Federal Court  Cour fédérale

Date: 20130829

Docket: IMM-12794-12

Citation: 2013 FC 917

Ottawa, Ontario, August 29, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

LIU, AMEI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [Act] for judicial review of the decision of an immigration officer [Officer], dated 31 October 2012 [Decision], which refused the application for a permanent resident visa because the Applicant did not meet the requirements to be considered a member of the family class because his father [Sponsor] failed to have the Applicant examined on his application for permanent residence in Canada.

BACKGROUND

[2] The Applicant is a Chinese citizen born on 19 January 1992, and is the Sponsor's younger son. The Sponsor also adopted a daughter, who together with the Applicant is referred to as "twins." The Sponsor and his wife found the Applicant's twin abandoned and so took her in, but she was never legally adopted.

[3] The Sponsor was granted permanent residence status in Canada on 22 October 2008. During the processing of this application in 2006, the Sponsor chose not to have his three children medically examined. A statutory declaration dated 26 May 2008 says that the Sponsor was aware that in proceeding with his application he would not be able to sponsor his children in the future (Applicant's Record, page 21).

[4] According to a letter dated 14 February 2012 submitted by the Sponsor's counsel to Citizenship and Immigration Canada (CIC) (Applicant's Record, page 16), the Sponsor was unable to have his children medically examined because he did not have the proper documentation to support his children's application. He felt the only way he could try to deal with this situation was to obtain permanent residence himself to ensure he could return to Canada once he left, and then return to China to resolve the issues himself.

[5] The Sponsor applied to sponsor his three children, including the Applicant, under the family class on 16 February 2012, requesting humanitarian and compassionate (H&C) consideration for the applications. The Sponsor claimed that the difficulty he had experienced in getting his children examined was fully documented at the time of the application in 2008, and that at that time the Sponsor had no choice but to file the requested waiver.

DECISION UNDER REVIEW

[6] The Decision in this case consists of a letter to the Applicant dated 31 October 2012 [Refusal Letter] and the Officer's Computer Assisted Immigration Processing Systems [CAIPS] Notes to the file [Notes]. In the Refusal Letter the Officer states that the Applicant is not eligible for sponsorship as a member of the family class because his Sponsor failed to have him examined for his application for permanent residence to Canada. Therefore, the Applicant was ineligible for processing. The Officer was not satisfied that sufficient H&C factors were present to overcome the Applicant's inability to meet the norms of selection.

[7] In the Notes dated 24 October 2012, the Officer noted the Sponsor's hardships in having his children examined at the time of his application for permanent residence in 2008 due to his wife's lack of cooperation. The Officer noted that the Applicant's parents were married at that time, and there was still no evidence that they were divorced. The Officer also noted that the Sponsor was well-informed concerning the consequences of not having his children examined at the time of his application, but he opted to continue with his application regardless. The Sponsor landed in Canada without having his children examined at his own request, and so the Officer did not think that subsection 117(10) of the Regulations applied in this case. The Officer noted that the Sponsor's stated motivation was to proceed with his permanent residence application so that he could return to China and sort matters out, but the Officer did not see a connection between the two and did not think that the Sponsor or his counsel had made clear what the connection was.

[8] The Officer went on to note that the elder son's birth certificate said that he was born in Hubei, but another document said he was born in Fujian. The Sponsor said the discrepancy was because the family had falsified one document in an attempt to avoid the one-child policy, but this

did not make sense to the Officer since the elder son was the family's first child. There were also discrepancies in the birth dates of the twins. The Officer doubted the authenticity of the adoption of the daughter, and noted that she has been cared for by the Sponsor's brother and sister-in-law. The Officer suspected the "adoption" may have been to assist a relative, and recommended DNA testing for all three children. Generally, the Officer did not believe there was enough evidence to suggest the familial relationships were genuine.

[9] As regards the H&C considerations, the Officer reiterated that he was not satisfied as to the *bona fides* of the relationships, but went on to consider different H&C factors. He noted that the Sponsor has been living away from the children since 1999, and there was no evidence that this created any significant hardship. To the Officer, the fact that the Sponsor chose to proceed without his children in his own application suggests a personal choice to establish a life in Canada without them. The impetus to stay in Canada was not demonstrated to be to provide better care for his children. The Officer concluded there were insufficient H&C factors to overcome the inadmissibility of the Applicant.

ISSUES

[10] The Applicant raises the following issue in this application:

1. Did the Officer fetter his discretion by either misconstruing the evidence or by placing undue emphasis on the reasons why the children were no longer members of the family class pursuant to paragraph 117(9)(*d*) of the Regulations?

STANDARD OF REVIEW

[11] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[12] The review of an discretionary decision whether or not to allow H&C factors to overcome exclusion mandated by paragraph 117(9)(*d*) is a matter that is reviewable on a reasonableness standard (*Sultana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 533 at paragraph 17 [*Sultana*]). When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[13] The following provisions of the Act are applicable in this proceeding:

Objectives — immigration	**Objet en matière d'immigration**
3. (1) The objectives of this Act with respect to immigration are	**3.** (1) En matière d'immigration, la présente loi a pour objet :
[…]	[…]
(*d*) to see that families are reunited in Canada;	*d*) de veiller à la réunification des familles au Canada;
[…]	[…]
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 or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada 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, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada 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.

[14] The following provisions of the Regulations are applicable in this proceeding:

Excluded relationships

117. (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if

[…]

(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

Exception

(10) Subject to subsection (11), paragraph (9)*(d)* does not apply in respect of a foreign national referred to in that paragraph who was not examined because an officer determined that they were not required by the Act or the former Act, as applicable, to be examined.

Restrictions

117. (9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :

[…]

d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

Exception

(10) Sous réserve du paragraphe (11), l'alinéa (9)*d)* ne s'applique pas à l'étranger qui y est visé et qui n'a pas fait l'objet d'un contrôle parce qu'un agent a décidé que le contrôle n'était pas exigé par la Loi ou l'ancienne loi, selon le cas.

ARGUMENTS

The Applicant

[15] The Applicant points out that when the Sponsor's inland application for permanent residence was approved on 29 April 2002, it was solely due to a positive risk assessment. Based on Chapter IP 5 of Citizenship and Immigration Canada's manual *Immigration Applications in Canada made on Humanitarian and Compassionate (H&C) Grounds*, March 2001, Part 9.3 says that admissibility of overseas dependants is not a relevant consideration. The Applicant says that the record is not clear whether this was addressed.

[16] Further, the Applicant points out that it is an application pursuant to section 25 of the Act that is required for overcome the strict requirements of paragraph 117(9)(*d*) of the Regulations (*Sultana*, above, at paragraphs 21-22). The circumstances surrounding the failure to have a non-accompanying dependant examined are a relevant consideration in a section 25 application.

[17] The court discussed the central issue to this application at paragraph 2 of *Ebebe v Canada (Minister of Citizenship and Immigration)*, 2009 FC 936 as:

> At the center of the decision under review is the inherent conflict between maintaining the unity of the family, including respect for the best interests of an affected child, and the important principle of protecting the immigration system from deception and abuse. As with most cases of this sort the choices available to the responsible decision-maker are difficult and, in some measure, unpalatable…

[18] The reasons why a dependant was not examined have to be considered along with other positive H&C factors (*Sultana*, above at paragraphs 30-31; *Phung v Canada (Minister of Citizenship and Immigration)*, 2012 FC 585 at paragraphs 34 & 39; *Aggrey v Canada (Minister of*

Citizenship and Immigration), 2012 FC at paragraph 7). The reason why a family member was not declared or examined may justify an exemption (*Bernard v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1121 at paragraphs 13-15).

[19] Further, a failure to give any consideration to the objectives listed in subsection 3(1)*(d)* of the Act, which is to see that families are reunited in Canada, is also an error (*Krauchanka v Canada (Minister of Citizenship and Immigration)*, 2010 FC 209 at paragraph 36).

[20] In this case, there was no misconduct or deception involved, and the Sponsor made every effort to comply with the requirements to have his children examined. The Applicant submits that it was inappropriate for the Officer to put any negative emphasis on why the children were not examined, and the Officer failed to appreciate that a return to China by the Sponsor in advance of becoming a permanent resident would have jeopardized his ability to sponsor his children.

[21] The Officer's suggestion that the Sponsor chose to proceed with a life in Canada without his children instead of making every effort to have them examined, or to forego his own application to return to live with them, is not only misconstruing the facts, but constitutes a failure to acknowledge the stated objective that families be reunited in Canada. There is little to no legislative purpose served by barring these children from entering Canada, and the Applicant submits that the Decision is unreasonable.

The Respondent

[22] The Sponsor concedes that he failed to declare his children upon landing in Canada. Section 117(9)*(d)* of the Regulations excludes from the Family Class any non-accompanying family

members who were not examined at the time of the sponsor's initial application for permanent residence. As is clear from the declaration signed by the Sponsor, he was aware of the consequences of not declaring his children, but chose to proceed.

[23] An H&C application is meant to provide relief from "unusual, undeserved or disproportionate hardship" (*Krauchanka v Canada (Minister of Citizenship and Immigration)*, 2010 FC 209), and is the only way an applicant can avoid the strict application of section 117(9)*(d)* of the Regulations. An officer must consider a variety of factors, many of which have to do with geographical separation of family members (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 [*Kisana*] at paragraph 33). The Officer thoroughly considered these factors, and explained why they were insufficient to grant the application. Further, the Decision was supported by specific evidence of the Sponsor's decision to live in Canada away from his children, and a lack of evidence of financial or emotional support.

[24] The purpose of an H&C application is to provide flexibility to deal with deserving cases not foreseen by the legislation (*Kisana*, above, at paragraph 22). The Sponsor may have faced a difficult decision in deciding whether or not to stay in China and have his children examined, but the Officer fully considered all the relevant H&C factors in this case. Although the Applicant disagrees with the Officer's analysis, this is not a reason for allowing this judicial review.

[25] Furthermore, the Sponsor admits that the Applicant is neither a biological or legally adopted child. The Applicant must fit into one of those two categories to be considered a member of the family class (*Savescu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 353 [*Savescu*] at paragraph 26). Therefore, the Officer's conclusion that the Applicant is not a dependant child as required by section 2 of the Regulations is reasonable.

ANALYSIS

[26] I have heard and considered the applications in IMM-12793-12, IMM-12791-12 and IMM-12794-12. Although I am dealing with three separate applications and three separate individual Applicants (who are all siblings), the facts for each application are identical in all material respects, as are the grounds for review and the legal arguments and authorities advanced on both sides.

[27] The Applicants put forward a very particular argument in this case to support reviewable error. They say that the Officer, in considering an application pursuant to section 25 of the Act to overcome the children's removal from the family class because they were not examined at the time the Sponsor became a permanent resident, either misconstrued the evidence or placed undue negative emphasis on the reasons why the children were not examined.

[28] As the Applicants point out, there is no evidence in this case of misconduct or deception on the part of the Sponsor, and he has made every effort over the years to comply with the rules. The only reason that the Applicants were eventually excluded from the Sponsor's permanent resident application in 2008 was because he could not (because of resistance by the Applicants' caregivers in China) persuade his children to obtain and submit their medical examinations, and had to choose between losing his own permanent residence by returning to China or completing his application without the children.

[29] The Applicants' argument is that the Officer failed to appreciate the realities of the choice the Sponsor had to make in 2008, placed an undue and unreasonable negative inference on the

Sponsor's conduct, and failed to appreciate that what the Sponsor did in 2008 was done to comply with the legislation and to eventually facilitate reunion with the Applicants in Canada.

[30] What is more, the Applicants say there is no legislative purpose to be served by barring them from the usual opportunity to be sponsored. Recognizing that the application of Regulation 117(9)*(d)* forces the Applicants to seek a remedy under section 25(1) of the Act (see *Savescu*, above, at paragraph 33), the Applicants say they should not now have to demonstrate unusual and undeserved or disproportionate hardship, or a higher degree of connectedness to their Sponsor father than would have been the case in 2008, if they had been part of the Sponsor's permanent resident application. In the end, they say they are being asked to satisfy a higher burden of sponsorship for no good reason that supports the purposes of the Act. The Sponsor is now being asked to demonstrate that he has a good relationship with his children (it is admittedly strained) which would not have been required in 2008, and the Sponsor is being punished for the passage of time that was no fault of his. These are compelling arguments.

[31] On the other side, the Respondent points out that the passage of time has indeed made a significant difference to the relationship between the Applicants and the Sponsor, and even if the omission of the Applicants from the 2008 application was not the fault of the Sponsor, the fact remains that the Applicants' real family connections are now in China. They are now adults and they have had no meaningful contact with the Sponsor, who has made no effort to continue a relationship with them from Canada or to provide financial support, or even to move quickly to sponsor them after acquiring permanent residence in 2008. The passage of time has changed what is now at issue. These are also compelling arguments.

[32] When I look at the Decisions, I don't think there is much to support the Applicants, argument that the Officer misconstrued the evidence or placed undue negative emphasis on the reasons why the children were not examined in 2008 when the Sponsor had to exclude them from his permanent residence application. The reasons for the Decisions as found in the CAIPS notes read in significant part as follows:

> Assessment of H&C considerations: I have examined all evidence on file, submitted by the applicant and weighed the positive and negative H&C considerations. I have considered the following indicators of hardship that might warrant H&C: 1. Impact of current separation 2. Financial, emotional needs of applicant 3. Alternatives and future consequences of separation 4. Depth of relationships, bona fides of dependency. Analysis: Analysis is consistent for all three children in applications F000091315, F000091314 and F000091312. Circumstances have not been indicated to be different. PA appears to be living with siblings and with mother's parents. Appears this has been the case for many years as the SPR first entered Canada in 1999. No statement or evidence has been provided in this or the siblings' applications to indicate this situation has changed. There is insufficient indication that their life separated from the SPR has significant hardship. The apparent family conflict was stated to have been aggravated by the separation of the SPR, however, there is insufficient indication that the PA's life in China is made significantly more difficult as a result of the separation from the SPR. I note that the PA is now over 20, and consequently, though still under the age of 22 for the purposes of R2, could be considered an adult with fewer needs than a dependent of a younger age. There is insufficient information provided that there is substantial hardship that might mean in spite of PA's age, H&C should be considered due to financial and emotional needs of PA and that SPR provides for. PA's age means BIOC review is not required. There is insufficient evidence to indicate that any future separation as a result of the refusal of this application would result in undue hardship or the PA or SPR. A dependency relationship with SPR has not been established. There is insufficient indication of financial or emotional support, or the desire to return to China to live and care for children. The fact that the SPR chose to proceed without his children in his own PR application suggests a personal choice to establish a life in Canada without them, rather than make every effort to have them examined, or forgo his own application to return to live with them. The impetus to stay in Canada has not been demonstrated as to better care for his children, including the PA. I have weighed the positive

> and negative factors regarding the use of humanitarian and compassionate relief. I am not satisfied that the information on file warrants a positive recommendation for H&C relief for the ineligibility of the PA under R117(9)(d). Application refused.

[33] The only sentence in all of this assessment which the Applicants appear to take issue with is:

> The fact that the SPR chose to proceed without his children in his own PR application suggests a personal choice to establish a life in Canada without them, rather than make every effort to have them examined, and forgo his own application to return to live with them.

[34] It seems to me that the only portion of this sentence that is possible to question factually is "rather than make every effort to have them examined." If there is a negative inference here, or a misunderstanding about what occurred in 2008, I do not think that when it is placed in the context of the Decision as a whole, the Decision can be said to be based on a misunderstanding of the evidence or an "undue negative emphasis on the reasons why the children were not examined". This is not the kind of situation that arose in *Sultana*, above, where the officer fixated on the failure to disclose and so fettered his discretion under section 25(1). The Officer in this case weighed all of the relevant factors. The reason why the children were not examined is of little significance in a decision that examines many other factors that the Applicants do not question. The main point of the Decisions is that the Applicants are now adults whose lives and family connections are in China. They have had no interaction with the Sponsor over many years. To refuse the application under section 25 may thwart the Applicants desire to now come to Canada, but it can hardly be said, given the facts, that if they do not come it will result in any kind of hardship to them or the Sponsor, let alone a substantial, undeserved or disproportionate hardship.

[35] The Sponsor and the Applicants are not, in my reading of the Decisions, being punished for the passage of time and their observing the rules of Canadian immigration law. The Officer is simply assessing the situation under section 25(1) as it exists in 2012 at the time of the applications.

[36] In their written submissions, the Applicants say that the Officer "misconstrued the evidence or placed undue negative emphasis on the reasons why the children were not examined." Their principal argument at the oral presentation before me, however, was that the Decision fails to accord with the purposes and considerations for using section 25(1) as a means to alleviate and overcome the strict requirements of Regulation 117(9)*(d)*.

[37] It seems clear on the facts that the Applicants and the Sponsor have not engaged in any kind of deception or abuse. However, it is equally clear that the Officer took into account the factors set forth in the relevant portions of BP2 as confirmed by the case law. See *Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 437 at paragraph 18 and *Sultana*, above, at paragraph 23.

[38] The jurisprudence makes clear that, in some cases, section 25 of the Act can mitigate the harshness of the requirements of the Act, including any harshness resulting from Regulation 117(9)*(d)*. This can involve taking into account why a family member was not declared or was not examined. See *Bernard v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1121, paragraph 15.

[39] Even if there was no fault in this case on the part of the Applicants and the Sponsor, and the exclusion of the children in 2008 was beyond the Sponsor's control, it is clear from the Decision that, taking into account all of the factors at play, the real focus of the Decision is that relief under

section 25(1) was not warranted because there was no ongoing relationship between the Applicants and the Sponsor, and the Applicants are adults with lives and interactive family connections in China. They now say they would like to come to Canada, but there is no evidence that they require relief from any hardship that might have resulted from the application of Regulation 117(9)*(d)*.

[40] In my view, the Officer did not fetter his discretion or place undue emphasis, and the Decision was reasonable. The Court cannot intervene.

[41] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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