Federal Court  Cour fédérale

Date: 20180404

Docket: IMM-3891-17

Citation: 2018 FC 359

Ottawa, Ontario, April 4, 2018

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

QIU SHENG JIN

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by the Immigration Appeal Division's [IAD] decision, dated August 21, 2017 [the Decision], finding that the exclusion order issued against the Applicant by the Immigration Division [ID] was valid and that there were insufficient humanitarian and compassionate [H&C] considerations to grant special relief.

[2] For the reasons that follow, the application is dismissed.

I. Factual Background

[3] The Applicant is 58 years of age and a citizen of China. He has a 32-year old daughter in Canada with his first wife, who has three children, a 15-year old Chinese son who lives in China with his second wife, and an alleged 3-4 year old Canadian son of his Canadian alleged partner, also an immigrant from China.

[4] The Applicant applied for permanent residence from China on December 31, 2004, under the investor program with his first wife and daughter. They all obtained status as permanent residents on March 3, 2006.

[5] In applying for permanent residence, the Applicant did not disclose that he had a son through an extra-marital relationship (with a woman who later became his second wife).

[6] Approximately two weeks after his arrival in Canada, the Applicant separated from his first wife, and on March 16, 2007, the Applicant filed for divorce. There were issues about the genuineness of this marriage, but they were not proven. The divorce became effective on July 11, 2007. The daughter of this marriage has three children living in Canada, who are the grandsons of the Applicant, and whose best interests were claimed to be affected by his removal.

[7] On September 2007, the Applicant married his second wife, with whom he already had a son, and on November 30, 2007, proceeded to sponsor her, as well as her daughter from another relationship, and their son who was born in China on July 30, 2002.

[8] The sponsorship application failed because an immigration officer who processed the application realized that the Applicant did not declare his son born from an ex-marital relationship with his second wife, before, and at the time permanent residence status was granted to him in March 2006 when immigrating to Canada with his first wife. An investigation ensued at the Etobicoke immigration office.

[9] On March 20, 2013, a subsection 44(1) report was written, citing paragraph 40(1)a) of the IRPA for misrepresentation, as he failed to declare his son who was born before he obtained his permanent resident visa.

[10] Prior to the Applicant's admissibility hearing, the Applicant claimed that he had a son born in Toronto on September 15, 2014 from a relationship with his alleged partner, Tong, Mei Hou [the partner]. The partner has a daughter by another marriage. The husband of the partner is alleged to have returned to China shortly after they immigrated together to Canada in 2006, returning to Canada only once in 2012. The partner has initiated divorce proceedings, but they are not finalized.

[11] On October 20, 2014 and November 25, 2014 admissibility hearings took place before the ID. The Applicant stated at the ID hearing that at the time of his application in 2006, he was just 50% sure that his son, whom he had not disclosed in his application for permanent residence, was his, and that is why he did not disclose that information. On November 25, 2014, the ID issued an exclusion order against the Applicant.

[12] The Applicant filed his Notice of Appeal with the IAD on December 8, 2014. At that time he raised the allegation of having had a son with his alleged partner.

[13] On August 21, 2017, the IAD concluded that the ID's decision on admissibility was legally valid and that H&C considerations did not warrant special relief, in particular with respect to his H&C claim and best interest of the children [BIOC]. These were the only serious issues advanced by the Applicant.

[14] On September 11, 2017, the Applicant filed this application for judicial review of the IAD's Decision.

II. Standard of Review

[15] The Applicant argues that the IAD erred in law by applying the wrong legal test in assessing the BIOC in terms of a relationship being sufficiently established, and that even if it was the appropriate test, it was applied unreasonably. However, the Court finds that the Applicant has mischaracterized the IAD's Decision in the first instance. The IAD rejected the genuineness of his relationship with the partner, as well as his claimed biological parentage to her son on the grounds of negative credibility findings, in addition to finding that there was insufficient probative evidence to support his claims of involvement in the life of his partner's children. This issue relating to the IAD's assessment of the evidence is to be determined in accordance with a reasonableness standard as per the line of jurisprudence emanating from the decision in *Dunsmuir v New Brunswick*, 2008 SCC 9.

III. Analysis

[16] The Court concludes that the IAD properly described the jurisprudence pertaining to the need to conduct an overall consideration of the various factors applying as described in the decision of *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para 77, citing *Ribic vCanada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL).

[17] These factors include: the seriousness of the misrepresentation and the circumstances surrounding it; the remorsefulness of the Applicant; the length of time spent in Canada and the degree to which the applicant is established; the Applicant's family in Canada and the impact on the family that the Applicant's removal would cause; the support available to the Applicant and the family and the community; the BIOC directly affected by the decision; and the degree of hardship caused by removal including the conditions and the likely country of removal.

[18] In considering these factors, the IAD noted the seriousness of the misrepresentation of the Applicant, which was deliberate, purposeful and accompanied by little remorsefulness on his part.

[19] In assessing the Applicant's establishment, the IAD considered his relationship with his partner and her children. Much of this evidence was highly relevant to the issue of the BIOC and their potential hardship caused by his removal.

[20] The IAD questioned the partner's credibility regarding her relationship with her husband whom she had not divorced, despite being allegedly separated for many years. This was related to the IAD's finding that both the Applicant and his partner were not credible in their explanation of the omission of the father's details on the child's birth certificate, including the fact that the birth records referred to the son as an adopted child of the partner and her husband.

[21] The IAD also assigned little weight to the DNA evidence intended to support a paternity relationship between the Applicant and the son for lack of any objective evidence as to how, from whom and when the DNA evidence was collected. The record also notes that the DNA evidence was obtained prior to any admissibility hearings being undertaken.

[22] The IAD concluded that there was insufficient evidence to support the Applicant's claim that he and his partner were a couple, or that they were in a genuine relationship. They had not co-mingled their affairs, or displayed a variety of indicia that would demonstrate such a relationship. They did not live together, but apparently close by, while the children resided with the partner in her home. The Applicant claims he worked in Canada, but there is no corroborating evidence of such employment, nor that he contributed financially to the partner's upkeep or the children's expenses.

[23] The Applicant also claims to be in a close relationship with his 32-year-old daughter in Canada and her three children. Again, there was a lack of any objective evidence to support this claim, even from his daughter living in Canada, which again seriously undermines his credibility.

[24] With respect to the Applicant's hardship on removal, the IAD noted that he spoke little English, while there was no indication that he could not become reacquainted again with his life in China, given that he was a previously successful businessman. He was financially well off, owning a house in Toronto valued at approximately $900,000, that could be readily liquidated. Thus, while he had some establishment in Canada, most of it was due to the misrepresentation, and was insufficient to support a significant establishment claim.

[25] With respect to hardship relating to his medical frailties, the IAD made a negative credibility finding due to the Applicant's failure to provide corroborating evidence of his condition. The IAD considered that it was reasonable to expect that some objective evidence would be forthcoming if his medical condition was as serious as he described. The IAD concluded that the evidence was insufficient to support the Applicant's claim that he would suffer from his medical condition if removed from Canada.

[26] The IAD also rejected the hardship claim of the Applicant's partner. Besides not accepting the genuineness of the relationship, it rejected the contention that the Applicant provided financial assistance for lack of corroborative evidence, which should have reasonably been forthcoming in the circumstances. The IAD noted that the partner owns her own home, is well-educated with an MBA, and is a real estate agent in the Greater Toronto area.

[27] In considering the BIOC, the IAD relied upon its previous findings that the Applicant had no genuine relationship with his partner, nor that he was the biological father of the Canadian-born child to conclude that the relationship with the children was not as close as claimed. There

was no objective evidence supporting the testimony of the Applicant and his partner that he was providing food and clothing, and assisting in the care of the child or stepdaughter. Bearing in mind the negative credibility of findings regarding the Applicant and his partner, it was reasonable to expect some objective evidence supporting the Applicant's role during the four-year period he claimed to be assisting the partner in the upbringing and support of the child and the partner's stepdaughter.

[28] In coming to this conclusion, the Court disagrees with the Applicant's argument that the decision in *Maldonado v Canada (Minister of Employment & Immigration)* (1979), [1980] 2 FC 302 [*Maldonado*] stands for the proposition that the testimony of the Applicant and his alleged partner should have been accepted unless demonstrated to be not credible. In the first place, both were found not to be credible in many respects. Moreover, when the corroborative evidence is available in Canada, the failure to provide proper corroborative evidence will undermine the testimony of a self-interested witness, such as the Applicant and his partner in this matter. *Maldonado* is relevant with respect to accepting the Applicant's testimony at face value and attenuating the need for corroborative evidence where the evidence is difficult to obtain. This occurs for example, when the refugee claimant is in a situation of flight from risk, or the source of the corroborative evidence is under the control of the persecutor. Even then, there is a view that "Evidence tendered by a witness with a personal interest in the matter may also be examined for its weight before considering its credibility because typically this sort of evidence requires corroboration if it is to have probative value", per Mr. Justice Zinn, in *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 27.

[29] As indicated, the Applicant bases its argument upon the failure of the IAD to properly carry out an assessment of the H&C factors and particularly the BIOC. The Court agrees however, that it is not unreasonable to conclude that before such an assessment is required, the burden rests with the Applicant to establish that he maintained a significant relationship with the children, and in this case with the alleged partner, such that there is some foundation for his claim that he played an important role in the children's lives. Having failed to establish this relationship with the children, besides there being no probative corroborative evidence of his participation in their lives, including that he was the biological father of his alleged partner's young son, there is no evidentiary foundation upon which an examination of the factors in an H&C assessment regarding the children can be carried out.

[30] In addition, the IAD carefully examined the evidence pertaining to the several factors relevant to the determination of whether it should exercise its discretionary jurisdiction to allow the appeal. The Applicant has not demonstrated any reviewable error or that the decision is unreasonable for not being within a range of acceptable possible outcomes in respect of the facts and law, or sufficiently explained by transparent, justified and intelligible reasons.

[31] Accordingly, the application must be dismissed. No questions were advanced for certification on appeal, and none are certified.

JUDGMENT in IMM-3891-17

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified for appeal.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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