Federal Court  Cour fédérale

Date: 20170223

Docket: IMM-3149-16

Citation: 2017 FC 223

Ottawa, Ontario, February 23, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

SHANRONG ZHONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Shanrong Zhong, is a 19 year old citizen of China who was included as the dependent daughter of Zuan Zhong in his application for permanent residence made in April 2013. However, after it was discovered that she was not the biological or adopted daughter of Mr. Zhong and his wife, Yunlan Fan, an immigration officer at the Consulate General of Canada in Hong Kong and Macao determined that the Applicant did not meet the requirements to obtain a permanent resident visa as a family member of Mr. Zhong. Ms. Fan and Mr. Zhong, on behalf

of the Applicant, requested that this determination be reconsidered on humanitarian and compassionate grounds, but the officer denied this request in a letter dated July 11, 2016. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the officer's reconsideration decision.

I. Background

[2] In the early morning of March 28, 1997, Ms. Fan and her husband heard an infant crying at the doorway. When they opened the door, they found a female infant in a basket and after taking the infant in discovered a red slip stating the infant's birthdate was at 11:50 p.m. on March 25, 1997. Due to Ms. Fan's inability to have children, she and Mr. Zhong decided to take the infant in and raise her, the Applicant, as their daughter. They also decided to not disclose to anybody that the Applicant had been abandoned because they wanted her to grow up happy without being negatively impacted by the fact that her biological parents had abandoned her.

[3] On September 19, 2000, the Applicant's "parents" obtained a birth certificate for her through what Ms. Fan describes as "improper means." This birth certificate enabled the Applicant to be registered to her parents' *hukou*, or household register, and thereby obtain proper legal status in China. According to Ms. Fan, education, medical services and, eventually, work would have been denied to the Applicant if she had not been named in the family's *hukou*. Neither Ms. Fan nor Mr. Zhong has disclosed to the Applicant that she was abandoned or that they are not her biological parents.

[4] In 2010, Mr. Zhong fled China because of religious persecution and arrived in Canada where he obtained Convention refugee status in March 2013. He then applied for permanent resident status in April 2013 and included his wife and the Applicant as family members. Upon review of the application at the Consulate General of Canada in Hong Kong and Macao, an immigration officer [the Officer] noted that the Applicant's birth certificate was unusual because it was handwritten. In a letter to Ms. Fan dated March 6, 2015, the Officer requested a DNA test to confirm the relationship between the Applicant, Mr. Zhong and Ms. Fan. The DNA test revealed that the Applicant was not the biological daughter of either Mr. Zhong or Ms. Fan.

[5] In a letter to Ms. Fan dated May 6, 2015, the Officer outlined the findings of the DNA test and indicated that the Applicant would be removed from the permanent residence application. The Officer indicated that the Applicant was not a "dependent child" as described in section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] and, therefore, she did not meet the requirements of paragraph 117(1)(b) of the *Regulations*. The Officer also cautioned Ms. Fan that she may be found inadmissible for misrepresentation, contrary to subsection 40(1) of the *IRPA*, if she failed to respond to questions truthfully. The Officer then requested that Ms. Fan provide any other relevant information which should be considered before a final decision was made.

[6] Ms. Fan responded to the Officer's letter with one of her own dated May 20, 2015, in which she explained her and her husband's relationship with the Applicant and why they never disclosed the fact that the Applicant had been abandoned by her biological parents. Ms. Fan also explained that they obtained the Applicant's birth certificate through improper means in order to

ensure that the Applicant would obtain legal status in China and not be regarded as "an illegal and black child." Ms. Fan apologized to the Officer for not initially disclosing that the Applicant was abandoned as an infant and that she and Mr. Zhong had adopted the Applicant; she asked the Officer for mercy in considering her daughter's case.

[7] In a letter dated October 6, 2015, the Officer notified Ms. Fan that the Applicant did not meet the requirements to obtain a permanent resident visa as a family member of Mr. Zhong. The Officer quoted the definition of a "dependent child" in section 2 of the *Regulations*, pursuant to which the child must be either the biological or adopted child of the parent. The Officer noted: that the DNA testing confirmed that Mr. Zhong and Ms. Fan were not the Applicant's biological parents; that the birth certificate had been improperly obtained and verified to be fraudulent; and that there was no proof of adoption. The Officer concluded that the Applicant was not a family member of Mr. Zhong and, consequently, refused her application for a permanent residence visa pursuant to subsection 11(1) of the *IRPA*.

II. The Reconsideration Request

[8] In a letter dated December 15, 2015, the Applicant, through a representative retained by Mr. Zhong and Ms. Fan, requested that the Officer reconsider the decision refusing her a permanent resident visa and, on humanitarian and compassionate [H&C] grounds, to approve the application for the visa. Specifically, the Officer was asked to consider the Applicant as a *de facto* family member of Mr. Zhong on H&C grounds, taking into account the best interests of the child [BIOC].

[9] The submissions to the Officer reiterated the Applicant's relationship with Mr. Zhong and Ms. Fan, and emphasized that they had concealed the abandonment of the Applicant in order to prevent her from feeling inferior. The submissions outlined the discrimination suffered by children without a *hukou* and how these children, referred to as "black children" or *heihaizhi*, are denied healthcare, schooling, and other services. They also included various human rights reports from the United States Department of State, the United Nations High Commissioner for Refugees, and the UK Border Agency, concerning the abandonment of female children in China and the mistreatment of "black" or "illegal" children and their inability to access education, healthcare, and other services.

[10] The submissions also stated that Mr. Zhong and Ms. Fan had raised the Applicant as their own daughter. They provided various photographs throughout the Applicant's life to substantiate their relationship as well as copies of the *hukou*, a health card, and school records, where it was documented that the Applicant was the daughter of Mr. Zhong and Ms. Fan. The submissions noted that after they received the letter of October 6, 2015, Mr. Zhong and Ms. Fan attempted to formally adopt the Applicant, but the City of Fuqing Civic Affairs Bureau determined that the Applicant was ineligible for adoption because she was over the age of 14 years. The City of Fuqing did, however, issue a certificate dated October 28, 2015, which confirmed that the Applicant had been living with Mr. Zhong and Ms. Fan since 1997 and that established "a de facto adoptive family relationship." This certificate was provided to the Officer.

[11] The Applicant's representative submitted to the Officer that the Applicant should be considered a *de facto* family member as the result of her dependence on her parents, pointing to

Citizenship and Immigration Canada's Operation Manual IP-5 [the Manual]. The Manual states that compelling H&C reasons may exist to allow a *de facto* family member to immigrate to Canada, and provides in relevant part:

> *De facto* family members are persons who do not meet the definition of a family class member. They are in a situation of dependence that makes them a *de facto* member of a nuclear family that is either in Canada or applying to immigrate. Some examples: a son, daughter (over age 22), brother or sister left alone in the country of origin without family of their own; an elderly relative such as an aunt or uncle or an unrelated person who has resided with the family for a long time. Also included may be children in a guardianship relationship when adoption as described in R3 (2) is not possible. Separation of persons in such a genuine dependent relationship may be grounds for a positive assessment.

[12] The submissions also requested that the Officer consider the principle of the BIOC when assessing the Applicant's application. Relying on *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*], the Applicant's representative submitted that the Applicant was completely dependent on Mr. Zhong and Ms. Fan for the physical, emotional, and financial aspects of her life and would be unable to survive on her own. The representative submitted that the Applicant's best interests were to come to Canada with her mother and be reunited with her father who cannot return to China due to religious persecution. Denial of the Applicant's application would, the representative asserted, effectively mean permanent separation between the Applicant and the only father she has ever known.

III. The Officer's Decision

[13] In a letter to Ms. Fan, "on behalf of Shanrong Zhong," dated July 11, 2016, the Officer refused the Applicant's request for reconsideration on H&C grounds pursuant to

subsection 25(1) of the *IRPA*. The Officer was not satisfied that the merits of the Applicant's application overcame her ineligibility as a member of the family class. The Officer found there was insufficient evidence to substantiate that the Applicant was a *de facto* family member. The Officer noted that there were concerns about Mr. Zhong's and Ms. Fan's overall credibility in view of the improperly obtained birth certificate, and that it was only after receiving the procedural fairness letter in May 2015 that Ms. Fan admitted to having improperly obtained a birth certificate for the Applicant. The Officer remarked that Mr. Zhong and Ms. Fan could have gone through an adoption process soon after finding the Applicant abandoned outside their home in 1997, and that it was not credible that they looked into formal adoption only after the Applicant turned 14 years old. The copies of the *hukou*, school academic records and photographs did not, in the Officer's view, substantiate the stated level of dependency, stability and duration of the relationship among the Applicant, Mr. Zhong and Ms. Fan. The Officer found no proof of ongoing financial support from or ongoing contact between Mr. Zhong and the Applicant to substantiate emotional and financial dependency.

[14] In assessing the Applicant's best interests, the Officer noted that she was living in the country where she was born, raised, and educated, and was familiar with the language and culture. The Officer found that insufficient evidence had been provided to demonstrate that the Applicant would not be able to continue living in China, and that upon completion of her studies the Applicant should have skills to be employable in China. The Officer further noted that the Applicant was 16 years old when she was included in Mr. Zhong's application for permanent residence and that, at age 19, she should be mature enough to take care of herself financially and emotionally. The Officer supported his conclusion in this regard by observing that, since Mr.

Zhong had requested that a permanent resident visa be granted to Ms. Fan if the reconsideration request was rejected, this showed that the Applicant would be able to continue living in China on her own. The Officer found insufficient evidence to substantiate a level of dependency, stability and duration of the relationship amongst Mr. Zhong, Ms. Fan and the Applicant for her to be considered a *de facto* family member. The Officer concluded by noting that the Applicant had been physically separated from Mr. Zhong since April 2010 and, hence, she would not benefit from reuniting with Mr. Zhong in Canada.

[15] The Officer's notes in the Global Case Management System [GCMS] reveal further reasons for the decision not to grant the Applicant a permanent resident visa. These notes show the Officer's concerns with the lack of evidence about the Applicant's relationship with Mr. Zhong and the absence of any evidence of financial or emotional dependency while Mr. Zhong has been in Canada. Although the Officer referenced the photos, the *hukou*, and the Applicant's academic records in the GCMS notes, it appears he placed little weight on the academic records because they were missing background information about Mr. Zhong and Ms. Fan, such as their contact numbers, age, employment status, and occupation. In the Officer's mind, these records, the *hukou* and the photos did "not substantiate stated level of dependency, stability and duration of this relationship," even though the *hukou* and the academic records list Mr. Zhong and Ms. Fan as the Applicant's parents. The Officer made no reference in the GCMS notes to the certificate issued by the City of Fuqing Civic Affairs Bureau, the family's health card issued by the local government, or the human rights reports which were provided with the reconsideration request.

IV. Issues

[16] The Applicant raises several questions in arguing that the Officer's decision is unreasonable. These questions can be reframed as follows:

1. What is the appropriate standard of review?
2. Was the Officer's assessment of whether the Applicant was a *de facto* family member reasonable?
3. Was the Officer's assessment of the Applicant's best interests as a child reasonable?

V. Analysis

A. *What is the appropriate standard of review?*

[17] The Officer's consideration of H&C factors in determining whether a person is a *de facto* family member is reviewed on the reasonableness standard (*Dorlus v Canada (Citizenship and Immigration)*, 2015 FC 1095 at para 25, [2015] FCJ No 1117; *Pervaiz v Canada (Citizenship and Immigration)*, 2014 FC 680 at para 15, [2014] FCJ No 802; *Da Silva v Canada (Citizenship and Immigration)*, 2011 FC 347 at para 14, 386 FTR 247). The Officer's alleged failure to consider the BIOC involves a question of mixed fact and law and is also reviewed on the reasonableness standard (*Kanthasamy* at para 44; *Singh v Canada (Citizenship and Immigration)*, 2016 FC 240 at para 13, [2016] FCJ No 200).

[18] Accordingly, the Court should not intervene if the Officer's decision is justifiable, transparent, and intelligible, and it must determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; and it is also not "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339.

[19] The Applicant's argument that the Officer unreasonably failed to reference certain evidence raises a question as to the sufficiency of the Officer's reasons and whether they adequately explain how the evidence was treated. The standard of reasonableness applies to the Officer's assessment of the documentary evidence (*Lozano Vasquez v Canada (Citizenship and Immigration)*, 2012 FC 1255 at para 34, 222 ACWS (3d) 218).

B. *Was the Officer's assessment of whether the Applicant was a de facto family member reasonable?*

[20] The Applicant argues that the Officer ignored and misconstrued crucial evidence which contradicted the finding that the Applicant was not a *de facto* family member of Mr. Zhong. In

particular, the Applicant points to the certificate issued by the City of Fuqing and the family's health card, official government documents which the Applicant says confirm she has been living with Mr. Zhong and Ms. Fan as their daughter. The certificate from the City of Fuqing states that: the Applicant was abandoned; has been living with Mr. Zhong and Ms. Fan since she was found; is a registered member in Mr. Zhong and Ms. Fan's household; and is in a *de facto* adoptive family relationship with Mr. Zhong and Ms. Fan. The family health card lists the Applicant as the daughter of Mr. Zhong and Ms. Fan. This card was created before Mr. Zhong left China and confirms their family relationship. The Applicant states these two documents directly attest to her being a *de facto* family member of Mr. Zhong, and that the Officer completely ignored these documents since they are not mentioned at all in the Officer's decision or the GCMS notes.

[21] The Respondent contends that the Officer did not ignore or misconstrue the Applicant's evidence and that the Applicant's redetermination request was "thoroughly" considered. According to the Respondent, the Officer was not required to address every piece of evidence specifically, and it is presumed that a decision-maker takes into account all of the evidence submitted. The Respondent says the Officer reasonably considered all of the evidence, including the certificate issued by the City of Fuqing, and he was not required to comment on all of the documents individually, especially given that the Applicant did not make specific representations regarding the unmentioned documentary evidence. The Respondent also says it was open to the Officer to determine that neither the certificate nor the family health card was material. The Respondent further says it was open to the Officer to determine that the general information

about country conditions relating to black or unregistered children would not resolve questions about the Applicant's relationship with Mr. Zhong and Ms. Fan.

[22] For the reasons that follow, I find that the Officer's assessment of whether the Applicant was a *de facto* family member of Mr. Zhong and Ms. Fan was not reasonable. Consequently, the Officer's decision must be set aside and the matter returned for redetermination by a different immigration officer.

[23] In *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35, [*Cepeda-Gutierrez*], Justice Evans observed that:

> [16] …the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.). … A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.
>
> [17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency

> overlooked the contradictory evidence when making its finding of fact.

[24] It is, moreover, well-established that administrative decision-makers, including immigration officers assessing H&C factors under section 25(1) of the *IRPA*, do not have to reference every piece of evidence in their decisions. The presumption that a decision-maker has considered all of the evidence after making a general statement that they have done so applies to immigration officers assessing H&C applications. H&C officers are not required to refer to every piece of evidence so long as they state in making their findings that they have considered all of the evidence (see: *Bustamante Ruiz v Canada (Citizenship and Immigration)*, 2009 FC 1175 at para 38, 182 ACWS (3d) 996). In *Palumbo v Canada (Citizenship and Immigration)*, 2009 FC 706, [2009] FCJ No 873, the Court remarked that:

> [13] There is a presumption that the immigration officer has considered all the evidence. Although the officer is not obliged to recite all the facts in its decision, the relevant facts should be mentioned and these facts must be considered and discussed. A general statement to the effect that the officer considered all the evidence may be sufficient to meet this requirement (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 (F.C.T.D.); *Bains v. Canada (Minister of Employment and Immigration)*, 63 F.T.R. 312, 40 A.C.W.S. (3d) 657 (F.C.T.D.).

[25] The deference afforded to administrative decision-makers dissipates and lapses, however, when a key piece of evidence is not adequately addressed. As noted in *Cepeda-Gutierrez*, the more important the evidence that is not mentioned specifically and analyzed in a decision-maker's reasons, "the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence'" (para 17).

[26] The Officer in this case made no mention of two significant pieces of documentary evidence in arriving at the following conclusion:

> After reviewing your application thoroughly, I am not satisfied that the merits of your application overcome your ineligibility as a member of the family class. Your application does not present sufficient grounds to warrant a positive consideration under Humanitarian & Compassionate grounds.

[27] In particular, the Officer never referenced the certificate issued by the City of Fuqing Civic Affairs Bureau. This certificate was obtained after the Officer advised the Applicant in the letter dated October 6, 2015, that there was no proof of her adoption. It unequivocally states that: the Applicant was abandoned; has been living with Mr. Zhong and Ms. Fan since she was found; is a registered member in Mr. Zhong and Ms. Fan's household; and is in a *de facto* adoptive family relationship with Mr. Zhong and Ms. Fan. This certificate clearly provides some evidence of the Applicant being a *de facto* family member of Ms. Fan and Mr. Zhong; yet, the Officer's reasons and the GCMS notes make no mention whatsoever of the certificate, nor do they offer any explanation as to why it was immaterial or afforded little, if any, weight. The absence of any mention, let alone any discussion, of this certificate makes the Officer's reasons unintelligible and, therefore, unreasonable because the Court is left to speculate or wonder as to why this highly relevant document was ignored or discounted.

[28] In addition, the Officer never referenced the family health card, an official government document which was issued in 2006, before Mr. Zhong fled from China, and which stated that the Applicant is the daughter of Mr. Zhong and Ms. Fan. Again, the absence of any mention, let alone any discussion, of this health card makes the Officer's reasons unintelligible and, therefore,

unreasonable because the Court is left to speculate or wonder as to why this highly relevant document was ignored or discounted.

[29] The Officer in this case did not explicitly state that all of the evidence was considered, only that the H&C application was reviewed "thoroughly." In the GCMS notes, the Officer noted only the photos and academic records as being submitted with the request for reconsideration on H&C grounds. In this case, it cannot be presumed that the Officer considered all of the evidence because the reasons and the GCMS notes indicate a failure to consider the certificate issued by the City of Fuqing and the family health card. Even if one assumes that "thoroughly" reviewing the reconsideration application is sufficient to create a presumption that the entirety of the evidence submitted was considered, the Officer still should have specifically referenced evidence which squarely contradicted the Officer's finding that the Applicant was not a *de facto* family member.

[30] In concluding that the Applicant was not a *de facto* family member, the Officer did so without referencing key pieces of evidence which spoke directly to the duration of the relationship among the Applicant, Ms. Fan and Mr. Zhong. The certificate issued by the City of Fuqing and the family health card, when considered alongside the school records and photographs, strongly suggest that the Applicant is a *de facto* daughter of Mr. Zhong and Ms. Fan.

C. *Was the Officer's assessment of the Applicant's best interests as a child reasonable?*

[31] It is not necessary to determine whether the Officer's BIOC analysis in respect of the Applicant was reasonable because the decision is not reasonable for the reasons stated above.

VI. Conclusion

[32] This application for judicial review is allowed. The Officer's decision is set aside and the matter returned for redetermination by a different immigration officer.

[33] Neither party proposed a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the decision of the immigration officer dated July 11, 2016, is set aside and the matter is returned for redetermination by a different immigration officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3149-16
STYLE OF CAUSE:	SHANRONG ZHONG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 11, 2017
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	FEBRUARY 23, 2017

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