Federal Court  Cour fédérale

Date: 20190409

Docket: IMM-4319-18

Citation: 2019 FC 435

Edmonton, Alberta, April 9, 2019

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

THI THU PHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada denying the Applicant's appeal, which was based on humanitarian and compassionate [H&C] grounds, from an exclusion order issued against her following a finding that she is inadmissible to Canada for misrepresentation.

Background

[2] The Applicant, Thi Thu Phan, is a citizen of Vietnam. When she was 19 years old she came to Canada via a spousal sponsorship application. She became a permanent resident on August 2, 2007. It is undisputed that she obtained that status by way of her marriage, which was not a genuine relationship.

[3] The Applicant divorced her sponsor in 2009. In 2008, she met her current husband, a Canadian citizen. They have a son who was born in 2009 and a daughter born in 2014, both are Canadian citizens.

[4] On September 21, 2016, the Applicant was found inadmissible to Canada, pursuant to s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for misrepresentation with respect to her spousal sponsorship. She conceded the validity of the exclusion order but brought an appeal pursuant to s 67(1)(c) of IRPA on the basis that, taking into account the best interests of her children and other matters, sufficient H&C considerations existed to warrant the granting of special relief. Alternatively, and on the same basis, she sought to stay her removal under s 68 of the IRPA.

[5] By a decision dated August 16, 2018, the IAD denied her appeal and refused a stay. That decision is the subject of this application for judicial review.

Decision Under Review

[6] The IAD noted that a Canadian Border Services Agency [CBSA] investigation into the Applicant's landing began in 2014. At that time, she falsely claimed that her marriage to her sponsor was genuine but had broken down because he was abusive. It was only when she was referred to an admissibility hearing that she finally conceded that her marriage to her sponsor was a fraud. Given this history, the IAD stated that it could not give any weight to the Applicant's uncorroborated testimony, but that based on the evidence and her husband's testimony, it accepted that her current marriage was genuine.

[7] The IAD considered the nature of the Applicant's misrepresentation, which it found to be serious, deliberate, and to be a negative consideration in her appeal. On the basis of its finding that it could not accept the Applicant's uncorroborated evidence, the IAD refused to give any positive weight to her expression of remorse. As to her establishment in Canada, the IAD stated that her indicia of establishment "only exist because the appellant lied her way into Canada and then availed herself of various procedures to delay the removal after her fraud was uncovered." The IAD accepted that the Applicant's husband would suffer some hardship if the Applicant were removed but stated that paid childcare was a possibility and there was no reason to believe that the husband's adult daughter, who lives with the family, could not assist. Moreover, there were many letters of support which showed that the family had many friends upon whom her husband could potentially rely. Thus, the positive weight given to this factor was tempered. As to community support, this was a positive factor, but, given that the Applicant's presence in Canada was the result of fraud, the IAD stated that the fact that the Applicant had managed to make

friends was not terribly compelling. As to hardship to the Applicant, the IAD stated that the situation was of her own making and therefore merited less positive weight than might otherwise be accorded. Finally, as to the best interests of the children, while this was a compelling positive factor, it was not sufficient to warrant special relief and was not determinative. The children would still have their father and stepsister to care for them and dismissing the appeal would not uproot them from their current life.

[8] The IAD concluded that the Applicant had failed to meet her onus of establishing that the circumstances merited the exercise of the IAD's discretionary jurisdiction under s 67(1)(c) of the IRPA, and dismissed the appeal. It also stated that, in the circumstances of the appeal, there was no basis for a stay of removal. As it had determined that special relief was not warranted under s 67(1)(c) of the IRPA, it was therefore also not warranted under s 68(1).

Issues and Standard of Review

[9] This application raises the following issues:

i. Was the IAD's decision reasonable?

ii. Was the IAD's decision procedurally unfair?

[10] The Officer's decision made pursuant to s 67(1)(c) and s 68(1) of the IRPA is reviewable on a reasonableness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 53 [*Khosa*]; *McIntyre v Canada (Citizenship and Immigration)*, 2016 FC 1351 at paras 14, 18; *Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 705 at para 16

[*Wang*]). Issues of procedural fairness are reviewable on a standard of correctness (*Khosa* at para 43).

Relevant Legislation

[11] Sections 67 and 68 of the IRPA state:

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.
68 (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	**68 (1)** Il est sursis à la mesure de renvoi sur preuve qu'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.

Analysis

Issue 1: Was the IAD's decision reasonable?

[12] The Applicant submits that the IAD's analysis of the best interests of the children and its analysis of her establishment in Canada were unreasonable.

Best Interests of the Children

[13] The IAD's analysis of the best interest of the children was a brief five paragraphs. In the first three, it made general references to *Kolosovs v Canada (Citizenship and Immigration)*, 2008 FC 165 [*Kolosovs*], and *Ferrer v Canada (Citizenship and Immigration)*, 2009 FC 356 [*Ferrer*], as identifying that factors relating to a child's emotional, social, cultural, and physical welfare should be taken into account including age, level of dependency between the child and the applicant, the degree of the child's establishment in Canada, medical or special needs of the child, and the impact on the child's education. The IAD stated that although the children's best interests should be given substantial weight, they will not necessarily be the determining factor in every case (*Canada (Citizenship and Immigration) v Legault*, 2002 FCA 125).

[14] The IAD then noted that the evidence was that if the appeal was dismissed, the children would remain in Canada. It stated that the best interest of the children was a compelling positive consideration on the appeal, and it would clearly be in the children's best interests to permit the Applicant to remain in Canada. However, it agreed with the Minister that although this situation (removal) was "not ideal," it was not sufficiently compelling to warrant special relief. The

children would still have their father and stepsister to care for them and dismissing the appeal would not result in them being uprooted from their current life.

[15] The Applicant submits that the IAD did not sufficiently consider the best interests of the children and applied the wrong standard. Rather than analyzing what is in the best interests of the children (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]), the IAD simply analyzed whether their basic needs for a home and the presence of at least one parent would be met. The IAD did not engage in any further assessment of the children's interests such as the fact that they currently have two parents present and active in their lives, or the impact that removal of one parent would have on them. The IAD did not acknowledge or assess how the Applicant's daily and physical presence in her children's lives impacts their best interest. Rather, the IAD reasoned that the children's basic needs will continue to be met by their father and assumed, without any evidentiary basis, that the children's adult stepsister will be willing and able to help take care of them as a surrogate mother and relied on this in order to minimize the impact of removal of their mother.

[16] The Applicant submits that a best interests of the child analysis that focuses heavily on the children's continued access to one parental caregiver in Canada, while discounting the emotional and practical support provided by the other parent, is unreasonable (*Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at para 17 [*Sivalingam*]). Further, the Respondent's arguments perpetuate the IAD's flawed analysis by assuming that the father can afford to hire supplemental childcare and that the stepsister and the father's friends can provide assistance, rather than considering the impact on the children if the Applicant could not remain in

Canada (*Daugdaug v Canada (Citizenship and Immigration)*, 2018 FC 772 at paras 4, 11 [*Daugdaug*]). The IAD failed to sensitively engage with the best interests of the children (*Cerezo v Canada (Citizenship and Immigration)*, 2016 FC 1224) and wrongly required the Applicant to establish that her removal would cause hardship on her children to a particular degree in order to satisfy the best interest test, rather than identifying the best interests of the children and how they are served (*Patousia v Canada (Citizenship and Immigration)*, 2017 FC 876).

[17] The Respondent submits that the IAD did not apply a basic needs or hardship standard when assessing the children's best interests, nor did it ignore the role the Applicant plays in her children's lives. Rather, the IAD placed significant positive weight on this factor, but found that it was not sufficiently compelling to outweigh the serious, prolonged and deliberate fraud that the Applicant committed. It was reasonable for the IAD to consider factors that would mitigate the impact of the Applicant's removal on the children. Further, the IAD did not rely on the children's stepsister's ability to act as a surrogate mother. The IAD was simply pointing out that the presence of family in Canada may mitigate the impact of removal on the children.

[18] Upon review of the IAD's reasons, I am not persuaded that the IAD applied a basic needs or hardship standard when assessing the children's best interests. That said, the IAD's very limited best interest analysis does not demonstrate that it was alive, attentive, or sensitive to the children's best interests.

[19] In assessing whether an analysis of the child's best interests under s 67 of the IRPA is reasonable, the jurisprudence analysing this factor in the context of s 25(1) of the IRPA is

relevant (see, for example, *Ferrer*). In that regard, the Supreme Court of Canada in *Kanthasamy* revisited the analysis that must be engaged when considering the best interests of a child in the context of an H&C application. When discussing s 25 of the IRPA generally, the Supreme Court of Canada stated that there will inevitably be some hardship associated with being required to leave Canada but that this alone will generally not be sufficient to warrant relief on H&C grounds (*Kanthasamy* at para 23). What will warrant relief will vary depending on the facts and context of the case, but officers making H&C determinations must substantively consider and weigh all of the relevant facts and factors before them (*Kanthasamy* at para 25).

[20] As to the requirement under s 25(1) to take into account the best interests of a child directly affected, the Supreme Court of Canada stated that the best interests principle is highly contextual because of the multitude of factors that may impinge on the child's best interests. It must therefore be applied in a manner responsive to each child's particular age, capacity, needs, and maturity. The decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive, and sensitive to them (*Kanthasamy* at para 38, referencing *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 74–75 [*Baker*]).

[21] A decision under s 25(1) will be unreasonable if the interests of children affected by the decision are not sufficiently considered. This means that decision-makers must do more than simply state that the interests of a child have been taken into account, those interests must be well identified and defined, and examined with a great deal of attention in light of all the evidence. Additionally, where the legislation specifically directs that the best interests of a child

who is directly affected be considered, those interests are a singularly significant focus and perspective (*Kanthasamy* at paras 23–25, 35, 38 and 41).

[22] Accordingly, the IAD was required to be alert, alive and sensitive to the best interests of the children, afford these interests significant weight, examine them with care and attention in light of all of the evidence, and to take into account the children's personal circumstances. In my view, the IAD failed to do so.

[23] While the IAD acknowledged pre-*Kanthasamy* jurisprudence indicating that factors such as age and dependence of the children at issue are to be considered, it simply did not engage in any analysis. The IAD did not make reference to any evidence, or lack thereof, in its best interests of the children reasons. It did not mention the ages of the children nor make reference to the testimony of the Applicant and her husband concerning the children.

[24] This testimony was that the children are now eight and three years old. The Applicant and her husband purchased a nail salon in 2011. They were able to do this using her husband's savings and loans from his friends and family. At that time, they worked very long days, from 9:00 in the morning until 10:00 or 11:00 at night to establish the business. They now live above the shop and they both still work about 10–12 hours a day; the shop is open seven days a week (but only from 11:00–6:00 on Sunday), and they have six employees. The Applicant wakes her son each morning, prepares his breakfast and takes him to school. While she is doing this, her husband cleans the salon and does the administrative tasks for the business. The Applicant also takes care of her daughter, taking her to the salon while the Applicant is working and, if there is

any free time, taking her out. She then picks up her son at the end of the school day. She also takes care of most of the household chores.

[25] When asked if her husband would be able to continue to work 10–11 hours a day and also care for the two children, the Applicant said she thought this would be impossible. When asked how he would manage if his wife returned to Vietnam, her husband stated that he had no idea. When asked if he could not just hire full time nannies or babysitters, he said that the relationship between a nanny and a child cannot be compared to that of a mother and child. As to his 23-year-old daughter from a prior marriage, he testified that she is a relative newcomer to Canada and he wants to help her adjust to Canada so that she can later work and live on her own.

[26] As pointed out by the Applicant, the IAD did not engage in any analysis of how the Applicant's daily and physical presence in the children's lives impacts their best interests (see *Daugdaug* at para 11). Rather, the IAD appears to have discounted the role of the Applicant as the children's mother and primary caregiver. Instead, it focused on the ability of the children's father and stepsister to take care of the children in the absence of their mother (see *Sivalingam* at para 17), which it premised at least in part on the potential availability of alternative caregivers, the stepdaughter and friends. However, there was no evidence before the IAD that the stepdaughter would be willing and able to assist, or that the friends who wrote letters in support of the Applicant for the purposes of her appeal to the IAD would, in fact, be willing and available to provide regular, long-term child care.

[27] While the Respondent submits that the IAD was not required to set out any of the analysis that it conducted and that it was sufficient for the IAD to merely state that this was a compelling positive consideration but insufficiently compelling to warrant special relief, I do not agree. This is contrary to the requirements set out in *Kanthasamy*. Further, while the IAD is to be afforded deference and the best interest of the child will not necessarily be determinative, without any analysis or reference to any evidence as to the children's circumstances, the Court is unable to assess the reasonableness of the IAD conclusion, making its decision unintelligible.

[28] In sum, the IAD's reasons do not demonstrate that it was alert, alive, and sensitive to the best interests of the children nor do they enable the Court to assess the IAD's weighing of this factor. This is a reviewable error.

Establishment

[29] In assessing establishment, the IAD listed the factors set out in *Archibald v Canada (Citizenship and Immigration)* (1995), 29 Imm LR (2d) 259, [1995] FCJ No 747 (QL) (FC TD). While acknowledging the Applicant's submission that she is well-established in Canada, that her nuclear family is here, that she and her husband run a successful business, that she has now spent almost all of her adult life here, and that she has many friends here, the IAD noted that these *indicia* of establishment only existed because the Applicant lied her way into Canada and then availed herself of various (but unspecified by the IAD) procedures to delay her removal after her fraud was uncovered. As such, it treated establishment as a neutral consideration.

[30] The Applicant submits that *Ribic v Canada (Employment and Immigration)*, [1985] IADD No 636 [*Ribic*], and *Wang v Canada (Citizenship and Immigration)*, 2005 FC 1059, identify six factors to be considered in determining if there are sufficient H&C considerations to grant an appeal, including establishment. However, establishment is not limited to only a negative or neutral characterization in an appeal of a removal order where misrepresentation has been established. To find that the establishment factor in the *Ribic* test may only be considered as neutral or negative is to dictate that all applicants found to have been engaged in misrepresentation are to be treated the same way, regardless of their conduct after their arrival in Canada. The Applicant submits that it was unreasonable to ignore the very positive and productive life that she has lived since her arrival in Canada. While it is true that jurisprudence has held that "immigration cheats" cannot be placed "on equal footing with the person who has complied with the law" (*Canada (Citizenship and Immigration) v Liu*, 2016 FC 460 at para 29 [*Lui*]), there must still be an individual assessment of their establishment and this Court has held that decision-makers must give an applicant's establishment some weight, despite ongoing misrepresentation (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 [*Semana*]).

[31] The Respondent submits that the Applicant's argument cannot succeed because not every misrepresentation neutralizes establishment obtained thereafter. Given the nature of the Applicant's misrepresentation, it was reasonable for the IAD to find that her establishment was neutralized by the fact that she acquired it entirely through fraud. Additionally, the IAD considered the Applicant's establishment in Canada elsewhere in the analysis, such as the hardship her husband would suffer if she were removed, and placed significant weight on the

best interests of the children. Thus, it was not dismissive of these factors as the Applicant suggests.

[32] In its reasons, the IAD quoted from *Dan Shallow v Canada (Citizenship and Immigration)*, 2012 FC 749 at paras 7–8 [*Shallow*], and *Serda v Canada (Citizenship and Immigration)*, 2006 FC 356 at para 21, in which this Court found that an applicant's establishment may be discounted where it accrued because of the applicant's choice to live illegally in Canada.

[33] In *Shallow*, which was an H&C application, Justice Snider stated:

> [7] As observed by Justice de Montigny in *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 at para 21, [2006] FCJ No 425 (QL):
>
> > It would obviously defeat the purpose of the Act if the longer an applicant was to live illegally in Canada, the better his or her chances were to be allowed to stay permanently, even though he or she would not otherwise qualify as a refugee or permanent resident.
>
> [8] I agree that establishment in Canada is a relevant factor. However, merely managing to evade deportation for a lengthy period of time through various procedures and protections available through the immigration process ought not to enhance an applicant's "right" to remain in Canada on H&C grounds. In this case, the Applicants' stay in Canada was of their own choosing. They could have returned to St. Vincent at any time and chose not to.
>
> [9] For this factor to weigh in favour of an applicant, much more than simple residence in Canada must be demonstrated. And, it must always be remembered that the focus is on the hardship to the Applicants on applying for permanent residence from their country of origin as is required by s. 11 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. Unless the establishment in Canada is both exceptional in nature and not of the applicant's

> own choosing, this will not normally be a factor that weighs in favour of the applicants. At best, this factor will usually be neutral. On this question, the Officer did not err.

[34] At the hearing, the IAD stated its view as to the treatment of the establishment factor in misrepresentation cases, being that "…with respect to establishment, I tend to follow the Federal Court jurisprudence from *Shalo* (ph) decision where, I mean, anything that accrues after the fraud has to be really spectacular before giving any weight and at best establishment in cases of this nature will be a neutral consideration."

[35] In my view, had the IAD actually assessed the Applicant's evidence of establishment, then it would have been entitled to weigh the Applicant's establishment against her misrepresentation. In that event, it may well have reasonably concluded that it was to be afforded only a neutral consideration in view of the circumstance that her establishment was entirely the result of fraud which not to be rewarded (*Semana* at paras 46–52). However, as with its treatment of the best interests of the children, the IAD did not engage in any assessment of the evidence and apply this to an analysis. As stated in *Liu*, "[w]hether the impact of fraud is to reduce the establishment to zero or something more is a question for the discretion of the decision-maker based on the particular facts before him or her. But it must be considered" (*Lui* at para 29). Here, however, the IAD afforded a neutral consideration solely on the basis of the existence of the misrepresentation, rather than on the facts before it, which included that the Applicant and her husband had established a business that employs six other people. While it would have been open to the IAD to conclude that this was not sufficient to warrant more than a neutral consideration, it at least had to put its mind to the facts prior to reaching that conclusion.

[36] The IAD determined that the misrepresentation was deliberate and serious and, as such, found this was a negative consideration under the *Ribic* factors. This Court has found that the establishment factor can be discounted because of the misrepresentation. However, there is debate as to the circumstances in which the IAD will commit a reviewable error if it "double counts" misrepresentation to reduce the weight of other factors (see *Jiang v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 413; *Wang* at paras 23–25; *Dhaliwal v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 157 at paras 105–108; *Shen v Canada (Citizenship and Immigration)*, 2018 FC 620 at paras 24–29). In this matter, the IAD discounted not only the establishment factor but also the Applicant's expression of remorse, her community support, and the hardship to the Applicant, all on the basis of the misrepresentation. Because I have found that the decision was unreasonable for the reasons set out above, I need not make a determination as to whether the IAD double discounted the misrepresentation in this case. However, I would observe that, read in whole, the IAD's focus appears to have been to discount or dismiss the H&C factors primarily on the basis of the misrepresentation, rather than properly assessing each of those factors and then weighing them to determine if they served to establish H&C considerations that warrant special relief in light of all the circumstances of the case.

Issue 2: Was the IAD's decision procedurally unfair?

[37] The Applicant submits that the IAD breached the duty of procedural fairness by failing to provide reasons explaining why it refused the Applicant's request for a compromise resolution, whereby her removal would be stayed for a period of time within which she would complete a sentence of community service, the stay being granted pursuant to s 68(1) of the IRPA.

[38] In my view, the IAD did provide adequate reasons when it stated that, "[i]n the circumstances of this appeal, I see no basis for such an order. Moreover, as I have determined that special relief is not warranted under section 67(1)(c) of the IRPA, it is also not merited under section 68(1)." The IAD thereby indicated that it intended its analysis as a whole to apply to both s 67(1)(c) and s 68(1) of the IRPA (*Rajagopal v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 523 at para 34). Accordingly, there was no breach of procedural fairness.

[39] However, given that the same considerations apply under both s 67(1)(c) and s 68(1), and as I have found the IAD's decision made pursuant to s 67(1)(c) to be unreasonable, this also undermines the IAD's refusal of the stay and renders it unreasonable.

JUDGMENT in IMM-4319-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The decision of IAD is set aside and the matter is remitted for redetermination by a different officer.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4319-18
STYLE OF CAUSE:	THI THU PHAN v MCI
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 28, 2019
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	APRIL 9, 2019

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