Date: 20090203

Docket: IMM-2218-08

Citation: 2009 FC 116

Montréal, Quebec, February 3, 2009

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

LISA JOE,
a minor, by her litigation guardian, Xue Lan Huang

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an applicant for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*) of a decision of an officer of Citizenship and Immigration Canada, dated April 22, 2008, refusing the applicant's application for permanent residence on humanitarian and compassionate (H&C) grounds wherein the officer found that there were insufficient H&C considerations to warrant exempting the applicant from the requirement that she applies for permanent residence outside of Canada.

II. The Facts

[2] The applicant is a seventeen-year-old girl and citizen of New Zealand whose parents are citizens and residents of China. Due to the one-child policy in China, the applicant's mother went to New Zealand in 1991 to visit her mother and to give birth in April 1991 to the applicant, her fourth child. A few months later, the applicant returned to China with her mother on a visitor's permit.

[3] The applicant's parents were told that they had two unauthorized children in the family due to the one-child policy and that they had to pay a fine of 130 000 *yuan*.

[4] Between 1991 and 2000, the applicant lived in China on a visitor's permit renewed yearly. She attended school in China for one year only and, according to a previous decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), she was forbidden to continue her schooling in the absence of a valid status in China.

[5] In September 2000, the applicant was nine years old when she was given a one-time only exit permit to leave China, a permit which expired on October 6, 2000.

[6] Due to the impossibility for the applicant to return to New Zealand, since her maternal grandmother and only relative in that country had passed away in 1996, the applicant's paternal grandmother, a Canadian citizen, brought the applicant to Canada on September 13, 2000, where many of the extended family members of the applicant's father resided. Since her arrival in Canada, the applicant has been living in Canada with her paternal grandmother.

[7] With the support of an immigration consultant, the applicant made a refugee claim which was heard by the RPD in July 2002 and was rejected on September 17, 2003. The RPD determined that the applicant had no status in, or right to return to China but that the applicant did not meet the definition of Convention refugee based on her nationality as a citizen of New Zealand.

[8] A legal clinic then helped the applicant's paternal grandmother to apply for custody of the applicant, and her request to the Ontario Court of Justice was granted on February 14, 2006.

[9] In April 2006, the applicant was given a notice of her removal order and advised of her right to apply for a pre-removal risk assessment (PRRA). The applicant filed a PRRA application in May 2006, which was rejected a year later. While sympathetic to the applicant's situation, the PRRA officer was not satisfied that the applicant would face any risks if she were to return to New Zealand. This officer noted however that the applicant's situation was best suited for consideration under H&C grounds.

[10] Following the reception of a notice of removal in May 2006, the applicant applied for permanent resident status from within Canada on H&C grounds. In July 2007, she was asked to submit additional information which was filed in October and November 2007. The applicant's H&C application was rejected in April 2008. The negative decision of the H&C officer is impugned by the present recourse.

III. The Impugned H&C Decision

[11] The H&C officer concluded that "there is not a single piece of documentary evidence provided" to support the applicant's claim that she has no legal status in China or that she was ordered to leave China by the Chinese government. The officer also commented that "according to China's nationality law, [the applicant] is a Chinese citizen. Should she be required to apply for it instead of recognized, there is no documentary evidence to satisfy me she did."

[12] The officer found "no credible evidence" showing that the applicant's unauthorized birth by China had led to the denial of her legal status, exclusion from school, and forced separation from her parents. The officer also did not accept the applicant's argument that the authorities in China communicated decisions verbally to her. The officer noted: "it is questionable that a school would not give written notice of its decision to refuse a pupil's attendance. It is known that education system in China is well managed."

[13] The officer noted that the parental grandmother was granted by judgment of an Ontario court custody of the applicant in February 2006, but added that "this is not an adoption". The officer also added that the reasons submitted for custody were not disclosed and stated that "I have considered the submission and am not satisfied that [the applicant] could not return to her parents and her family in her home country".

[14] The officer rejected the explanation provided by the applicant's legal representative with respect to the different spelling of her parents' last names in different records. The officer

commented: “as a Chinese myself, I know this is not so. There is no such combination of ‘J-O-E’ and ‘S-U-E’ in Chinese ‘Pin In’. ‘Zou’ would be spelled ‘Chow’ in Cantonese and ‘Su’ would be ‘So’. I have confirmed this with an officer [who] speaks Cantonese. I would understand that spelling mistakes might be made at registration in New Zealand. However, the statement that it was the difference between Mandarin and Cantonese is not acceptable.”

[15] The officer questioned the applicant’s credibility for having mentioned in her Personal Information Form (PIF) in 2001 that her maternal grandmother was a citizen of New Zealand, and later stated that her grandmother was only a “visitor” to New Zealand who had been visiting her widowed sister-in-law.

[16] The officer found that there was insufficient evidence to show that should the applicant return to China, she would suffer undue or disproportionate hardship. The officer concluded that the applicant having “attended school in China […] [was] familiar with the school system in China […] noting that China is considered having one of the best education system [*sic*].”

[17] The officer finally concluded that the applicant “would have a normal family life of growing up with her parents and siblings. She would also have a bright future in front of her in her home country.”

IV. Issues

A. Should the H&C decision be set aside as unreasonable?

B. Should the H&C decision be set aside as a result of a breach of procedural fairness?

V. Analysis

Standard of Review

[18] The present case involves the application of law to a situation of fact only. The appropriate standard of review here is therefore reasonableness. The question at issue falls within the expertise of the PRRA officer and as a result deference is owed and the Court should not intervene unless the PRRA officer's decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47).

[19] But if the PRRA officer committed a breach of natural justice or procedural fairness, no deference is due and the Court will set aside the impugned decision (*Benitez v. Canada (Minister of Citizenship and Immigration*), 2006 FC 461, at para. 44).

A. Should the H&C Decision Be Set Aside as Unreasonable?

1. Errors in Findings of Fact

[20] Where a decision maker fails to take into consideration important material that was placed before him, this could constitute a reviewable error (*Khakh v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1030, at para. 4). A decision can also be set aside when the decision maker

ignores credible and trustworthy evidence and draws inappropriate inferences about an applicant's credibility based on an absence of evidence (*Mui v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1020).

[21] In the context of refugee claims, this Court has repeatedly held that when a refugee claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are good and valid reasons to doubt their truthfulness. While a failure to offer documentation may be a valid finding of fact, it cannot be related to the applicant's credibility, in the absence of evidence to contradict the allegations (*Maldonado v. Minister of Employment and Immigration*, [1980] 2 F.C. 302 (C.A.); *Anthonimuthu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 141).

a) Country of Reference

[22] The officer ignored both the RPD and PRRA decisions which verified the applicant's country of reference as New Zealand, not China, because the applicant does not have any legal status in China. The IRB had specifically stated in its decision that while there is no direct evidence as to the applicant's status in China other than her exclusion from the family "*hucou*" and her exist permit submitted as evidence of her forced departure, it nevertheless applied its specialized knowledge to find that the applicant had no status in or right to return to China.

[23] Although there appears to be discrepancies pertaining to other documentation related to the applicant's situation in China, the Court is nevertheless satisfied on the balance of probabilities that

the applicant does not have legal status in China and that as a consequence the officer erred in basing his decision on China as the country of reference as opposed to New Zealand, as previously determined by the RPD and PRRA decisions that were ignored by the H&C officer without any valid reason.

[24] Dual citizenship is not permitted in China; therefore, the applicant having been born in New Zealand is a citizen of that country. Furthermore, even if the applicant could benefit from citizenship rights in China because her parents are both Chinese citizens, the applicant's exit visa constitutes further evidence that the applicant has presently no status in China; she has rights maybe, but no present status in China. Although the exit permit was not included in the tribunal record, this Court can presume that this permit exited since the RPD refers specifically to this permit in its decision.

b) Credibility

[25] To challenge the applicant's credibility, the officer relied on the fact that there was no credible evidence to prove that the applicant had been denied legal status in China, but ignored on the other hand for no valid reasons that her credibility had already been positively established by the IRB and PRRA officers in this regard.

c) Fine

[26] The officer ignored the documentary evidence confirming that a fine of 130 000 *yuan* applies in the district where the applicant's parents reside to those who have violated the one-child

policy. Whether or not the applicant's parents actually paid the fine was irrelevant since the applicant's claim was not based on her parents' failure to pay the fine, but on the fact that her mother gave birth to her in New Zealand due to the one-child policy.

d) Parents' Names

[27] The officer took into account irrelevant factors when she rejected the explanation for the different spelling of the last names of the applicant's parents. The spelling discrepancies were not an issue until it was raised by the officer. Although not determinative of the outcome, this finding of the officer shows nevertheless the importance she attached to insignificant aspects of the evidence to diminish the applicant's credibility, while closing her eyes at the same time on more important elements of proof with respect to the outcome expected by the applicant.

e) Maternal Grandmother

[28] The officer found discrepancies between the affidavit of the applicant's paternal grandmother and the applicant's PIF with respect to the legal status of the applicant's maternal grandmother in New Zealand and this although the status of the applicant's grandmother in New Zealand is irrelevant and that the statement of her status was made by the applicant's legal representative and not by her paternal grandmother. Again, the officer considered an irrelevant discrepancy while ignoring more important aspects of the evidence.

2. Best Interests of the Child

[29] Decision makers should consider the children's best interests as an important factor, give them substantial weight, and be "alert, alive and sensitive" to them. Where the interests of children are minimized in a manner inconsistent with Canada's humanitarian and compassionate tradition, the decision will be unreasonable (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 73, 75).

[30] None of the applicant's submissions about her best interests were considered by the H&C officer whose decision was inconsistent with her best interests as a child.

[31] Firstly, the officer disregarded without any valid reason the main consideration behind the custody order made by the Ontario Court in favour of the paternal grandmother. It is stated law that the first duty of a court of justice granting a custody order is always to consider the child's best interests. The officer here goes on to say that the custody order is not supported by sufficient reasons although the factual evidence before him showed more than sufficient reasons for the said order. In addition, the officer appears to have ignored that the Ontario Court must be presumed to have been governed only by "best interests of the applicant as a child" when it rendered its decision. True the officer was not bound by the said custody order, but the officer was nevertheless bound by the main consideration behind the Ontario Court order. Nevertheless, the officer gives no valid reasons to disregard this order or to diminish its legal effect.

[32] Secondly, the officer nevertheless found that the applicant would have a bright future in China and this despite the evidence showing that she had no legal status there. The officer also concluded that the applicant would not suffer undue or disproportionate hardship because the applicant had attended school in China and was therefore familiar with the school system in China, when in fact, the applicant only attended school for one year in China and was excluded afterward.

[33] Finally, the officer either ignored or dismissed the close ties that the applicant has built along the years with her paternal grandmother, her extended family members and the broader community in Canada.

[34] In brief, the Court concludes that the H&C officer decided arbitrarily what was best for the applicant's interests as a child, and this without any consideration for the applicant's submissions, evidence and concerns. The officer's conclusion in this regard is unacceptable and unreasonable and as a consequence justifies the intervention of the Court.

[35] If the applicant were to leave Canada, she would be sent to New Zealand, where she has no remaining family ties and where she has not been since she was a baby. Although the applicant is a citizen of New Zealand, which is a democratic country with strong social and education systems, the Court does not see how it would be in her best interests that she be separated at her age from her entire family, including the grandmother to whom the Ontario Court of Justice entrusted her legal custody.

[36] By remaining in Canada, the applicant has the opportunity to live and grow among members of her extended family. It would be inconsistent with the best interests of the applicant for her to be sent to New Zealand, where she would live either in a foster or group home or she would be adopted. Furthermore, the custody order granted by the Ontario Court of Justice should be respected since it must be presumed to have been rendered in the applicant's best interests and that no evidence of any event was adduced since this order that could have permitted the officer to arrive at a different conclusion.

B. Should the H&C Decision Be Set Aside as a Result of a Breach of Procedural Fairness?

[37] The officer's errors and omissions when viewed as a whole on the first issue are sufficiently important to render the impugned decision unreasonable without the necessity for this Court to address the other issue concerning the alleged breach of procedural fairness.

[38] The Court therefore finds the impugned decision unreasonable and as a result will set it aside, while agreeing with the parties that there is no important question of general interest here to certify.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application is allowed, the decision dated April 22, 2008, is set aside, and the matter is referred to another immigration officer for rehearing.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2218-08
STYLE OF CAUSE:	LISA JOE (XUE LAN HUANG) v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 4, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	LAGACÉ D.J.
DATED:	February 3, 2009

APPEARANCES:

Avvy Yao-Yao Go	FOR THE APPLICANT
Ladan Shahrooz	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Metro Toronto Chinese & Southeast Asian Legal Clinic Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT