Federal Court  Cour fédérale

Date: 20240327

Docket: IMM-2891-23

Citation: 2024 FC 482

Toronto, Ontario, March 27, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Do Mee TUNG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Do Mee Tung, is a citizen of China who was granted refugee protection in Canada in 2002 based on her Falun Gong practice. She subsequently obtained permanent residence but that status was ceased, years later, in 2018 on the basis of reavailment.

[2] The Applicant applied to reacquire permanent residence on the basis of humanitarian and compassionate [H&C] grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (reproduced in Annex "A" below). The refusal of the H&C application [Decision] by a senior immigration officer [Officer] is the subject of the Applicant's judicial review application.

[3] The sole issue in this matter is whether the Decision is reasonable. Stated another way, the Court must determine whether the Decision is intelligible, transparent and justified, further to the applicable, presumptive standard of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25, 99. I find that none of the situations rebutting this presumption is present here: *Vavilov*, above at para 17.

[4] I am persuaded that the Applicant has met her onus to demonstrate that the Decision is unreasonable: *Vavilov*, above at para 100. The determinative issues are the Officer's assessment of the establishment and adverse country conditions factors. For the more detailed reasons that follow, the Decision will be set aside, with the matter remitted to a different decision maker for redetermination.

II. Additional Background

[5] The Applicant lives with her two children and her grandchildren, who are all Canadian citizens. The Applicant is retired and has not provided any evidence of employment in Canada.

[6] The Applicant became a permanent resident in 2004 but, in 2014, the Minister brought an application to cease the Applicant's status for reavailment of Chinese state protection. The Applicant had obtained and later renewed her Chinese passport to take 12 one-month trips during this period. According to the Applicant, she took these trips to care for her ailing mother following a stroke and to support the Applicant's husband, who Chinese authorities wrongly convicted and sentenced to 11 years in prison. The Applicant also asserts that, from 2004, she stopped her practice of Falun Gong.

[7] The Refugee Protection Division [RPD] ceased the Applicant's permanent residence in 2014, finding that she had reavailed herself of Chinese state protection. This Court allowed the Applicant's judicial review application of the 2014 RPD decision: *Tung v Canada (Citizenship and Immigration)*, 2015 FC 1296.

[8] Consequently, the cessation application was redetermined and allowed again. This Court dismissed the Applicant's judicial review application of the RPD redetermination decision: *Tung v Canada (Citizenship and Immigration)*, 2018 FC 1224.

[9] A departure order was issued in 2018. The Court stayed the Applicant's removal from Canada pending the determination of the Applicant's judicial review application of the departure order: *Tung v Canada (Public Safety and Emergency Preparedness)*, 2019 CanLII 6094 (FC). The Court subsequently granted the judicial review application: *Tung v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 917.

[10] A further removal order was issued in 2020, but the Court dismissed the Applicant's judicial review application of the order: *Tung v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 141.

[11] The Applicant submitted an application for a pre-removal risk assessment [PRRA] that was refused in 2021. The Court dismissed the Applicant's judicial review application of the refused PRRA application: *Tung v Canada (Citizenship and Immigration)*, 2022 FC 1633.

[12] In 2022, the Applicant submitted the H&C application that is the subject of the judicial review application presently before the Court. All of the above administrative and judicial history is summarized in the Decision.

III. Analysis

[13] I find that the cumulative errors of the Officer warrant the Court's intervention in this matter.

[14] A decision may be unreasonable, that is lacking justification, transparency and intelligibility, if the decision maker misapprehended the evidence before it. Flaws or shortcomings must be more than superficial, peripheral to the merits of the decision, or a "minor misstep" to warrant intervention by the Court: *Vavilov*, above at paras 99-100, 125-126; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36, rev'd on other grounds 2023 SCC 21; *Metallo v Canada (Citizenship and Immigration)*, 2021 FC 575 at para 26.

[15] With these principles in mind, I turn to a consideration of the Decision.

[16] The Applicant asserts, and I agree, that it was an error for the Officer to characterize the Applicant's status in Canada as temporary residence, when she was a permanent resident until 2018, albeit with the prospect of cessation for reavailment looming overhead. That said, I view this characterization as more in the nature of a minor misstep than not, given the Officer's acknowledgement in the establishment assessment that the Applicant has resided in Canada for a significant period of time (at least 20 years by the time of the Decision).

[17] The Applicant also takes issue with the Officer's reference (in the adverse country conditions assessment) to the Applicant's Convention refugee status having been vacated. The Applicant argues that vacation necessarily involves a determination of misrepresentation resulting in a negative connotation attached to one's refugee status being vacated. Cessation, on the other hand, can involve compelling reasons why a refugee may have returned to their home country which do not point necessarily to misrepresentation.

[18] While I do not disagree with the Applicant's submission about the different natures of cessation and vacation, nonetheless I again view this error, in itself, as a minor misstep. The Officer only refers to "vacation" once and otherwise overwhelmingly refers to "cessation" throughout the Decision. In addition, I note that the Applicant describes her refugee status as "vacated" in paragraph 8 of her affidavit filed in support of the H&C application.

[19] That said, the Officer also describes the Applicant repeatedly as a “failed refugee.” This characterization, in my view, is more consistent with the concept of vacation. Her refugee claim was successful, however, and her status was ceased for reasons unrelated to the initial claim.

[20] I note that the Applicant is described in her H&C submissions and in her supporting affidavit as a “returning refugee claimant” as opposed to a failed one. This lends support, in my view, to the argument that the Officer’s references to vacation and the Applicant as a failed refugee, taken together, are an unstated reason why the Officer attaches negative weight to the cessation decision, giving rise to a concern about logic and transparency.

[21] For example, the Officer found “the applicant’s return trips to China following the acceptance of her refugee claim in Canada to not favour the applicant.” This statement has the appearance of a negative finding. There is no explanation, however, regarding how the Officer weighed this factor with the other factors. Accordingly, the Court is left wondering why the Officer reached this conclusion about the return trips, especially given the Applicant’s evidence that she made no further trips to China after 2014. In my view, this is unreasonable and inconsistent with a compassionate review of the Applicant’s circumstances, per *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 13, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338.

[22] The above determination is reinforced, in my view, by the Officer’s treatment of the establishment and adverse country conditions factors.

[23] I find that the Officer unreasonably discounts the "significant" length of time the Applicant has lived in Canada because of the lack of evidence about employment in Canada (the Applicant is retired), friendships and community involvement. For this Officer, the latter are measures of an "expected level of establishment." In my view, this is a rigid, checklist approach to assessing whether the exercise of H&C discretion is warranted in this Applicant's situation, bearing in mind that relevant factors will vary depending on the circumstances and all the relevant facts and factors must be considered and weighed: *Bernabe v Canada (Citizenship and Immigration)*, 2022 FC 295 at para 19.

[24] Further, I agree with the Applicant that the Officer unreasonably speculates that the Applicant will be able to arrange future trips to Canada—based on trips she took a decade or more ago—in the face of the Applicant's and her daughter's evidence that the Applicant is dependent financially on her children, who both have limited resources.

[25] I conclude that the Officer did not weigh properly the significant length of time the Applicant has resided in Canada in the context of her own situation, as opposed to ill-defined "expected" circumstances: *Toussaint v Canada (Citizenship and Immigration)*, 2022 FC 1146 at para 19.

[26] I further find unreasonable the Officer's assessment regarding the impact on the Applicant of the lack of a valid hukou were she to return to China. The Officer notes that their own research discloses the importance of a hukou in determining Chinese citizens' access to housing, education, public services and social benefits. After concluding that there is insufficient

evidence to demonstrate that the Applicant was able to obtain and renew her passport without presenting a valid hukou, the Officer concludes that the Applicant does not intend to seek employment upon return to China. This conclusion unreasonably overlooks, however, that the Applicant's evidence points to a need to access housing and social benefits, as opposed to employment, for which a hukou would be required, according to the Officer's own research.

IV. Conclusion

[27] For the above reasons, I find that the Officer's cumulative errors warrant the Court's intervention. Accordingly, the Decision will be set aside, with the matter remitted to a different officer for redetermination.

[28] Neither party proposed a serious question of general importance for certification. I find that none arises in the circumstances.

JUDGMENT in IMM-2891-23

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The February 27, 2023 decision of the senior immigration officer refusing the Applicant's application for permanent residence on humanitarian and compassionate grounds is set aside.
3. The matter will be remitted to a different officer for redetermination.
4. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

Immigration and Refugee Protection Act, SC 2001, c 27.
Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27.

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35, 35.1 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35, 35.1 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25 (1)** Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35, 35.1 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35, 35.1 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2891-23
STYLE OF CAUSE:	DO MEE TUNG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 6, 2024
JUDGMENT AND REASONS:	FUHRER J.
DATED:	MARCH 27, 2024

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