the Officer found that they took the risk of settling in Canada without status and the ties they developed since arriving do not automatically constitute sufficient H&C grounds. The Officer acknowledged that the applicants would have to make additional efforts to readjust upon return, but found they would likely be able to find employment and also noted that they will have family support upon return to China.

[8] Regarding the best interests of the child, the Officer stated:

> In light of the foregoing analysis, and considering that the children are able to return with their parents to a country where there is a family network, they know the language and there is an educational system, I find that interrupting the schooling of the children in Canada is a significant factor but not a decisive one. Thus, on that point, I am of the opinion that the best interests of the children will not be compromised should they have to return to China.

[9] The application was therefore refused.

Standard of Review and Issue

[10] The issue raised by this application is whether the Officer's decision was reasonable: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

Analysis

[11] The applicants submit that the Officer failed to be alert, alive, and sensitive to the best interests of the children as required by section 25 of the *IRPA*: *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 at paras 9-11. The applicants contend that the best interests of the children must be well-identified, examined with a great deal of attention and given substantial weight. The applicants argue that the Officer's cursory remarks on this point come nowhere close to meeting this burden.

[12] I agree with the respondent's submission, however, that the Officer did consider the two allegations related to the children's best interests; that the son would face discrimination because he was not registered, and that removal would interfère with the children's education, in which they were excelling here in Canada.

[13] Regarding the son's registration, the Officer noted the RPD's finding that the son could be registered following payment of a fine and therefore there was insufficient evidence he would face any discrimination. Regarding the children's education, the Officer acknowledged that interruption of schooling was a significant factor, but found that this was mitigated by the fact that the children would be returning with their parents to a country where they had family, spoke the language and would receive an education. Thus, the Officer considered all the relevant factors raised by the application and the applicants' arguments amount to a request to weigh those factors differently.

[14] The applicants also allege several errors of law.

[15] First, they argue that it was an error to characterize the H&C application as an application for an exemption from the requirements of the *IRPA*. While the applicants are correct that section 25 states that the Minister "may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act", that does not mean that the grant of permanent residence under section 25 is not an exemption from the requirements of the *IRPA*. The availability of permanent residence on H&C grounds is itself an exemption intended to provide exceptional relief to an applicant that does not meet the requirements of any categories of permanent residence under the *IRPA*. This argument fails.

[16] The applicants also submit that the Officer applied the incorrect test for permanent residence on H&C grounds, repeatedly referring to risk and persecution, rather than hardship. However, as the respondent submits, the references to risk and persecution were in response to the allegations presented by the applicants: the majority of their submissions related to the alleged risks they faced

because of religious practice or violation of the one-child policy. Thus, the Officer's use of those terms was in her consideration of whether the applicants had proven these factual allegations. The correct test, whether the applicants would face unusual and undeserved or disproportionate hardship, was identified and applied in the decision.

[17] I agree that the reasons provided in this case come perilously close to being inadequate in demonstrating that the Officer was "alert, alive and sensitive" to the interests of the children, as required by *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. They evince, on first impression, the sense that the Officer treated the obligation arising from *Baker* summarily. The reasons, however, must be read in the context of the record and submissions before the Officer. They were, and it is conceded by counsel (who I hasten to add was not counsel at the time) superficial. There was not much for the Officer to consider.

[18] It is axiomatic that the applicant has the burden of adducing evidence and argument in support of an H&C application: *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635. This does not change in respect of the interests of children. As Dawson J noted in *Ahmad v Canada (Citizenship and Immigration)*, 2008 FC 646:

> The applicants do not point to any factual error in the officer's analysis, but instead argue that the analysis was too narrow. The applicants say that the officer should have considered the discrimination the applicants' now eight-year-old daughter would face in Pakistan.
>
> In my view, this submission is not consistent with the fact that it is the applicants who had the burden of specifying that their application was based, at least in part, upon the best interests of the children and the burden of adducing proof of any claim on which their humanitarian and compassionate application was based. It was incumbent upon the applicants to raise, and support with evidence,

> any specific issue a family member would face that was said to give rise not just to hardship, but to hardship which is unusual and undeserved or disproportionate.
>
> Because the applicants failed to directly raise the best interests of the children as a basis of their humanitarian and compassionate application, and because they failed to raise any specific factors relating to the children, I find no error in the officer's treatment of the best interests of the children.

[19] Here, the applicants advanced two specific factors relating to the best interests of the children; the effect on their education and the fact that their second child was in violation of the one-child policy and would be denied access to basic institutions.

[20] The later point was considered by the RPD. The Officer noted that the RPD found that, after some delay and the payment of a fine, a *hukou* would issue. Insofar as the education was concerned, the Officer did not embark on a comparison of the Chinese educational system or under which system the children would be better off. It would be an error to do so, as that is not the test. The Officer noted that the children spoke Cantonese, were very bright and would have parental and extended family support.

[21] In *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360, para 45, quoting *Osuwu* the Court of Appeal noted:

> In *Owusu*, above, this Court held that an H&C officer was not under a positive obligation to make inquiries concerning the best interests of children in circumstances where the issue was raised only in an "oblique, cursory and obscure" way […].

[22] The Officer was thus not obliged to conduct an examination as to whether the children would be better served by an education in China as opposed to an education in Canada.

[23] Thus, while the outcome was not what the applicants would have preferred and perhaps the Court would have reached a different conclusion, I find that the Officer considered all the evidence and reached a reasonable and justified conclusion. There is therefore no basis for the Court to intervene.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7489-11
STYLE OF CAUSE:	ZIXIANG ZHOU, QUIAN YI FENG WEN FENG ZHOU (minor), CHU LIN ZHOU (minor), by their Litigation Guardian ZIXIANG ZHOU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto
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