Federal Court  Cour fédérale

Date: 20140826

Docket: IMM-3653-13

Citation: 2014 FC 824

Ottawa, Ontario, August 26, 2014

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

XIAO WEN GAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of an Immigration Officer [the Officer] dated March 18, 2013, which refused the applicant's application for permanent residence under the family class due to her exclusion under paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], finding that humanitarian and compassionate [H&C] considerations under subsection 25(1) of the

Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA or the Act] did not overcome the applicant's exclusion under the Regulations due to non-disclosure by her mother.

[2] The applicant, Ms Xiao Wen Gan, is a citizen of China. She was sponsored to come to Canada as a member of the family class by her mother, Rui Lan Lin [the mother or the sponsor], who has been a Canadian citizen since 2008. On three occasions, the applicant's mother did not declare the applicant as a non-accompanying relative (2004, 2005 and 2010). The present sponsorship application merges two sponsorship applications, one filed in 2009 for permanent residence, and the other in 2012 also for permanent residence but on H&C grounds.

[3] The 2009 application was dismissed, and judicial review was sought. However, the case was settled by agreement that both applications should be decided by a different officer by way of a merged application. The merged application was dismissed, leave was granted, and this is the decision on the resulting judicial review.

[4] At issue is whether the Officer fixated on the mother's failure to declare the applicant as a non-accompanying dependant, such that there was an unreasonable fettering of the Officer's discretion resulting in a breach of natural justice and procedural fairness.

[5] In my view judicial review should be allowed for the following reasons.

[6] It is not possible to read the Officer's letter decision and notes without concluding, as did my colleague Justice de Montigny in *Sultana v Canada (Minister of Citizenship and*

Immigration), 2009 FC 533 in somewhat similar circumstances, that the officer was fixated on, and viewed the H&C application through the prism of the mother's failure to declare the applicant on three previous applications. In the result I find there was not a genuine consideration of the submissions made in support of the applicant separate and apart from those relating to the finding of ineligibility based on the mother's repeated misconduct in failing to declare the applicant (see also *Weng v Canada (Citizenship and Immigration)*, 2014 FC 778 at para 34). The result is not within the range of possible, acceptable outcomes which are defensible on the facts and law, and there was a lack of procedural fairness. Therefore judicial review must be granted (*Dunsmuir v New Brunswick*, 2008 SCC 9).

[7] As part of an H&C application, an officer is entitled to assess the credibility of the sponsor, who in this case was found seriously wanting due to her repeated failure to tell the truth to her adopted country. The applicant's mother deliberately failed to declare the applicant on not just one but on three separate occasions. And while China's one child policy might possibly excuse the mother's misrepresentation prior to the child being officially registered in China, in my opinion there is no credible excuse for the mother's misrepresentation thereafter. In the result, the applicant was properly found to be ineligible under paragraph 117(9)(d) of the Regulations.

[8] But that is not the end of the matter because the applicant had the right to a genuine and unfettered assessment of her H&C application separate and apart to the extent possible from the mother's sponsorship application.

[9] If H&C applications brought by otherwise ineligible persons are determined on the same or predominantly the same basis as grounded their ineligibility, Parliament's intent in creating a separate H&C process would be defeated. Therefore this H&C required a decision on its merits separated to the extent possible from the mother's serious and repeated misconduct in failing to declare.

[10] Indeed, the Officer recognized that he had before him an application under subsection 25(1) of the IRPA and that this was the main issue he was called upon to decide. He knew that the application was an H&C, stating:

> This application for permanent residence was made on the basis of an appeal under Humanitarian & Compassionate Grounds, under section A25 of the *Immigration and Refugee Protection Regulations*

And:

> That the PA was not ever declared to IMM is not in question, prior to the submissions of her FC3 applications. This application is being considered to see if there is sufficient H&C to overcome the sponsor's non-declaration of the PA, making her a member of the Family Class and overcoming R117(9)(d).

[11] The difficulty with the Officer's reasons is that any fair reading of the Officer's notes, which are far more extensive than the letter decision and which are to be considered on judicial review, disclose repeated references to the mother's misrepresentations/failure to declare.

[12] For example, the notes state:

> Also, one wonders why the mother neglected to include [the applicant] in her submissions for her other children, who I believe are also in Canada.

And:

> I note that the psychological assessment from Fujian Normal did not have access to these individuals to fill out its report. It states that a refusal of positive H&C would deny [the applicant] an equal place in her family. I read events to place this responsibility at her sponsor/mother's feet; it is she who repeatedly did not declare the PA on immigration application forms, or to PRC authorities. … I cannot escape the conclusion that is [*sic*] the sponsor's actions that have resulted in this reading of events.

And:

> … it is this sponsor that saw fit to not declare this PA to civil authorities and separate from in moving to Canada, a move that I read to have facilitated the sponsor's landing in Canada via an MOC.

And further:

> Any separation of the family, in my view, is and was solely caused by the sponsor's choices.

[13] Nor are these the only examples where the Officer considered the misrepresentations by the applicant's mother. It is not necessary to recite them all. Suffice to say that the Officer referred to the mother's misconduct on more than 30 occasions. While some such references are undoubtedly fair comments in relation to the issue of the mother's credibility as the applicant's sponsor, many if not the majority are made in contexts other than assessing the credibility of the mother, or their reunification plans.

[14] This excessive concern with the mother's actions, as serious as her misconduct was, creates the appearance that the rejection of the H&C, which was brought to overcome her ineligibility, was instead decided because of the very facts underlying that ineligibility, namely the mother's failure to disclose the applicant.

[15] In addition to the submissions of the mother, which the Officer found not credible due to her misrepresentations, in my view in this case, the Officer was required to assess the applicant's submissions, a psychological assessment, and submissions by the applicant's sister and brother.

[16] The Officer did consider the Applicant's submissions, but did so in the context of the mother's misrepresentations.

[17] The Officer considered but criticized the psychological report, in part again because it was based on the mother's version of events, which had been found not credible. The psychological assessment is significant to this application. The Officer was entitled to accept, or reject or otherwise weigh that report, but was required do so in a fair and unfettered manner yet failed in this respect.

[18] While I have found that the applicant's reunification with her mother was considered by the Officer, given the Officer's findings regarding the mother, it became all the more important for the Officer to consider the submissions of both the applicant's older sister and younger brother (both of whom are Canadian citizens). However such assessment was again inadequate.

No mention is made of the brother for example. Again the assessment is tainted by the Officer's repeated references to the mother's misrepresentations.

[19] It should also be noted that an important principle underlying Parliament's statement of objectives for the IRPA is family reunification. Paragraph 3(1)(d) of the IRPA states:

Objectives — immigration	**Objet en matière d'immigration**
3. (1) The objectives of this Act with respect to immigration are	3. (1) En matière d'immigration, la présente loi a pour objet :
…	…
(d) to see that families are reunited in Canada;	d) de veiller à la réunification des familles au Canada;

[20] Therefore, I have concluded that judicial review is required and that this application should be allowed.

[21] No party asked for a question to be certified and I find no question of general importance to certify.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Judicial review is granted;
2. The decision dated March 18, 2013 is set aside and the matter (being the merged applications for permanent residence and H&C) is hereby remitted to a different immigration officer for redetermination;
3. No question is certified.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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