Federal Court Cour fédérale

Date: 20120911

Docket: IMM-2928-12

Citation: 2012 FC 1072

Ottawa, Ontario, September 11, 2012

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

JING MEI YE

Applicant

and

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

Respondent

REASONS FOR ORDER AND ORDER

[1] Ms. Ye, a citizen of both China and Belize, came to Canada in 2007 to claim refugee status. She was accompanied by her young daughter Peilin who was born in Belize and is a citizen of that country. The record is unclear as to whether she is also a Chinese citizen.

[2] The tragedy in their lives is that in 2006, Ms. Ye's husband, the owner of a convenience store in Belize, was shot in the head by two armed robbers. At the time, Peilin, who was only four months old, was in his arms.

[3] He was shot through an eye and the bullet lodged in his brain. To this day, he remains in a coma.

[4] With the aid of the Belize Chinese Association, he was returned to China where he remains in hospital. Ms. Ye and Peilin returned to China, but after a few months came to Canada to seek refugee protection.

[5] The basis of her fear of persecution in China was that she and her husband have another daughter, older than Peilin, who was born out of wedlock in China. Her fear was that she would be sterilized for violating China's one child policy.

[6] Her fear of persecution or lack of protection in Belize was based on the robbery incident.

[7] She was unsuccessful both at the refugee stage and later at a pre-removal risk assessment.

[8] She also asked for permission to apply for permanent residence from within Canada on humanitarian and compassionate grounds. The normal rule is that one must apply from outside Canada. That request was dismissed and is the subject of this judicial review.

[9] As regards Ms. Ye, the well-known test which serves as the basis of the Minister's discretion under section 25 of the *Immigration and Refugee Protection Act* [IRPA] is whether an application from outside Canada would subject her to undue, undeserved or disproportionate

hardship. The Act requires the Minister to take into account the best interests of a child directly affected.

[10] In the past, circumstances which did not quite amount to persecution or to the need of protection under sections 96 and 97 of IRPA, which serve as the basis of a refugee claim, might nevertheless have been found to constitute undue, undeserved or disproportionate hardship. However, those circumstances can no longer be taken into account in a humanitarian and compassionate application as a result of amendments made to IRPA in 2010. Section 25(1.3) now provides:

(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.	(1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

[11] The thrust of the Applicant's case is that the decision-maker did not take into account Peilin's best interests. Certainly, there would be no basis for a judicial review if Ms. Ye were here on her own. The officer looked at her establishment, but pointed out that a certain level thereof would be normally expected of a person waiting for the conclusion of a refugee and removal process. Her establishment here was not as a result of circumstances beyond her control or due to an inability to leave Canada. There was insufficient evidence to conclude that conditions in Belize "are dreadful enough to qualify as unusual, undeserved or disproportionate hardships." Belize is

a constitutional democracy, with a government in control. Discrimination based on race, gender, disability, language or social status has been successfully outlawed. Laws are in place and enforced to protect the welfare of children. There was no reason to believe that she would not be able to use her retail and other skills to help her obtain employment in Belize. Having come to that conclusion the officer did not consider China and what hardship she might endure should she be returned there.

[12] The officer also accepted that Ms. Ye showed symptoms of post-traumatic stress disorder, but was of the view that her condition did not relate to a particular hardship present in Belize, so much as it had to do with the Applicant's mental state.

[13] The submissions are that the same "unusual, undeserved or disproportionate hardship" test was applied to Peilin. It was submitted that this was the wrong legal test in considering the best interests of a child, as was any consideration as to whether the "basic needs" of Peilin would be met in Belize.

[14] Counsel relied very strongly on the recent decision of Mr. Justice James Russell in *Williams v Canada (MCI)*, 2012 FC 166, [2012] FCJ No 184 (QL), and cases he relied upon including *Shchegolevich v Canada (MCI)*, 2008 FC 527, [2008] FCJ No 660 (QL), and *Mangru v Canada (MCI)*, 2011 FC 779, [2011] FCJ No 978 (QL).

[15] At paragraph 63 of *Williams*, above, Mr. Justice Russell stated that the decision-maker must first establish what is in the child's best interests and, second, the degree to which the child's

interests are compromised by one decision rather than another, and finally in light thereof determine the weight that this factor should play in the balancing of positive and negative factors.

[16] One of the leading cases following the decision of the Supreme Court in *Baker v Canada (MCI)*, [1999] 2 SCR 817, 174 DLR (4th) 193, [1999] SCJ No 39 (QL), is the decision of the Federal Court of Appeal in *Hawthorne v Canada (MCI)*, 2002 FCA 475, [2003] 2 FC 555, [2002] FCJ No 1687 (QL). *Hawthorne* was more recently extensively reviewed by the Court of Appeal in *Kisana v Canada (MCI)*, 2009 FCA 189, [2010] 1 FCR 360, [2009] FCJ No 713 (QL). It was pointed out that absent exceptional circumstances a child's best interests would play in favour of the non-removal of the parent. An important factor is hardship arising from the geographical separation of family members. Consideration could also be given to reuniting of the family.

[17] In this particular case, there is no question of separating Peilin from her mother. Peilin is separated from her father and older sister due to actions of her mother. She is not a Canadian citizen and in the normal course of events will remain with her mother wherever she may be.

[18] Unlike the *Williams* case, in these circumstances I consider the argument of the Applicant to be one of form over substance. The choice of words is somewhat unfortunate, but it must be borne in mind that the onus is upon the Applicant to establish humanitarian and compassionate grounds (*Owusu v Canada (MCI)*, 2004 FCA 38, [2004] 2 FCR 635, [2004] FCJ No 158 (QL)). The only hardship to Peilin is that she is now in elementary school and would be separated from her classmates in British Columbia. However, this is no more traumatic than if her mother moved to Toronto. This is inherent in any removal (*Melo v Canada (MCI)*, 188 FTR 39, 2000 FCJ No 403

(QL)). She speaks English and Cantonese. English is the official language of Belize and as the record shows, there is a viable Chinese community there. The medical services provided to her father were first rate.

[19] Another factor urged upon me is that a psychological report produced to deal with Ms. Ye's state of mind also mentioned that her depression, were she to be returned to Belize, would likely flow through to Peilin. The officer did not specifically mention this aspect of the report, which she obviously read. It would be most unfair to say that she overlooked a point which had not been pressed upon her in first instance. As recently stated by the Supreme Court in *Lax Kw'alaams Indian Band v Canada (Attorney General)***,** 2011 SCC 56, [2011] 3 SCR 535, [2011] SCJ No 56 (QL), a party, or in this case a decision-maker, was entitled to proper notice as to what exactly was being advanced. It is not up to the decision-maker to ferret out points which might possibly assist an applicant.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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