Federal Court  Cour fédérale

Date: 20160622

Docket: IMM-5060-15

Citation: 2016 FC 705

Ottawa, Ontario, June 22, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

JIAWEI WANG

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (IAD), dated October 28, 2015, upholding a removal order issued against the Applicant by the Immigration Division's (ID) for being

inadmissible for misrepresentation on the grounds set out in paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 (the Act).

II. Background

[2] The Applicant is a 31 year old male and citizen of China. He first entered Canada in September 2002 at the age of 18 on a student visa. He married a Canadian citizen on September 16, 2006 and was granted permanent residence on September 16, 2007. On July 15, 2009, the Applicant and his wife divorced. No children were born of the marriage.

[3] In 2008, the Applicant met his current wife, Ms. Jing Ren, a Canadian citizen. They had their first child, Bonnie, in May 2011. A second child, Luca, was born of the marriage in June 2014.

[4] In May 2009, the Applicant's first marriage and subsequent sponsorship became the object of a wide ranging investigation of marriages of convenience conducted by the Canada Border Services Agency (CBSA). In July 2010, a report was issued against the Applicant pursuant to subsection 44(1) of the Act alleging that the Applicant was a person described by paragraph 40(1)(a) of the Act on the grounds that he had engaged in a paid marriage of convenience and failed to advise either Citizenship and Immigration Canada (CIC) or the CBSA that he had never lived with his first wife.

[5] A statutory declaration signed by the Applicant's first wife states the following details of the arrangement:

> - Introduced to Christine through James in 2006. I was set up to engage in marriage with Jia Wei Wang.
>
> - On our first encounter we were asked to bring 10 different outfits to reflect 4 different seasons + we were asked to take pictures to appear as if we had known each other for years.
>
> - In addition we were asked to open bank accounts + put […] in each other's names.
>
> - On this day I was paid 500.
>
> - A week later or so we had the ceremony (Sept 16 2006) and I was paid 3000. At this time I signed divorce papers + receipts of payment.

[6] The ID found the Applicant inadmissible under paragraph 40(1)(a) of the Act and issued a removal order against him in December 2012.

[7] In his appeal of the removal order to the IAD, the Applicant conceded the legal validity of the order but sought special relief on humanitarian and compassionate (H&C) grounds under paragraph 67(1)(c) of the Act.

[8] First, the IAD, referring to this Court's decision in *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 [*Wang*], held that the factors to be considered in exercising discretion in cases involving misrepresentation included: (i) the seriousness of the misrepresentation leading to the removal order and the circumstances surrounding it; (ii) the remorsefulness of the appellant; (iii) the length of time spent in Canada and the degree to which the appellant is established in Canada; (iv) the appellant's family in Canada and the impact on

the family that removal would cause, including the best interests of the child; and (v) the degree of hardship that would be caused to the appellant by removal from Canada, including the conditions in the likely country of removal.

[9] On the first factor, the IAD found that the Applicant's misrepresentation was direct, deliberate and material and found the misrepresentation to be especially serious since it strikes at the integrity of Canada's immigration system. It further found that in "failing to admit his culpability and responsibility and in failing to express any remorse for his actions" the Applicant set the bar for remaining in Canada very high.

[10] The IAD then found that no expectation of gaining permanent status should be granted on the basis of the length of time spent in Canada as the Applicant's illegal stay in Canada should not be rewarded. The IAD considered the Applicant's establishment in Canada and found it improbable that he is able to pay for his mortgage and provide welfare for himself and his family as the sole breadwinner for the family while earning a salary of only $30,000.00 a year plus commission. The IAD accepted that the Applicant had some establishment, but that it was not so significant as to be determinative of the appeal.

[11] Regarding the Applicant's family in Canada, the IAD noted that his daughter Bonnie was diagnosed with Kawasiki disease in April 2014. The IAD recognized that while Bonnie is in good health, her health may deteriorate if she has a recurrence of Kawasaki disease. The Applicant's son Luca was a year and a half at the time of the IAD hearing. The Applicant testified that Luca was born underweight and with a hole in his heart, which is being monitored

to determine if he requires surgery in the future. Regarding the children's best interests, the IAD recognized that the Applicant's removal would likely have a negative impact on his children. The IAD also found that the children are not in need of acute care, that they could obtain adequate care in China if they were to move there and could easily adapt to life in China.

[12] Finally, the IAD found that the Applicant would not suffer much hardship if he were to return to China as he has the financial support of his parents and in-laws. It also noted that the exclusion may only be temporary as his wife could apply to sponsor the Applicant.

[13] The Applicant contends that the IAD applied the wrong test in the assessment of the H&C factors and failed to assess and weigh the factors set out in *Ribic v Canada (Minister of Employment and Immigration (1986)*, [1985] IADD No 4 [*Ribic*]. In this regard, the Applicant submits that the IAD failed to assess the Applicant's individual factors for a positive or negative impact and simply concluded that there were no factor(s) worthy of overcoming the Applicant's misrepresentation and lack of remorse.

[14] The Applicant further argues that the IAD breached the rules of procedural fairness by introducing and relying on extrinsic evidence, namely, making reference to its decision rendered in *Zhao v Minister of Public Safety and Emergency Preparedness*, TB1-15834, 10 June 2014 [*Zhao*].

III. Issue and Standard of Review

[15] The issue to be determined in this case is whether the IAD committed a reviewable error as contemplated by section 18.1(4) of the *Federal Courts Act*, RSC 1985 c F-7.

[16] It is well-settled that the standard to be applied when reviewing the IAD's decision not to grant special relief based on H&C considerations is that of reasonableness (*Philistin v Canada (Public Safety and Emergency Preparedness),* 2011 FC 1333, at para 17; *Uddin v Canada (Citizenship and Immigration),* 2016 FC 314, at para 19; *Li v Canada (Public Safety and Emergency Preparedness),* 2016 FC 451, at para 20 [*Li*]). It is also well-established that when concerns engaging procedural fairness principles are raised, those concerns are to be reviewed on the standard of correctness *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, at para 43, [2009] 1 SCR 339 [*Khosa*]).

IV. Analysis

A. *The IAD's decision is reasonable*

[17] Granting special relief pursuant to paragraph 67(1)(c) of the Act is exceptional and discretionary in nature (*Khosa; Charabi v Canada (Public Safety and Emergency Preparedness),*2011 FC 1184, at para 21; *Li*, at para 26). That provision reads as follows:

67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	67 (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

[…]	[…]
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[18] The factors laid out in *Ribic* guide the IAD in its assessment of whether there are sufficient H&C grounds warranting special relief in regard to a removal order *(Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84 [*Chieu*]; *Li,* at para 26). These factors are non-exhaustive and the weight to be accorded to any particular factor varies according to the particular circumstances of each case (*Chieu*, at para 40).

[19] It has also been well-established that the IAD has considerable discretion to consider and weigh the *Ribic* factors in accordance with the particular circumstances of each case (*Chieu*, above at para 40; *Khosa*, above at para 65). Moreover, this Court's case law has established that balancing the *Ribic* factors is a qualitative rather than a quantitative exercise (*Dhaliwal v Canada (Public Safety and Emergency Preparedness*), 2015 FC 157, at para 106 [*Dhaliwal*]; *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292, at para 32, 386 FTR 35 [*Ambat*]).

[20] As indicated previously, the IAD assessed the H&C factors in this case under the following headings: (a) the misrepresentations and remorse; (b) length of time spent in Canada and establishment; (c) the appellant's establishment; (d) family in Canada; (e) family abroad; (f) hardship; and (g) best interests of the children.

[21] The Applicant contends that the IAD erred in law by applying the factors set out in this Court's decision in *Wang v Canada (Minister of Citizenship and Immigration),* 2005 FC 1059, 277 FTR 216 [*Wang*] as opposed to the *Ribic* factors. In my view, this argument must fail. While the factors enumerated in *Wang* do not include (i) the support available to the appellant in the family and the community; and (ii) the best interests of a child directly affected by the decision, I am of the view that this difference is of no consequence since the IAD assessed those two factors in his decision as he clearly considered the best interests of the Applicant's two children and as he formed the view that there appears to be "significant family resources available to the appellant and his family in China" and that it is "unlikely that either set of parents would abandon the appellant or his family if they returned to China."

[22] The Applicant also contends that the IAD erred in its assessment of H&C factors. In my view, this argument must also fail. As indicated above, the IAD assessed the impact of the relevant factors as follows:

1a.	Seriousness of the misrepresentation	Negative
1b.	Applicant's remorsefulness	Negative
2a.	Length of time spent in Canada	Negative
2b.	Establishment	Neutral
3.	Family in Canada and impact of removal on family	Positive
4.	The best interests of the children	Positive
5.	Hardship	Negative

[23] The Applicant relies on *Jiang v Canada (Public Safety and Emergency Preparedness),* 2013 FC 413 [*Jiang*], to support his submissions that the IAD counted misrepresentation against him twice, thus committing a reviewable error. In this respect, the Applicant alleges that the IAD reduced the positive weight of the length of time spent in Canada by referring to passages of this Court's decision in *De Melo Silva v Canada (Citizenship and Immigration),* 2013 FC 941, which states that the "number of years spent in Canada, in and of themselves, under illegal circumstances, in respect of the immigration law is not a reason to reward such behaviour" (at para 8) and that "[s]uch disregard of the immigration system would make it bereft of integrity, that cannot be accepted, and, is, thus, unacceptable, and, therefore, inappropriate for H&C considerations" (at para 11).

[24] While *Jiang* stands for the principle that the IAD commits a reviewable error if it double counts misrepresentation to reduce the weight of other H&C factors, this Court recently distinguished *Jiang* in *Dhaliwal* where Justice Keith Boswell refused to set aside the IAD's decision "merely because the IAD conducted part of its weighing analysis under the wrong heading" (at para 108). In distinguishing *Jiang* from that case, Justice Boswell stated the following:

> 106 However, weighing the *Ribic* factors is not a quantitative or mensurative exercise; it is not simply about adding up the positive factors and subtracting the negative ones. Rather, it is qualitative or relative assessment, and the IAD is "free to weigh each factor, and is consequently free to give no weight to any given factor depending on the circumstances" (*Ambat v. Canada (Minister of Citizenship & Immigration*), 2011 FC 292 (F.C.) at paragraph 32, (2011), 386 F.T.R. 35 (Eng.) (F.C.)).

> 107 This naturally involves comparing the factors against each other, and the Applicant has not seriously impeached the IAD's reasoning for deciding that the misrepresentation outweighed the hardship. As Justice Mosley has said about an application under subsection 25(1) of the Act, "misrepresentations engage public policy considerations involving the integrity of the immigration system," and "the regulation would be rendered meaningless if all such applications were given special dispensation and approved because of family separation and hardship" (*Kisana v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 307 (F.C.) at paragraph 32, aff'd 2009 FCA 189 (F.C.A.) at paragraph 27, (2009), [2010] 1 F.C.R. 360 (F.C.A.)).
>
> […]
>
> 108 Thus, the Applicant's argument reduces to merely one that the IAD conducted the weighing process too early in its reasoning. However, to set aside the decision merely because the IAD conducted part of its weighing analysis under the wrong heading seems like the type of "line-by-line treasure hunt for error" criticized by the Supreme Court in *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34 (S.C.C.)at paragraph 54, [2013] 2 S.C.R. 458 (S.C.C.)). To the extent that *Jiang* cannot be distinguished from this case, I decline to follow it.

[25] With respect, I agree with the views expressed by Justice Boswell in these paragraphs.

[26] I am also of the view that the Applicant's contention that the IAD's analysis of the best interests of the children does not conform to this Court's teachings in *Li* must also fail. My colleague Justice Michel Shore wrote the following at paragraph 25 of *Li* with respect to the IAD's assessment of the best interests of a child:

> [25] In *Kanthasamy*, above, the Supreme Court instructed that under subsection 25(1) of the IRPA analysis, a decision-maker must do more than to simply state that the decision-maker took into consideration the best interests of the child; the decision-maker must well identify, define, and examine — with significant attention — in light of the evidence, the interests of the child (*Kanthasamy*, above at para 39). In the present case, the IAD did not even proceed to specify that it took into consideration the best interests of the child; the IAD simply mentioned that the child is as yet unborn; and, does have per se no interests. At the very least, the IAD should have considered the child's best interests of being united in Canada with his/her family (see paragraph 3(1)(d) of the IRPA). Consequently, the IAD's best interests of the child analysis, in and of itself, is unreasonable (*Hamzai*, above at para 33; *Kim*, above at para 58).

[27] In the present matter, the IAD, presuming the family would relocate to China to remain united with the Applicant, noted that the children are not in particular need of acute care and no evidence was introduced to establish that the children could not obtain treatment for their conditions in China. The IAD also found that Bonnie could probably adapt to life in China since she speaks both Mandarin and English and given Luca's young age, he is largely a blank slate upon which the Chinese culture and language might be imprinted. The IAD also considered the prospect of the Applicant's wife and children remaining in Canada and found that the Applicant could be sponsored by his wife to return to Canada. While the IAD found that the best interests of the children were engaged and that the Applicant's removal would likely have a negative impact on them, it decided that this factor was not determinative of the appeal. In sum, the IAD found that the Applicant's misrepresentation outweighed the best interests of his children.

[28] In my view, the IAD's assessment cannot be described as cursory. The IAD defined and examined the children's interests in accordance with the family's intention to remain united despite the Applicant's removal.

[29] As indicated above, considerable deference in owed to the weight given to H&C factors by the IAD. In my opinion, it was reasonably open for the IAD to find that the Applicant's misrepresentation, lack of remorsefulness and lack of hardship suffered if returned to China outweighed the best interests of his children, the impact of his removal on his family in Canada and the length of time he has spent here. Ultimately, the Applicant is dissatisfied with how the IAD weighed the H&C factors. However, this is not a basis for this Court to intervene (*Ambat*, at paras 32-33).

[30] That being said, the Applicant claims that the IAD's decision is also reviewable on procedural fairness grounds. I disagree.

B. ***No breach of procedural fairness***

[31] The Applicant contends that the IAD's reference to its decision in *Zhao* violated the rules of procedural fairness because it was cited as evidence against the Applicant. The paragraph in the IAD's decision referring to *Zhao* reads as follows:

> [28] It is a matter of public record that in the case of *Zhao v Minister of Public Safety and Emergency Preparedness* (TB1-15834) June 2014, that appellant lied about his circumstances from the time he was first advised of the allegations of misrepresentation made against him through to his appearance before the ID in 2011 where he maintained his innocence of the allegations made against him. Mr. Zhao faced much the same evidence as does the appellant in the hear-in matter however Mr. Zhao abandoned any pretext of innocence when he appeared before the IAD admitting his culpability and expressing his remorse for what he had done. Not so our appellant, who steadfastly maintains, in the face of strong evidence to the contrary, that his marriage to PAM was genuine and that everything he said to the ID was the truth. The appellant has no credibility on this regard.

[32] It is well-established that the principles of procedural fairness require "that an applicant be provided with the information on which a decision is based so that the applicant can present his or her version of the facts and correct any errors or misunderstandings" (*Maghraoui v Canada (Citizenship and Immigration)*, 2013 FC 883, at para 22 [*Maghraoui*]). The purpose of the disclosure is twofold in that it (i) ensures that the applicant has had the opportunity to fully participate in the decision-making process by being informed of information that is not favourable to him or her; and (ii) provide the applicant with the opportunity to present his or her point of view (*Maghraoui*, at para 22; *Dasent v Canada (Minister of Citizenship and Immigration*) (TD), [1995] 1 FC 720, at para 22).

[33] As an exception to this general principle, publicly available information is not considered "extrinsic" evidence so long as the evidence is not novel (*Jiminez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1078, at para 19; *Holder v Canada (Citizenship and Immigration)*, 2012 FC 337, at para 28; *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461, at para 11).

[34] In my view, the IAD's decision in *Zhao* cannot be considered to be extrinsic evidence for the following reasons. First, the decision is a matter of public record and is readily and easily available to the public. Second, the reference to *Zhao* does not reveal any novel evidence or information related to the Applicant. Third, it is clear from the above quoted passage that the IAD referred to *Zhao* in passing as justification for deciding that the Applicant's lack of remorse weighed negatively against him given that the Applicant continued to deny that he had entered into a marriage of convenience. It is also clear that when read as a whole, the IAD's decision, as

contended by the Respondent, was based on a weighing of all of the factors in the present case and was not dependant on the facts or outcome of any other decision.

[35] Therefore, I find that the IAD did not breach the rules of procedural fairness by referring to its decision in *Zhao*.

[36] For all these reasons, the application for judicial review is dismissed. No question has been proposed for certification. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed;

2. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. James Morton	FOR THE APPLICANT
Mr. Kevin Doyle	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Morton Karrass LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT