Federal Court  Cour fédérale

Date: 20190821

Docket: IMM-1283-19

Citation: 2019 FC 1088

Vancouver, British Columbia, August 21, 2019

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

XIANGDONG YU

Respondent

JUDGMENT AND REASONS

(Delivered from the Bench at Vancouver, British Columbia, on August 19, 2019 and edited for syntax and grammar)

I. Overview

[1] This application judicially reviews a decision [Decision] of the Immigration Appeal Division [IAD] which allowed the Respondent's appeal finding that there were sufficient humanitarian and compassionate [H&C] considerations to outweigh the Respondent's

inadmissibility due to misrepresentation. For the reasons that follow, I am dismissing the judicial review.

II. Background

[2] The Respondent, Mr. Yu, landed in Canada as an immigrant investor with his first wife and son in November 2011. He did not declare on his application, and on several other occasions, his two daughters with another woman, who is now his second wife.

[3] Mr. Yu has four children: (i) a son with his first wife who accompanied Mr. Yu and his first wife when Mr. Yu landed as a permanent resident; (ii) two daughters with his second wife, not declared on his immigration forms, who were born in the United States prior to his landing as a permanent resident; and (iii) a third daughter born in Canada to Mr. Yu and his second wife.

[4] This misrepresentation came to the attention of Canada Border Services Agency [CBSA] due to a sponsorship application submitted by Mr. Yu to sponsor his second wife. CBSA accordingly commenced an investigation. At the interview, he admitted to and explained the reasons for failing to declare his two daughters at the time of his landing.

[5] Mr. Yu was then referred to the Immigration Division [ID], which found that he had committed a misrepresentation under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 200, c 27 [IRPA] and issued an exclusion order against him. He subsequently appealed that decision to the IAD.

III. Decision under review

[6] While the IAD found the exclusion order to be valid given that there was no dispute that Mr. Yu had failed to disclose the existence of his daughters, it found that the best interests of all the children affected was sufficient to grant special relief under paragraph 67(1)(c) of IRPA. The IAD also noted other reasons for which it felt Mr. Yu merited the granting of relief, the most salient points of which are captured in the Decision's conclusion which reads as follows:

> [41] The misrepresentation in this case was deliberate and serious, but the Appellant's permanent resident status was not acquired as a result of the misrepresentation. Applying the principle of proportionality to weighing H&C factors means the favourable factors need not be overwhelming. Having said this, positive considerations are ample in this case and support a positive result.
>
> [42] The Appellant expressed remorse, not only at his IAD hearing, but also beginning in 2014 when he began to realize the significance of his mistake. His length of time in Canada, being intermittently for four years on work permits and as a permanent resident since 2011 is moderate. The Appellant and his family's establishment in Canada is significant.
>
> [43] The most favourable H&C considerations are the best interests of the Appellant's children, family ties in Canada, and the negative effects of the applicant being potentially separated from his family. Although the best interests of the children are not solely determinative of this appeal, the Appellant's son and daughters' integration into Canadian society is a significant consideration in this case. It would be unduly harsh to uproot the Appellant's daughters from their life in Canada, or to separate them from their father, based on a misrepresentation which benefited no one. The Appellant's daughters appear to be thriving in Canada, and the Appellant is able to provide a stable life for them and his wife. Further, maintaining a close relationship and proximity to his son is also in his son's interest, even as he approaches adulthood. I assign substantial weight to the best interests of the children and find there would be unreasonable hardship to the family if the Appellant is removed from Canada.
>
> [44] Enforcement of the Exclusion Order would be a consequence disproportionate to the Appellant's misrepresentation. In light of

> the all of the circumstances of this case, including the best interests of the children noted above, I find sufficient H&C grounds exist to warrant special relief. The appeal is allowed.

[7] Finally, I note that paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) was neither alleged nor raised in this matter before the IAD.

IV. Issues and Standard of Review

[8] The issue is whether the IAD's Decision was reasonable. The standard of review of the IAD's Decision based on H&C considerations in the exercise of its equitable jurisdiction under paragraph 67(1)(c) of IRPA is that of reasonableness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57–59).

V. Analysis

A. *Was the Decision reasonable?*

[9] While the Minister argues that it was unreasonable for the IAD to find sufficient H&C considerations to outweigh the Respondent's inadmissibility to Canada given that the H&C considerations based on the best interest of the children were grounded on children who only have temporary status in Canada, I find that the underlying Decision is nonetheless reasonable.

[10] The IAD thoroughly canvassed (i) the seriousness of Mr. Yu's misrepresentation; (ii) the hardship and dislocation he would experience if the exclusion order is enforced; (iii) his remorse; (iv) his establishment and family in Canada; and finally (v) the best interests of his children. It reasonably found that the enforcement of the exclusion order would be a consequence disproportionate to Mr. Yu's misrepresentation. The IAD found that "it is notable his status in

Canada would not likely have been affected if he had disclosed the existence of his two daughters in 2011" (para. 19, Decision).

[11] The case law establishes that the seriousness of the misrepresentation and whether it had any bearing on the acquisition of status is a relevant H&C factor (*Duquitan v Canada (Citizenship and Immigration),* 2015 FC 769, para 10; *Qureshi v Canada (Citizenship and Immigration),* 2012 FC 238 at paras 19-21).

[12] I agree with the Respondent that the IAD was aware that the two daughters were in Canada on temporary status, as it noted that they had been "visitors" since 2014 and were on student visas. The IAD was also aware that Mr. Yu's misrepresentation came to the attention of CBSA through his sponsorship application filed on behalf of his wife, and two daughters who were dependants on that application. Furthermore, the IAD also considered the best interests of the other two children (see for instance, paragraphs 35 and 37-39 of the Decision).

[13] All factors in the H&C analysis were found to be positive. As such, even if I agreed with the Minister that the IAD did not "fully consider" that two of Mr. Yu's daughters are on temporary status in Canada, that would not be sufficient to render the IAD's decision unreasonable given the various other factors that the IAD found to weigh in Mr. Yu's favour.

[14] Finally, I find the legitimacy of the cases relied on by the Minister, which all have different facts and circumstances, neither undermine any of the factual or legal conclusions of the IAD, nor the reasonableness of its outcome. These cases include *Yuan v Canada (Public Safety and Emergency Preparedness), 2017 FC 578, Li v Canada (Citizenship and Immigration)*

2017 FC 841, *Lovo v Canada (Citizenship and Immigration)* 2018 FC 329, and my decision in *Yu v Canada (Citizenship and Immigration) 2018 FC 1281*.

VI. Conclusion

[15] The IAD provided a balanced assessment of the various H&C factors including immigration status of the dependents, remorse, establishment, seriousness of the misrepresentation, and the best interest of the children. The application for judicial review is dismissed without costs.

JUDGMENT in IMM-1283-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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