Federal Court Cour fédérale

Date: 20140331

Docket: IMM-13025-12

Citation: 2014 FC 304

Ottawa, Ontario, March 31, 2014

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

MIAO MIAO WANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a decision of an Immigration Officer (the Officer) dated November 7, 2012 denying the applicant's application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds.

FACTS

[2] The applicant is a 29 year-old citizen of China. Before coming to Canada she lived in the city of Guangzhou, in Guangdong province. She first came to Canada on a study permit on July 17, 2003 and last entered Canada on March 28, 2004, again with a study permit. She resides with her two daughters, who were born in Canada in 2008 and 2009.

[3] In 2005, the applicant made a claim for refugee protection fearing persecution due to her alleged religious beliefs. Her claim was rejected in January 2006.

[4] In August 2009 the applicant's first H&C application was rejected. An application for leave in respect of that decision was denied by this Court in April 2010.

[5] In September 2009, the applicant applied for a Pre-Removal Risk Assessment, which was refused. She submitted the current H&C application in December 2009 and then submitted updates to her H&C application in February 2011, May 2012, and October 2012.

[6] The applicant bases her H&C application on three grounds:

> (a) that she and her children have become established in Canada;
>
> (b) that she and her children will suffer financial and social hardship due to China's one-child policy, which imposes severe fines and other punishments on parents, and social restrictions on children; and
>
> (c) that it is in the best interests of the two children that they be allowed to remain in Canada, and not be required to return to China.

THE DECISION UNDER REVIEW

[7] The Officer acknowledged that the applicant fears returning to China as she is in violation of the country's one-child policy and also an unwed mother, for which she fears repercussions. The Officer made reference to the documentary evidence relating to country conditions and human rights in China.

[8] The Officer found that the applicant had failed to provide sufficient evidence that paying fees in China would constitute an unusual, undeserved or disproportionate hardship. While the information provided supports that the applicant may be required to pay a fine for her children to access education and medical care, there is no evidence to support that the applicant is incapable of paying these fees given her access to an overseas education in Canada, the ability to establish businesses in Canada and purchase a house.

[9] In relation to the factor of establishment in Canada, the Officer noted that the applicant submitted evidence showing that she had purchased a house for approximately $458,000 in February 2009. However, no further evidence or updated information had been provided with regard to her financial situation in Canada. Moreover, the applicant had not provided letters of support from friends, co-workers or persons involved in her business activities in Canada, or her family members in China. As such, the Officer found that the evidence did not support that the applicant had become established in Canada to the extent that severing her ties here amounted to an unusual and undeserved, or disproportionate hardship.

[10] The Officer then examined the best interests of the applicant's two children. Since they are both Canadian citizens, the decision to have them accompany their mother to China is left to the discretion of the applicant. The Officer acknowledged, however, that children's best interests are usually better served by them remaining with their parents. The fact that the children may prefer living in Canada was considered by the Officer to not be a factor in this assessment. While the applicant asserts that her children will be better off in Canada, the Officer concluded that the documentation does not support that it would be contrary to their best interests for the applicant to return to China.

ISSUES

[11] 1) Did the Officer fail to consider or ignore evidence?

2) Was the Officer's hardship analysis reasonable?

3) Was the Officer alert, alive, and sensitive to the best interests of the children?

STANDARD OF REVIEW

[12] It is well recognized that an Officer's H&C decision under section 25 of the Act is reviewable on a standard of reasonableness (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, at para 18 [*Kisana*]; *Terigho v Canada (Minister of Citizenship and Immigration)*, 2006 FC 835, at para 6). When reviewing an H&C decision, considerable deference should be accorded to immigration officers given the fact-specific nature of the inquiry, the exceptional nature of the provision and the considerable discretion evidenced in the statutory language (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 62).

ANALYSIS

1) Did the Officer fail to consider or ignore evidence?

[13] The applicant submits that the Officer failed to consider her updated submissions and evidence filed in October 2012 which included:

> (a) a news article confirming that the Nobel Prize in Literature had been conferred on a Chinese author who is an outspoken critic of the one-child policy;
>
> (b) a copy of the 2010 regulations of a town in Guangdong province with respect to the one-child policy confirming fines for having a second child in the amount of RMB 161 208 per parent (or $51,554 Canadian per couple), as well as fines for unapproved pregnancies, and having children outside of marriage; and
>
> (c) a news article confirming that one couple had been fined RMB 1.3 million (or $208,855 Canadian) for a violation of the one-child policy.

I disagree.

[14] The Officer specifically listed the October 2012 update at the end of her decision as a source she had consulted. It is well established that the decision-maker does not have to refer to every piece of evidence that they received and explain how they dealt with it (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 16 [*Cepeda-Gutierrez*]). However, when the evidence is contrary to the Officer's findings, the "burden of explanation increases with the relevance of the evidence in question to the disputed facts." (*Cepeda-Gutierrez* at para 17).

[15] This is not the case in the present file. The evidence that is not directly cited by the Officer is of low relevance to the facts in dispute and is very similar to other evidence that is directly cited. The documentary evidence submitted in the October 2012 update reinforces the existence of the one-child policy as well as its current application, topics covered by the Officer in her decision

through the use of other documentary evidence. The update does not address the issues that lie at the heart of this matter: the inability of the applicant to pay, the possibility of an exception being made, and the undue hardship that the policy would cause. Therefore, it cannot be said that not explicitly citing the documents included in the October 2012 update constitutes a reviewable error.

2) Was the Officer's hardship analysis reasonable?

[16] The applicant argues that she filed extensive submissions with respect to the degree to which she and her children would be affected by China's one-child policy: the applicant would be exposed to a very high penalty; she may be subjected to forced birth control or sterilization; and her children will be denied access to basic social services including education and health if they are not registered and the fine is not paid. Given this body of evidence, it was unreasonable for the Officer to find that the applicant did not face unusual, underserved or disproportionate hardship if required to return to China.

[17] Further, the Officer erred in finding that the one-child policy does not apply to Chinese nationals returning from overseas. The applicant submitted email correspondence from the professor, cited by the Officer, as an expert supporting this finding. In the email the professor stated that he "d[id] not remember making any conclusive recommendations regarding how a failed refugee claimant from the PRC in Canada will be treated with children born in Canada, who have Canadian citizenship." In *Jiang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1512 at para 50 [*Jiang*] this Court considered what appears to be the same evidence and granted the judicial review, finding that it was unreasonable for the Officer to fail to explain why this evidence

was rejected. Since the circumstances in *Jiang* are apparently the same as in the case at bar, the same result should follow.

[18] The applicant also argues that the Officer should have relied on the most recent Response to Information Request (RIR) from October 2012 which confirms that returnees are currently subject to the one-child policy and its consequences, particularly in Guangdong.

[19] Lastly, the applicant submits that while the Officer agreed in her reasons that the social maintenance fees are exorbitant, she failed to consider that having to pay such a fine merely for having a child may be, in and of itself, an unusual and undeserved or disproportionate hardship.

[20] I disagree. In an H&C application, the burden is on the applicant to satisfy the Officer that there would be unusual and undeserved or disproportionate hardship to obtain a permanent resident visa from outside Canada (*Pinter v Canada (Minister of Citizenship and Immigration)*, 2005 FC 296, at para 3). Given the lack of evidence submitted about the applicant's personal situation, including her current financial situation in Canada and the likely income she would receive in China, it was open to the Officer to find that she had not met her burden of showing undue hardship, particularly since the fine that may be levied is calculated in relation to income. Even if she were forced to pay a fine, the applicant has failed to prove that she would be unable to do so.

[21] The 2012 RIR referring to births in Guangdong is not definitive on the treatment of children of returnees, as claimed by the applicant. The RIR specifies that fines for violating the policy apply to "births in Guangdong that involve Chinese returning from abroad…". This would apply to

situations when a couple with an existing child return and then have a second child, which is not the scenario contemplated by the applicant.

[22] The present case can be distinguished from *Jiang* in that here, the Officer did not err in her treatment of the correspondence from the professor cited in the RIR. In *Jiang* the Officer's decision was found unreasonable since it was silent on this particular evidence. Here the Officer considered this evidence head on, stating "I have read and considered the information in this document." The Officer went on to explain that it is not within her mandate to correct IRB documents, and that assessments such as this one rely on a number of documentary sources that are weighed and evaluated. In *Jiang* at paragraph 50 Justice O'Reilly specified that "this piece of evidence does not dictate a particular outcome and it is not this Court's role to reweigh evidence." The Officer in the present case properly considered this evidence and it is not for this Court to question the weight it was given.

3) Was the Officer alert, alive, and sensitive to the best interests of the children?

[23] The applicant submits that the Officer's conclusion that the documentary evidence did not support that it would be contrary to the best interests of the applicant's children for the applicant to return to China flies in the face of the Federal Court of Appeal's decision in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, at para 5 [*Hawthorne*]. In addition, the Officer erred in not considering the children's preference of living in Canada as a factor in the assessment.

[24] The applicant further argues that the Officer used an unreasonably low standard in her best interests of the child analysis, contrary to the requirements in *Hawthorne*, when she concluded that

the children's basic amenities such as education and health care are available in China. The one-child policy will likely have a significant financial and social impact on the children. This Court has found that to expose children to "financial uncertainty" constitutes "irreparable harm" for the purpose of granting a stay of removal (*Harry v Canada (Minister of Citizenship and Immigration)*, [2000] 195 FTR 221, at para 17).

[25] I am satisfied that the Officer did not err in her analysis of the best interests of the children and her reasoning was in line with the decision in *Hawthorne*. At paragraph 6 of *Hawthorne* the Court states:

> To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial - such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent.

[26] The Officer acknowledged that children's best interests are usually better served by them remaining with their parents. She then went on to consider the particular circumstances of the case and the likely degree of hardship caused to the children by the applicant's removal. She found that there was a lack of documentary evidence submitted to show the children's level of establishment in Canada or the lack of availability of basic amenities such as education and health care in China.

[27] It was reasonable for the Officer to not place any weight on the wishes of the children. A child's wishes are to be considered "in accordance with the child's age and maturity" (*Hawthorne* at

para 33). While in *Hawthorne* the child in question was fifteen years old, here the applicant's children are two and three years old. There was no direct evidence from the children regarding what their wishes were, and even if there were such evidence, it would not carry much weight due to their very young age.

[28] Regardless of the Officer's final determination on the best interests of the children, it must be noted that it is settled law that while the best interests of the child factor must be given substantial weight, it is not determinative in the context of an H&C decision (*Hawthorne*, at para 3; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125; *Kisana*, at para 37). The question before the Officer is not whether the best interests of the children would require the applicant be allowed to stay in Canada. Rather, the correct question is whether the children's best interests, when weighed against the other relevant factors, justified an exemption on H&C grounds (*Kisana*, at para 38). The Officer's weighing of the factors to be considered in an H&C application, including the best interests of the children was reasonable and should not be disturbed.

CONCLUSION

[29] The Officer's decision is justified, transparent, and intelligible and falls within the range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47; *(Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 59). Thus, the intervention of this Court is not warranted.

[30] For these reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is dismissed.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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