Federal Court  Cour fédérale

Date: 20130110

Docket: IMM-1830-12

Citation: 2013 FC 20

Ottawa, Ontario, January 10, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

LIYUN YANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This decision, which disposes of an application for judicial review of a negative exemption ruling, is related to and was heard with the application in Court File IMM-1829-12, concerning the judicial review of a pre-removal risk assessment. Both applications are brought under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The application for an exemption on humanitarian and compassionate grounds was made in June 2009 and the request for a pre-removal risk assessment was submitted in January 2011. Both were decided by the same

immigration officer on December 13, 2011. The factual background relating to the applicant and conditions in her country of origin, China, are identical to both applications and will be addressed in these reasons. A separate order will issue to dispose of the application in file IMM-1829-12.

BACKGROUND:

[2] The applicant was born in Guangdong, China, in October 1971. In 1993, when she was 22, she went to Guyana, where she met her husband, also a Chinese national. They had two sons, born in 1994 and 1996, who were eventually sent back to China to live with her in-laws and pursue their studies. Ten years of residence were required for Ms. Yang to qualify for Guyanese citizenship. After seven years, in 2000, she became ill, abandoned her residency status in Guyana and returned to China for treatment. She was followed a few months later by her husband, who was also ill. Her husband was diagnosed with AIDS and died soon thereafter. The applicant then discovered that she was HIV positive.

[3] The applicant sought protection in Canada in December 2004 claiming, on the advice of an immigration consultant, that she was fleeing persecution related to membership in Falun Dafa. In this version of events, she had divorced in 2003, was left to care for her two sons, and became depressed. To overcome depression, she began practicing Falun Gong and joined an underground Falun Dafa group. Following the arrest of a friend who had introduced her to Falun Dafa, she went into hiding and made arrangements to come to Canada. This story was presented to the Refugee Protection Division of the Immigration and Refugee Protection Board and found to be not credible

in 2006. An application to reopen on the ground of procedural unfairness due to the order of questioning at the hearing was dismissed in 2007.

[4] The application for an exemption from the selection criteria on humanitarian and compassionate ("H&C") grounds, in June 2009, was supported by submissions that the reason the applicant chose to mislead the Board in presenting her claim for protection was that she was too ashamed to disclose and rely upon her HIV status. Further, it was submitted that if she returns to China she would not have access to life-saving treatment, or indeed any treatment as she has lost her *hukou* (household registration), that she and her children will be discriminated against in China by reason of her HIV status, and that she will no longer be able to work at assisting others living with HIV/AIDS as she has been doing in Canada.

DECISION UNDER REVIEW:

[5] The officer reviewed the factors concerning the applicant's establishment in Canada: support from and volunteer work at Asian Community Aids Services; membership in the Toronto Chinese Disciples Church; internet training and an oral English program; and close friendships with Canadians in the Chinese community. The officer found that the applicant did not demonstrate that she had entered the Canadian work force or become financially self-sufficient. Nor had she indicated in her application that she read, wrote, or spoke English. She was unemployed and on social assistance from her arrival in Canada to about 2010, when she began working in a factory.

[6] The officer noted that there are no language barriers or other significant obstacles to the applicant's re-employment in China. It would not be unreasonable for her to return; there would be a period of re-adjustment, but her mother and sons could provide her with support. The officer acknowledged that many HIV-positive people in China experience unfair or unjust treatment, and that privacy safeguards are inadequate in some regions.

[7] Concerning the best interests of the applicant's children, the officer noted that they are in the care of their maternal grandmother in China, where they are shielded from the stigma and discrimination which come from having a family member with HIV.

[8] Regarding the question of risk to the applicant should she return to China, the officer reviewed the general conditions in that country and assessed these against the applicant's personal profile. He found that China is an authoritarian state with a poor human rights record, and that many HIV-positive persons experience prejudice, discrimination, and stigmatization. However, in March 2006 China had enacted *Regulations on AIDS Prevention and Treatment* which provided fundamental rights to people living with HIV/AIDS. In 2008, China revised the criterion for initiating antiretroviral treatment, increasing the number of people receiving treatment. Coverage then continued to increase steadily, with positive effects, according to the sources relied upon by the officer. Moreover, China continued to improve and strengthen its government response mechanisms to HIV/AIDS. By 2010, this included implementing the "Four Frees, One Care" policy which provided four basic means of access to free treatment, as well as subsidies.

[9] The officer notes that as a prerequisite for benefiting from "Four Frees and One Care", a person must have a household or city registration permit. The applicant declares that her *hukou* is no longer valid as she had been out of China for over ten years and therefore that she would not have access to treatment. The officer found, however, that the applicant had not provided sufficient evidence for him to conclude that her *hukou* had been cancelled. Further, as she had returned to China for treatment after living in Guyana for seven years, she had not demonstrated that she would now be refused treatment.

[10] The officer devoted several paragraphs to discussion of a Xinhua news agency article from an on-line source ("Xinhuanet") that reported pledges by the Chinese Premier to bring in further measures to help those living with HIV/AIDS. This article was published on December 2, 2011, eleven days before the H&C decision was made.

[11] The officer determined that the factors favouring the application did not justify an exemption. Stating that he had considered the application, the submissions, the facts on file, and objective documentation on country conditions in China, he concluded that the difficulties mentioned would not constitute unusual, undeserved, or disproportionate hardship warranting an exemption.

ISSUES:

[12] The issues arising in this matter from the parties' submissions are as follows:

1. Did the officer fail to observe procedural fairness by relying on extrinsic evidence without providing the applicant with an opportunity to respond?

2. Did the officer err by applying the wrong test for H&C?

3. Did the officer make an unreasonable decision by;

    a. Misconstruing evidence, ignoring evidence, or basing his decision on a selective analysis of evidence without regard to the totality of the evidence;

    b. Failing to consider the personal circumstances of the applicant; or

    c. Failing to take into account the best interests of the child?

ANALYSIS:

Standard of Review;

[13] The standard of review for the issues noted above has been satisfactorily established by the jurisprudence: *Dunsmuir v New Brunswick*, 2008 CSC 9 [*Dunsmuir*] at para 57. The overall standard of review for the weighing of the evidence and balancing of the H&C factors is that of reasonableness: *Shallow v Canada (MCI)*, 2012 FC 749 at para 5. Reasonableness is concerned with the justification, transparency and intelligibility of the decision-making process, but also with whether the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law: *Dunsmuir* at para 47.

[14] For the second issue, the application of the correct H&C test, the standard of review is that of correctness: *Miller v Canada (MCI)*, 2012 FC 1173 at para 15. Where procedural fairness is in question, *Dunsmuir*, at para 50, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43, instruct that no deference to the decision maker is required. The Court must determine

whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances. The Court may withhold relief if the error is purely technical and occasioned no substantial wrong.

Did the PRRA Officer fail to observe procedural fairness by relying on extrinsic evidence without providing the applicant with an opportunity to respond?

[15] The applicant's argument on this issue targets the officer's reliance upon the Xinhuanet report. She contends that this was extrinsic evidence, relied upon by the officer to determine that there had been a change in country conditions. As such, the duty of fairness required that the officer disclose the article to her in advance of making a decision and provide her with an opportunity to respond: *Fi v Canada (MCI)*, 2006 FC 1125 [*Fi*]; *Mahendran v Canada (MCI)*, 2009 FC 1237; *Pathmanathan v Canada (MCI)*, 2009 FC 885; *Pinter v Canada (MCI)*, 2007 FC 986; *Thamotharampillai v Canada (MCI)*, 2003 FC 836;

[16] Further, the applicant submits, the source of the article is suspect as Xinhuanet is the website of the central news agency owned and operated by the government of China. The objectivity of an article published by the communications arm of the government, which arguably has a strong interest in presenting the country in the most positive light, is therefore highly questionable, she contends. Had she been given notice that the officer intended to rely upon the article she would have brought these concerns to his attention: *Sahota v Canada (MCI)*, 2011 FC 739 at para 11.

[17] Guidance in respect of the use of extrinsic evidence in administrative decisions related to immigration was offered by the Federal Court of Appeal in *Muliadi v Canada (Minister of Employment and Immigration)*, [1986] 2 FC 205 (FCA) and *Haghighi v Canada* (*Minister of Citizenship and Immigration*), [2000] 4 FC 407 (FCA). The question is whether meaningful facts essential or potentially crucial to the decision had been used to support a decision without providing an opportunity to the affected party to respond to or comment upon these facts.

[18] In *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461 (FCA) [*Mancia*] at paragraph 22 the Federal Court of Appeal offered the following statement of principle with respect to the disclosure of information about country conditions in the decision-making process following a review of the jurisprudence:

> These decisions are based, it seems to me, on the two following propositions. First, an applicant is deemed to know from his past experience with the refugee process what type of evidence of general country conditions the immigration officer will be relying on and where to find that evidence; consequently, fairness does not dictate that he be informed of what is available to him in documentation centres. Secondly, where the immigration officer intends to rely on evidence which is not normally found, or was not available at the time the applicant filed his submissions, in documentation centres, fairness dictates that the applicant be informed of any novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case. [Underlining added]

[19] The "documentation centres" referred to in the foregoing paragraph were physical locations. The reference to availability in paragraph 22 of *Mancia* has to be construed to-day in virtual terms in light of the extraordinary expansion of the Internet as the preferred vehicle for the dissemination of information over the course of the past decade.

[20] Citizenship and Immigration Canada describes the information it holds in relation to country conditions on its website (http://www.irb-cisr.gc.ca/eng/resrec/ndpcnd/Pages/index.aspx) as follows:

> The National Documentation Packages (NDPs) contain a selection of documents on human rights, security conditions and other issues that are relevant to the determination of refugee protection claims. They are regularly reviewed and updated as country conditions change. NDPs are intended solely to support the refugee determination process, and should not be construed as necessarily implying recognition of a particular territory's sovereignty or political status.

[21] The China Documentation Package which would have been available in December 2011 is dated July 30, 2010 and cites as sources various reports by international organizations, non-governmental organizations and governments, including that of China, as well as media outlets. The Chinese government sources relate to laws and official procedures. The package contains no references to articles carried by Xinhua or Xinhuanet. However, this does not exclude the possibility that the sources relied upon in the package contain information derived from articles distributed by the Xinhua news agency or published on-line on Xinhuanet.

[22] In any event, the report of the announcement by the Chinese government of its intentions with respect to HIV/AIDS services was in the public domain at the time the decision was made. That is the purpose of announcements to the media including those which may be intended to place the government in a better light. In this case, the announcement would have been available to anyone with access to a computer and Internet service.

[23] It is trite law that an officer has a duty to consult the most recent sources of information and is not limited to materials furnished by the applicant. This is not a case such as *Fi*, above, where the

information was obtained from the Wikipedia website and the reliability of the sources upon which it had been based had not been demonstrated. The fact that the source of the information in the present instance is a news agency owned and operated by the government of China does not make the information about the announcement incorrect or unreliable.

[24] I am not persuaded that the Court should instruct immigration officers to, as a general principle, treat as suspect any information disseminated by a government owned and controlled news agency such as Xinhua. It may be propaganda in the sense that its publication is intended to present the government in a positive light. That is a phenomenon not unique to China. Whether it is or is not propaganda, it is information to be considered with information from other sources that may shed a different light on the situation. The task of assigning appropriate weight to such information rests with the officer and the Court should not interfere unless it is clearly established that the resulting decision is unreasonable.

[25] The key question in the circumstances of this case is whether fairness dictated that the officer disclose the Xinhua report and invite further submissions because the content of the announcement was "novel and significant and [evidenced] changes in the general country conditions that may affect the decision" (*Mancia*, para 27).

[26] I agree with the respondent that the article from Xinhuanet did not meet this standard notwithstanding the attention given to it in the officer's analysis. The disputed article referred to future plans of the Chinese government to continue its efforts to address HIV/AIDS. The officer saw the announcement as worthy of mention, but that does not mean that it was treated as

significant new evidence of a change in country conditions which would materially affect his decision. Rather, in my view, he saw it as a reaffirmation of the government's intent to continue its efforts to improve conditions for persons with HIV/AIDS.

[27] As stated by the Court of Appeal in *Mancia* at paragraph 26, the fact that a document becomes available after the filing of an applicant's submissions does not signify that it contains new information or that such information is relevant information that will affect the decision. It is only where the officer relies on a significant post-submission document which evidences changes in the general country conditions that may affect the decision that it must be communicated to the applicant.

[28] Reading the officer's analysis as a whole I am satisfied that his decision turned on the existing anti-discrimination legislation, statistics on the increasing availability of treatment, and the "Four Frees, One Care" policy, rather than on the announcement of future plans. The objective documentation relied upon by the officer indicated that China was making efforts to assist those living with HIV/AIDS. The Xinhuanet article similarly referenced such efforts and did not reflect a change in country conditions. The content of the statement was in line with the previous documentary evidence and reflected an effort towards continuous progress.

[29] In the result, I do not find that the officer breached procedural fairness by failing to disclose the news report and to invite further submissions. Even if I had reached a different conclusion on this question, I doubt that I would have found that it was material to the outcome. Any submissions

that the applicant could have made about the source and quality of the information would not have displaced the officer's findings on the other evidence that he relied upon in reaching his decision.

Did the Officer err by applying the wrong test for an exemption on humanitarian and compassionate grounds?

[30] The applicant submits that the officer erred by applying the test which is relevant to a pre-removal risk assessment to the assessment of risk in the context of the H&C application. The proper test as explained in *Pinter v Canada (MCI)*, 2005 FC 296 at paragraphs 3 and 4 is of unusual and undeserved or disproportionate hardship, and not the more demanding test of risk to life. She submits that the officer was selective in his use of the evidence and disregarded her belief that she would not get the proper treatment in China and would die as a result.

[31] The officer did not, in my view, apply the risk to life standard. He discussed the degree of hardship the applicant would experience if her application was refused and came to the conclusion that it would not rise to the level of "unusual, undeserved, or disproportionate". That was the correct test.

Did the Officer make an unreasonable decision by a) misconstruing evidence, ignoring evidence, or basing his decision on a selective analysis of evidence without regard to the totality of the evidence; failing to consider the personal circumstances of the applicant; or c) failing to take into account the best interests of the child?

[32] The standard of review for all three aspects of this issue is reasonableness. On the first point, the applicant argues that the officer ignored her documentation of discrimination against people living with HIV/AIDS in China or selectively gave it less weight. It is clear from the reasons for decision that the officer considered all of the documentation presented. It was within his discretion to assign a suitable weight to each piece of evidence and it is not within the role of the Court to reweigh the evidence.

In particular, I do not accept that the officer erred in finding that the applicant had not provided sufficient evidence to indicate that she would be denied treatment in China. The applicant returned to China for treatment from Guyana and remained there for several years before seeking protection in Canada. That she might prefer the treatment available here is understandable. The conclusion that a household registration certificate ("Hukou") would be issued or reissued upon the applicant's return permitting access to health services was open to the officer on the evidence including a response to information request obtained by the IRB Research Directorate.

[33] On the second point, the applicant argues that the officer measured her establishment in Canada against that of a hypothetical person who had not arrived in Canada in a difficult psychological state due to being HIV positive. She contends that he should have assessed her individual circumstances. The factors listed in the IP5 Manual to guide the exercise of discretion by immigration officers focus on the objective degree of establishment. The officer is not directed to assess the relative progress in establishment of an applicant given her personal circumstances upon arrival, but the result at the time when she is requesting exemption. In this instance, the assessment fell within the range of acceptable outcomes.

[34] Finally, on the question of the best interests of the applicant's children, the officer analyzed whether the applicant's return to China would cause her HIV status to become known and thereby cause the children prejudice. He noted that even an affirmative finding would only be one factor, albeit a substantial one, in the decision, and not an overriding consideration. After considering the evidence, he concluded that the best interests of the two children did not justify an exemption in this case. That was a conclusion open to him and the decision discloses that he was sufficiently alert, alive, and sensitive to their interests.

[35] The applicant's argument essentially asks the Court to reweigh the evidence and come to a different conclusion. While the Court may have reached a different conclusion had it been considering the matter at first instance, the Court must defer to the officer's findings if they are, as I find in this case, transparent, intelligible and justified and fall within the range of acceptable outcomes.

CERTIFIED QUESTIONS:

[36] The applicant has proposed that the following questions be certified as serious questions of general importance:

a. Can a news agency which is owned and operated by a government ever be considered as a generally accepted and reliable source of human rights conditions of the country in question?
b. Would the answer to the above question be any different if the given news agency is specifically tasked to promote the good image of the government in question?
c. In making an H&C decision, when an officer relies on an article that the officer has obtained from an online news agency which contains information with respect to the country's human rights condition, does the officer have a duty to disclose such an article to the

> applicant if the news agency in question is owned and operated by the government of the country against which the applicant is seeking protection, and whose mandate is to promote the good image of that country?

[37] The respondent opposes certification of these questions on the ground that they are too dependent on the specific facts of this case to be of general importance. A certified question must lend itself to a generic approach leading to an answer of general application: *Boni v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68 at para 6.

[38] I agree with the respondent. Moreover, an answer or answers to the proposed questions would not be dispositive of an appeal in this matter as I have found that the use of the impugned news report did not materially affect the officer's decision.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Avvy Yao-Yao Go	FOR THE APPLICANT
Melissa Mathieu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

AVVY YAO-YAO GO Metro Toronto Chinese & Southeast Asian Legal Clinic Toronto, Ontario	FOR THE APPLICANT
WILLIAM F. PENTNEY Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT