Federal Court Cour fédérale

Date: 20120706

Docket: IMM-7241-11

Citation: 2012 FC 859

Ottawa, Ontario, July 6, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

GUANG MING QIU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This matter involves an application for judicial review from a decision of a senior immigration officer, dated September 9, 2011, in which the officer refused the applicant's application under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

[2] The applicant is a 30 year-old citizen of the People's Republic of China. On March 12, 2001, he came to Canada and sought refugee protection, arguing that as an adherent of the Tian Dao

religion, he was at risk in China. The Refugee Protection Division of the Immigration and Refugee Board denied his claim on March 7, 2003. The applicant made his H&C application in May of 2005. He also made a Pre-removal Risk Assessment [PRRA] application, which was refused on October 3, 2011. Accordingly, the applicant has been in Canada for over 10 years and waited nearly 6 1/2 years to have his H&C application determined.

[3] In the decision under review, the officer first identified the test applicable to the determination of an H&C application, holding that the applicant was required to demonstrate that the hardship of obtaining a permanent resident visa from outside Canada in the normal manner would be "unusual and undeserved or disproportionate". The officer went on to note that in most circumstances unusual hardship is one which is not anticipated by the Act, that undeserved hardship most often results from circumstances beyond an applicant's control and that H&C grounds may exist in cases that do not meet "unusual and undeserved" criteria, where the hardship of needing to apply for permanent resident status from outside Canada would have a disproportionate impact on an applicant, due to his or her personal circumstances.

[4] After enunciating the applicable test, the officer went on to evaluate the factors identified by the applicant in support of his H&C application, namely, his degree of establishment in Canada, existing linkages with family members in Canada and abroad, ties related to his country of origin, the best interests of a child in Ecuador the applicant sponsored through Plan International Canada and the risk the applicant claimed he would face if returned to China. Based on an assessment of all the factors, the officer concluded that the applicant's requested exemption was not justified on humanitarian and compassionate considerations.

[5] In evaluating the applicant's establishment in Canada, the officer commented on the evidence provided by the applicant regarding his employment record, payment of taxes, compliance with the law (including the requirements of the Act) and noted that the applicant had "shown himself to be an independent, productive, and law-abiding member of Canadian society" (Decision at p 4). However, the officer went on to state that the degree of the applicant's establishment in Canada was "not beyond what would normally be expected" given his presence in the country since 2001 and that the applicant had not demonstrated an "unusual degree of establishment" (Decision at p 4). The officer also noted that the applicant was fully cognizant of the uncertainty of his immigration status and concluded that he had not "demonstrated that his establishment and integration into Canadian society is such that being required to sever his communal and employment ties and depart Canada and apply for permanent resident status from outside the country would constitute unusual, undeserved or disproportionate hardship" (Decision at p 4).

[6] In this application for judicial review, the applicant asserts that the officer committed three interrelated reviewable errors, all connected to the officer's assessment of the degree of the applicant's establishment in Canada, arguing that:

1. The officer erred in law by requiring an "unusual degree" of establishment in Canada;
2. His assessment of the applicant's degree of establishment in Canada was unreasonable because it lacks a clear evidentiary basis; and
3. The officer breached the duty of fairness by failing to provide the applicant with a meaningful opportunity to respond to the officer's concerns regarding the applicant's degree of establishment in Canada.

[7] The respondent, on the other hand, argues that the officer's decision was reasonable, was made in accordance with the applicable case law and, accordingly, that this application ought to be dismissed. The respondent asserted a further ground for dismissal centered on the fact that the applicant failed to file an affidavit based on personal knowledge in support of the application for judicial review. At the hearing, however, counsel for the parties advised that this issue was settled, and the parties concurred that the application could properly proceed based on the certified tribunal record and Exhibit "B" to the impugned affidavit, being extracts from the Inland Processing Manual 5 of Citizenship and Immigration Canada, entitled "Immigration Applications in Canada made on Humanitarian and Compassionate grounds" [IP 5], which sets out guidelines to be applied by immigration officers in the assessment of H&C permanent residence applications.

[8] The parties agree that the standard of review applicable to all three of the alleged errors is that of reasonableness. I concur. The case law firmly establishes that the reasonableness standard is applicable to review of an exercise of discretion by an H&C officer under subsection 25(1) of IRPA (see e.g. *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 58, [2009] 1 SCR 339; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 at para 62 [*Baker*]; *Minister of Citizenship and Immigration v Okoloubo*, 2008 FCA 326 at para 30, 301 DLR (4th) 591; *Owusu v Minister of Citizenship and Immigration* 2004 FCA 38 at para 12, [2004] 2 FCR 635 [*Owusu*]). The case law likewise indicates that in applying the reasonableness standard to an exercise of discretion by an H&C officer under subsection 25(1) of the IRPA, the required approach is a decidedly deferential one, which must be fully cognizant of the broad discretion afforded to an officer under this section (see e.g. *Legault v Canada (Minister of*

Citizenship and Immigration), 2002 FCA 125 at para 11, 212 DLR (4th) 139 [*Legault*]; *Jung v Canada (Minister of Citizenship and Immigration)*, 2009 FC 678 at para 40).

[9] As noted, the applicant first argues that the officer applied the incorrect test by requiring an unusual degree of establishment. In my view, this argument is without merit. While the officer perhaps conflated the language of the two elements of the inquiry (i.e. whether removal would cause "unusual or disproportionate hardship" due to the "significant degree of establishment"), I do not believe he failed to perform the correct analysis. The officer reasoned that, given the time the applicant had been in Canada, the applicant had taken "positive steps" to integrate but concluded there was not such establishment that "being required to sever his communal and employment ties and depart Canada and apply for permanent resident status from outside the country would cause unusual, undeserved or disproportionate hardship" (Decision at p 4). This is the correct test to be applied to the assessment of an applicant's degree of establishment in Canada (see e.g. *Legault* at para 23; *Reis v Canada (Minister of Citizenship and Immigration)*, 2012 FC 179 at para 49, 211 ACWS (3d) 437).

[10] Thus, the first of the arguments advanced by the applicant fails.

[11] The second ground, in my view, is likewise without merit. The applicant argues that the officer incorrectly applied the criteria set out in IP 5, and, more specifically, ought to have found that the applicant faced unusual and undeserved hardship through the delay in processing his H&C and PRRA applications. The applicant also asserts that the officer's reasons are lacking, and that he failed to provide any meaningful analysis of the degree of the applicant's establishment in Canada, and, thus, that his conclusions are without evidentiary foundation.

[12] Turning first to IP 5, the applicant relies in particular on section 5.14, which provides that:

> Positive H&C considerations may be warranted when the period of inability to leave Canada due to circumstances beyond the applicant's control is of considerable duration and where there is evidence of a significant degree of establishment in Canada such that it would cause the applicant unusual or disproportionate hardship to apply from outside Canada.

[13] While it is true, as the respondent argues, that IP 5, as a guideline, does not have the force of law, it is useful in evaluating the reasonableness of an officer's exercise of discretion on an H&C application as the Supreme Court of Canada noted in *Baker* at para 72. In applying IP 5 to the applicant's situation, the question facing the officer was whether the applicant was "unable to leave Canada" due to circumstances "beyond his control". Contrary to what the applicant asserts, the delay in processing his H&C and PRRA applications do not constitute a "circumstance beyond his control" that resulted in his being unable to leave Canada. This Court has so found on several occasions (see e.g. *Singh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 612 at para 15, *Luzati v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1179 at para 21, 208 ACWS (3d) 386 [*Luzati*]; and *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 at para 23, [2006] FCJ No 425 [*Serda*]). As Justice Mosley noted in *Luzati* at para 21, "[t]he time elapsed during immigration proceedings cannot serve as the sole basis to demonstrate establishment as it would promote "backdoor" immigration". Thus, contrary to what the applicant claims, in my view, the officer correctly applied the criteria set out in IP 5 to the assessment of the degree of the applicant's establishment in Canada.

[14] Turning next to the officer's alleged lack of any meaningful analysis of the establishment factor in the decision under review, contrary to what the applicant asserts, I believe that the reasons of the officer are more than adequate, and consist of an elaboration of the correct test, review of the

relevant factual record, and a conclusion. In short, the officer considered the evidence and arguments made and reached a conclusion that was reasonably open to him.

[15] In addition, while one of the relevant factors for an officer to consider on an H&C application for permanent residence is the degree of establishment in Canada, this factor is not determinative (see e.g. *Samsonov v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1158 at paras 16-18. [2006] FCJ No 1457; *Lee v Canada (Minister of Citizenship and Immigration)* 2005 FC 413 at para 9, [2005] FCJ No 507; *Luzati* at paras 22-23; *Serda* at para 24). Thus, even if the officer had made an unreasonable assessment of the establishment factor, this would not necessarily result in the decision's being set aside.

[16] Turning finally to the alleged breach of procedural fairness, the applicant argues that the officer violated procedural fairness by not contacting him and explaining his concerns regarding the applicant's claim of establishment. In my view, this assertion is likewise without merit. It is trite law that the onus is on the applicant to establish that his or her circumstances justify waiving the requirement that a permanent residency application must normally be made from outside Canada (*Owusu* at para 5; *Anaschenko v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1328 at para 8, [2004] FCJ No 1602). Moreover, where all the officer does is assess the adequacy of the evidence provided by the applicant, there is no need to contact the applicant or invite additional submissions. The cases cited by the applicant in support of the alleged breach of procedural fairness – *Wong v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1791, 159 FTR 154; *Lau v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 485, 146 FTR 116; and *Ma v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1042, [2009] FCJ No 1283 – are distinguishable in that none involved an H&C application and in each instance the officer had concerns that were undisclosed to and unanticipated by the applicant. That cannot be said in the

present case. All the officer did was assess the evidence tendered by the applicant in respect of the degree of establishment demonstrated by the applicant, which the applicant asserted was a relevant consideration. The officer found the evidence fell short of establishing a degree of establishment sufficient to grant relief under subsection 25(1) of the IRPA. There is no breach of procedural fairness in proceeding in this fashion.

[17] Thus, none of the alleged errors warrants intervention and this application for judicial review must be dismissed.

[18] No question for certification under section 74 of IRPA was presented and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. No question of general importance is certified; and

3. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	*Guang Ming Qiu v The Minister of Citizenship and Immigration*
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