Federal Court Cour fédérale

Date: 20190125

Docket: IMM-2808-18

Citation: 2019 FC 108

Toronto, Ontario, January 25, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

KE MA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

Overview

[1] This is an application for judicial review of the decision [Decision] of a Senior Immigration Officer [Officer], dated May 17, 2018, denying the Applicant's application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

[2] As explained in more detail below, this application is allowed, because I have found that the Officer's analysis of the availability to the Applicant's children of a Hukou, and the benefits associated therewith, upon returning to China, is unreasonable. That aspect of the Decision, which was central to the Officer's analysis of the best interests of the children, is either unintelligible, or is based on a conclusion that the children can obtain status as permanent residents in China without demonstrating that the Officer engaged with the documentary evidence surrounding the difficulty in obtaining such status.

Background

[3] The Applicant, Ke Ma, is a 37-year-old Chinese citizen. Ms. Ma was formerly a Canadian permanent resident, but she lost that status as a result of a 2013 finding of inadmissibility because of her misrepresentation of her marital status when she applied for permanent residence. She has two children, a daughter born in 2013 and a son born in 2016, both of whom are Canadian citizens. She does not have any other family in Canada.

[4] Ms. Ma came to Canada as an international student on a student visa in July 2002. She completed her studies in 2006 and then entered the workforce. She submitted a permanent residence application in October 2008 under the Economic Class, Skilled Worker Program and became a permanent resident in September 2009.

[5] Ms. Ma met her ex-husband, Cheng Qian, in 2002 while attending English as a Second Language courses. They became a couple in 2007, were engaged in 2009, and married in May 2010. However, Mr. Qian received a removal order and returned to China in September 2010.

Ms. Ma travelled back and forth between Canada and China between 2010 and 2012, but the distance eventually led to a breakdown of the marriage. She filed for divorce in May 2017 and, while the divorce has not been finalized, she maintains that the relationship has been over for many years. The children remain with Ms. Ma in Canada.

[6] When Ms. Ma submitted her application for permanent residence in 2008, she was not married to Mr. Qian and she indicated that she was single. She states that this was because the concept of "common-law" relationships does not exist in China and she thought that "single" was the correct selection. However, the Minister issued a report for misrepresentation in 2013. The Immigration Division agreed with the Minister and issued a removal order. Both Ms. Ma's appeal of this decision to the Immigration Appeal Division [IAD] and her subsequent application for leave for judicial review were denied.

[7] Ms. Ma submitted an application for permanent residence on H&C grounds in June 2017. The application was rejected in May 2018 in the Decision that is the subject of this application for judicial review.

Decision Under Review

[8] In arriving at the Decision, the Officer considered Ms. Ma's arguments based on her establishment in Canada, the best interests of the children [BIOC], and risk and adverse country conditions in China.

[9] In relation to establishment, the Officer observed that Ms. Ma has spent most of her adult life in Canada, has worked here, volunteers with a local temple, and has friends and ties to the local community. It was also noted that Ms. Ma has property, co-owned with her father, in Ontario. The Officer afforded "due weight" to the positive steps Ms. Ma had taken in establishing herself in Canada.

[10] Turning to hardship, the Officer considered Ms. Ma's submissions that her ex-husband and her father would not provide financial support if she and her children were returned to China. The Officer also considered submissions that the children are not Chinese citizens and will not have a Hukou (household registration) in China, thereby denying them access to low tuition, healthcare, and work, and that Ms. Ma would not be able to both work and care for the children. The Officer noted that the reasons of the IAD dated October 20, 2016, indicated that her husband and family in China were assisting with household expenses.

[11] While acknowledging letters from Ms. Ma's father and ex-husband in which they say that they cannot provide financial assistance, the Officer also considered that she co-owns a house in Richmond Hill, Ontario and sold a house in Aurora, Ontario, in 2016. The Officer found that Ms. Ma had substantial assets which would mitigate any financial difficulties she may experience in re-establishing herself in China. The Officer also found that, even if her ex-husband and father may not be able to assist her financially, it was reasonable to believe that they would provide her and her children with support in other respects in establishing themselves. The Officer observed that Ms. Ma has strong ties to China and that all of her family resides there and could reasonably be expected to provide her with some support and assistance with re-establishment. The Officer

found that the financial benefits of residing in Canada did not overcome the requirement to obtain a permanent resident visa from abroad in the normal manner.

[12] Similarly, on the subject of environmental issues and the restriction of information by the Chinese government, the Officer concluded that Ms. Ma had not established sufficient hardship to warrant an exemption.

[13] The Officer then cited country reports on China relating to the children's access to citizenship rights in China, noting Ms. Ma's submission that the children would have to give up their Canadian citizenship to obtain a Hukou. While acknowledging that China does not recognize dual citizenship, the Officer concluded that any person born abroad whose parents are both Chinese nationals, or one of whose parents is a Chinese national, shall have Chinese nationality, that one of the parents could apply for a household registration for the children, and that the children could access education and services. The Officer then referred to the availability of permanent residency permits for foreigners in China, which allow retention of a foreign passport. The Officer concluded that the children would not be barred from accessing their Canadian citizenship in the future and therefore found the BIOC not compromised on this issue.

[14] While acknowledging that the BIOC would be to remain with Ms. Ma and in Canada, the Officer noted that the children's father and all their extended family resided in China and that they could re-connect with them. The Officer observed that the intent of the H&C exemption is not to account for differing standards of living in Canada and elsewhere and that the BIOC is

only one of many important factors to be considered. The Officer found the "considerable weight" of the BIOC insufficient to justify an exemption.

[15] Ultimately, the Officer concluded that, based on a global assessment of the evidence, there were insufficient grounds to grant an H&C exemption.

Issues and Standard of Review

[16] Following withdrawal at the hearing of this application of a procedural fairness issue that had been raised in her written submissions, the Applicant identifies the following two issues for the Court's consideration:

A. Did the Officer err in the assessment of hardship by ignoring or mischaracterizing the evidence?
B. Did the Officer err in the assessment of the BIOC?

[17] The parties agree, and I concur, that the standard of review applicable to H&C decisions in reasonableness.

Analysis

[18] My decision to allow this application for judicial review turns on one of the arguments raised by Ms. Ma in support of her position that the Officer's BIOC analysis was unreasonable.

[19] One of the principal arguments made by Ms. Ma in her H&C submissions was that her children's interests would be compromised if they were to return to China, because they would have to choose between (a) relinquishing their Canadian citizenship, so as to obtain Hukous and therefore access to education and health care benefits in China; and (b) maintaining that citizenship, so as to be able to return to Canada when they are adults, which would result in them being deprived of Hukous and the associated benefits.

[20] The Officer addressed this argument but was not persuaded by the evidence that the children would be prevented from accessing their Canadian citizenship in the future and therefore, on this factor, found that their interests were not compromised. In arriving at that conclusion, the Officer acknowledged that the documentary evidence indicated that China does not recognize dual citizenship but noted that any person born abroad to a Chinese national parent shall have Chinese nationality. The Officer commented that Ms. Ma or the children's father would be required to provide documentation in order to apply for the children's Hukou, which would then allow them school attendance and unrestricted access to social services including medical care. The Officer further noted from the documentary evidence that China has a permanent residency permit for foreigners, which allows foreigners to establish long-term residence in China and permits them to retain a foreign passport. The Officer then stated the relevant conclusion that, although China does not recognize dual citizenship, the children would not be prevented from accessing their Canadian citizenship in the future.

[21] I agree with Ms. Ma's submission that it is difficult to discern the analysis by which the Officer arrived at this conclusion. The Officer appears to recognize that China prevents their

citizens from retaining foreign citizenship but also appears to conclude that, because the children would be entitled to Chinese citizenship due to their parents' nationality, they would be entitled to obtain Hukous and associated benefits and yet still retain their Canadian citizenship. It is difficult to understand how the Officer reasoned that this could be accomplished, making the decision unintelligible and unreasonable.

[22] It is possible that, as argued by the Respondent at the hearing of this application, the Officer's reasoning turned on the documentary evidence that China has a permanent residence permit for foreigners, which allows them to establish long-term residence in China and retain a foreign passport. Adopting that interpretation, the Officer's reasoning was that the children could obtain permanent resident permits and therefore Hukous and the associate benefits, without becoming Chinese citizens, such that they can retain their Canadian citizenship. However, as Ms. Ma submits, if this is the interpretation to be afforded to the Decision, the Decision is unreasonable for another reason, in that the Officer has not addressed the documentary evidence as to the difficulty obtaining such permanent resident permits. The Decision expressly references this evidence, which notes such difficulty and states that, since 2004, when China began granting permanent resident permits to foreigners, only approximately 5,000 people have been able to obtain them.

[23] The Decision does not cite any evidence to the contrary. Nor does the Officer provide any explanation supporting a conclusion that, notwithstanding the evidence of the difficulty obtaining Chinese permanent resident permits, the availability of such permits would prevent the children's interests from being compromised.

[24] In summary, I find that either the Decision is unintelligible or, if I were to adopt the interpretation advocated by the Respondent, it demonstrates a conclusion that is unreasonable in the context of the evidence relied upon. As such, this application for judicial review must be allowed and the matter remitted to another officer for redetermination. It is therefore unnecessary for the Court to address the other issue raised by the Applicant.

[25] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-2808-18

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, and the matter is returned to another officer for redetermination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Britt Gunn	FOR THE APPLICANT
Christopher Crighton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada	FOR THE RESPONDENT