Federal Court  Cour fédérale

**Date: 20121219**

**Docket: IMM-1711-12**

**Citation: 2012 FC 1512**

**Ottawa, Ontario, December 19, 2012**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**JINGSHU JIANG, XIUQING JIANG, YUHAO RAYMOND JIANG AND TONY YUFENG JIANG**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision by a Citizenship and Immigration Canada officer (the officer) dated December 8, 2011 wherein the applicant's permanent residence application was refused. This conclusion was based on the officer's finding that there were insufficient humanitarian and compassionate (H&C) grounds to warrant an exception allowing the applicant's permanent residence application to be made from within Canada.

[2] The applicant requests that the officer's decision be set aside and the application be referred back to Citizenship and Immigration Canada (CIC) for redetermination by a different officer.

**Background**

[3] Jingshu Jiang, the principal applicant, and his wife, Xiuqing Jiang, are citizens of China, while their sons are United States citizens. The principal applicant applied for asylum in the U.S. in 1993 based on participation in the Chinese student democracy movement. His claim was denied in 2002 and his appeal was refused in 2009.

[4] In July 2001, the principal applicant married his wife who had fled China to the U.S. due to fear of persecution because of inhumane family planning policy in China. The principal applicant's sons were born in the U.S. while their asylum appeal was pending.

[5] The principal applicant's wife began practicing Falun Gong in March 2008 as treatment for insomnia and headaches. She began to contact her former schoolmates in China to share her experience, including pamphlets and *Epoch Times* clippings.

[6] When the principal applicant's U.S. appeal was refused in May 2009, his wife received a phone call from her father telling her that the Public Security Bureau (PSB) went to their home, had discovered the pamphlets and asked that she return to China and turn herself in. Her classmates had already been arrested.

[7] The principal applicant and his family came to Canada on August 22, 2009 and made a claim for refugee protection. This claim was refused on December 24, 2010 and leave for judicial review was denied by this Court on April 13, 2011.

[8] In May 2011, the applicants filed a pre-removal risk assessment (PRRA) application and in July 2011 they filed an H&C application. These applications were refused on December 8, 2011 and December 12, 2011 respectively, by the same officer.

**Officer's H&C Decision**

[9] In a letter dated December 8, 2011, the officer informed the applicants of the negative decision. Reasons for the decision were also provided.

[10] The officer began by summarizing the applicant family's biographical information and immigration history. The officer identified the issues as adverse country conditions, establishment and the best interests of the children.

[11] The officer noted that as the H&C application had been submitted after June 29, 2010, risk factors relating to sections 96 and 97 of the Act could not be considered in this type of application.

[12] The officer summarized the applicants' allegations and noted that the Refugee Protection Division (RPD) had found that the principal applicant's wife had not been identified as a practitioner by the PSB, was not a genuine Falun Gong practitioner and that she came to Canada on

a fraudulent basis. The RPD had also found the applicant's testimony was not credible in relation to his wife's practice of Falun Gong. On the applicants' claim of persecution by the Chinese government due to violating the one child policy, the RPD found that the children would be registered in the family hukou after the payment of a fine.

[13] The officer reviewed country conditions evidence relating to China's persecution of Falun Gong practitioners, noting that they continue to face arrest, detention and imprisonment. Although practicing Falun Gong in the privacy of one's home is possible, it could become dangerous if the authorities became aware of it. The treatment of practitioners varied across provinces, being more relaxed in the south.

[14] The officer then turned to country conditions evidence relating to family planning policies, describing the history of the one child policy and the monetary penalty for extra births. The officer cited a response to information request (the RIR) stating that forced abortion and sterilization are banned by Chinese law, but that some local officials have resorted to coercion. It was also indicated that Chinese nationals who have children abroad may not be subject to the one child policy.

[15] The officer found that the evidence did not support the applicants' assertion that the hardship of returning to China would constitute unusual and undeserved or disproportionate hardship.

[16] The officer next considered the establishment of the principal applicant's family. The principal applicant was unemployed for a year and half after arrival in Canada, but had worked at a

sushi restaurant as confirmed by an employer letter. The principal applicant did not indicate if his wife was employed. The officer reviewed other documentary evidence relating to education and community involvement. The officer placed positive consideration on the principal applicant's employment in Canada, but noted that it did not commence until after the negative RPD decision.

[17] The officer noted the principal applicant's family has a good civil record, but did not provide copies of bank statements or tax statements.

[18] The officer found that while leaving Canada after two years may be difficult, the level of integration achieved by the principal applicant's family did not make their hardship upon removal unusual and undeserved or disproportionate.

[19] In considering the best interests of the children, the officer found that they were dual U.S. and Chinese citizens. The officer held that the evidence did not support a legal obstacle to the children residing in China. There was little evidence their basic amenities would not be provided for. It was reasonable to expect the children to have been exposed to the Chinese culture and Mandarin language by their parents in North America. The officer concluded that the general consequences of relocating would not have a significant negative impact on the children.

[20] The officer found that the applicant's family had demonstrated their ability to adapt to new environments and could be expected to adjust to their return to life in Canada. Their skills acquired in North America were transferable and their extended family members lived in China.

[21] In conclusion, the officer acknowledged that the applicants would face hardship, but it did not rise to the level of unusual and undeserved or disproportionate hardship. Therefore, the application was refused.

**Issues**

[22] The applicants submit the following points at issue:

1. Whether the officer breached the duty of fairness by failing to make any reference to the applicants' written submissions and documentary evidence?

2. Whether the officer breached the duty of fairness by basing his decision on a selective review of the country conditions evidence?

3. Whether the officer erred in failing to provide any reasons for his finding of no unusual and undeserved or disproportionate hardship, particularly when the officer referred to conflicting findings?

4. Whether the officer erred in failing to adequately assess the best interests of the children?

5. Whether the officer erred in failing to properly assess the establishment of the applicants' family?

[23] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer violate procedural fairness?

3. Did the officer err in denying the application?

**Applicants' Written Submissions**

[24] The applicants submit the appropriate standard of review for an H&C decision is reasonableness, but that procedural fairness should be reviewed on a standard of correctness.

[25] The applicants argue the IP 5 H&C Manual requires an officer to consider and weigh all relevant evidence and look at the whole picture. The manual also refers to the right to be heard as a fundamental component of natural justice.

[26] The officer failed to consider the written submissions and supporting document evidence provided by the applicants' counsel. There was no consideration of counsel's submission that the conclusion on Chinese citizens working abroad in the RIR referred to citizens working at Chinese embassies and did not include failed refugee claimants. This submission was corroborated by correspondence with the author of the report. The officer's failure to consider this evidence violated procedural fairness and constituted bias.

[27] In his country conditions analysis, the officer only selected information unfavourable to the applicants. The U.S. Department of State Report described a coercive birth control regime, sometimes including forced abortion or sterilization and the detention of Falun Gong adherents. The fee for each unapproved child can reach ten times a person's annual disposable income. Unregistered children cannot access public services. The officer ignored these findings and therefore breached the principles of fairness and justice.

[28] The officer failed to provide reasons for his finding of no unusual and undeserved or disproportionate hardship. The applicants are entitled to know why they failed to convince the officer of their case. The officer cited adverse country conditions and then dismissed them without any explanation or analysis. The paragraphs excerpted dealing with the risk of sterilization and the detention of Falun Gong practitioners conflicted with the officer's finding of a lack of evidence.

[29] The officer failed to consider the best interests of the children by not considering the hardships of failing to be recorded in the household registry, including discrimination, lack of health care and risk of kidnapping. The officer's analysis of the best interests of the children was superficial. The officer's conclusion that there was no legal obstacle to the children receiving Chinese citizenship was based in part on the DOS Report that only referred to Hong Kong.

[30] The officer's conclusion on establishment contained no analysis. The applicant family is financially self supportive and regularly attend church and ESL classes. It can therefore not be said that their establishment is no different than that of other refugee claimants.

**Respondent's Written Submissions**

[31] The respondent argues the applicants' argument to Chinese refugee claimants abroad not being exempt from the one child policy is an assertion without evidence and that the RIR relied upon by the officer made no such distinction. The officer reasonably determined that the evidence did not support a finding of hardship upon return.

[32] It was open to the officer to conclude the evidence did not indicate hardship based on the persecution of Falun Gong as the RPD had found the principal applicant's wife was not a genuine practitioner.

[33] The officer specifically listed the sources he consulted, including the applicants' submissions. The applicants' argument with respect to country conditions amounts to a disagreement on the weighing of evidence. This Court should consider the substance of contrary evidence, not the particularities of any specific article. The officer properly considered all the evidence.

[34] The officer was alert, alive and sensitive to the best interests of the children. His decision was reasonably made based on the evidence. The applicants merely asserted that the children could not be recorded in the hukou, but the officer had already noted that Chinese nationals with children born abroad are not subject to the one child policy and can return to China with more than one child without serious problem.

[35] The officer properly considered establishment and the applicants are simply asking this Court to reweigh the evidence.

**Analysis and Decision**

[36] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57, [2008] 1 SCR 190).

[37] It is well established that assessments of an officer's decision on H&C applications for permanent residence from within Canada are reviewable on a standard of reasonableness (see *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paragraph 18, [2009] FCJ No 713; *Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193 at paragraph 14, [2009] FCJ No 1489; and *De Leiva v Canada (Minister of Citizenship and Immigration)*, 2010 FC 717 at paragraph 13, [2010] FCJ No 868).

[38] In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[39] It is also trite law that the appropriate standard of review for issues of procedural fairness is correctness (see *Khosa* above, at paragraph 43). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50).

[40] **Issue 2**

Did the officer violate procedural fairness?

The applicants argue the officer violated procedural fairness by failing to consider or make reference to particular evidence. As explained in *Khosa* above, at paragraphs 45 and 46, the *Federal Courts Act*, RSC 1985, c F-7, indicates that a reasonableness standard of review is appropriate when reviewing fact finding:

> 45 Judicial intervention is further authorized where a federal board, commission or other tribunal
>
> (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
>
> . . .
>
> 46 More generally, it is clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the Federal Courts Act.

[41] The subsection excerpted in the above paragraph specifically mentions "without regard for the material before it" as a ground of review, which is the ground alleged by the applicants here. However, this passage makes clear it should be reviewed on a reasonableness standard and is therefore not a matter of procedural fairness. I instead will consider this argument under the general reasonableness review discussed below.

[42] **Issue 3**

Did the officer err in denying the application?

The officer is presumed to have considered all of the evidence before him (see *Oprysk v Canada (Minister of Citizenship and Immigration)*, 2008 FC 326 at paragraph 33, [2008] FCJ No 411). However, the more important the evidence that is not mentioned, the more willing a court may be to infer from silence that the tribunal made a finding of fact without regard to the evidence (see *Pinto Ponce v Canada (Minister of Citizenship and Immigration)*, 2012 FC 181 at paragraph 35, [2012] FCJ No 189).

[43] The officer properly considered the country conditions evidence on Falun Gong practitioners, but relied on the officer's negative credibility finding that the principal applicant's wife was not a practitioner. Therefore, the evidence pointed to by the applicants is not significant enough to warrant further mention from the officer.

[44] I also do not believe it is an error for an officer to explicitly consider evidence that contradicts his ultimate conclusion as the applicants argue. A decision which considers evidence on both sides is harmonious with the value of transparency.

[45] The applicants argue that the officer failed to consider the applicants' argument that the exemption of Chinese citizens working abroad from the one child policy referred only to those working in embassies. The respondent argues the applicants provided no evidence on this point and therefore it need not have been explicitly considered by the officer.

[46] The respondent is correct that the evidence offered by the applicants on this point is not overwhelming. The applicants made the claim in submissions regarding Chinese embassy staff without reference to any country conditions evidence.

[47] The applicants did, however, submit correspondence with the political science professor relied upon in the RIR on this point. The professor stated he did not recall making any conclusive recommendations regarding how the children of failed refugee claimants would be treated upon their arrival in China.

[48] This correspondence does not perfectly buttress the applicants' claim that the one child exemption only applies to embassy staff. It does, however, raise some doubt as to whether the waiver of the one child policy, as described in the RIR, applied universally to those born overseas or varied depending on circumstances.

[49] This is a significant issue in assessing the applicants' case and for the officer to be silent on it is an omission that rises to the level described in *Pinto Ponce* above. It is particularly relevant since the officer's finding was only that children born abroad "may" not be subject to the one child policy.

[50] This piece of evidence does not dictate a particular outcome and it is not this Court's role to reweigh evidence. However, the officer's failure to explain why this evidence was rejected conflicts with the *Dunsmuir* above, value of transparency. It is therefore unreasonable.

[51] I would therefore grant the application and return the matter for redetermination by a different officer.

[52] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** the application for judicial review is set aside and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

## ANNEX

**Relevant Statutory Provisions**

***Immigration and Refugee Protection Act*, SC 2001, c 27**

| | |
|---|---|
| 72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court. | 72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation. |
| 96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, | 96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques : |
| (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or | a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays; |
| (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country. | b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner. |
| 97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally | 97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée : |
| (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or | a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture; |
| (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if | b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : |

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1711-12 |
| **STYLE OF CAUSE:** | JINGSHU JIANG, XIUQING JIANG, YUHAO RAYMOND JIANG and TONY YUFENG JIANG<br><br>- and –<br><br>THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | October 25, 2012 |
| **REASONS FOR JUDGMENT AND JUDGMENT OF:** | O'KEEFE J. |
| **DATED:** | December 19, 2012 |

**APPEARANCES:**

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| Nicole Paduraru | FOR THE RESPONDENT |

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