Federal Court  Cour fédérale

Date: 20191001

Docket: IMM-1259-19

Citation: 2019 FC 1235

Toronto, Ontario, October 1, 2019

PRESENT: Mr. Justice Diner

BETWEEN:

SHU YUAN LI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application judicially reviews a decision [Decision] of the Immigration Appeal Division [IAD] upholding an exclusion order made against Ms. Li by the Immigration Division [ID]. The ID deemed Ms. Li inadmissible to Canada for misrepresentation, a finding that was not contested. The sole issue before the IAD was whether to allow the appeal on humanitarian and compassionate [H&C] grounds. The application is dismissed for the following reasons.

II. Background

[2] Ms. Li is a 61-year-old citizen of China who became a permanent resident of Canada on June 12, 2005, along with her husband and daughter. One month after landing as a permanent resident, Ms. Li returned to China. She came back to Canada in June 2006 and stayed until January 2009. Ms. Li resided in China for a year in 2009, and then from early 2011 until 2015. Since May 2015, Ms. Li has lived in Canada with her daughter, son-in-law and two grandchildren.

[3] During 2010, she resided in Canada and applied to renew her permanent resident card, hiring New Can Consultants Ltd. [New Can] to manage the application after seeing advertisements in the Chinese language newspapers. New Can was run by Xun “Sunny” Wang, who ultimately pleaded guilty to several fraud, tax and immigration-related offenses, and was sentenced to seven years in prison.

[4] Ms. Li testified that, in her first application, she signed a blank application form to renew her permanent resident card. This application contained factual inaccuracies, including the amount of time she had spent in Canada, her travel history and her residence in Canada. The parties agree that Ms. Li in fact met her residency obligation at the time of the application. Immigration authorities sent letters to Ms. Li advising her of their concerns about the information contained in her application. Ms. Li did not receive these letters given that they were sent to a false address where Ms. Li did not reside. Due to her lack of response, the application was determined to be abandoned.

[5] After a period of nine months, Ms. Li met with Sunny Wang of New Can who claimed that he had made a mistake on the first form and had her sign a new blank form. She ultimately received her renewed permanent resident card as a result of this second application. Mr. Wang turned out to run a fraudulent scheme and was ultimately convicted of several offenses, and received a substantial sentence. (I note in passing that this is one of four cases argued before the Court over the span of two weeks in August 2019. Sunny Wang had represented all applicants in these various immigration applications, each of which resulted in misrepresentation findings. The other three decisions may be found at *Yang v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1236; *Yang v Canada (Citizenship and Immigration)*, 2019 FC 1237; and *Gao v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1238.

[6] After a subsequent investigation, a referral was made to the ID alleging that Ms. Li was inadmissible due to the misrepresentations made on the first application. Ms. Li received a fairness letter from the Canada Border Services Agency notifying her of this allegation.

[7] Before the ID, Ms. Li conceded that an incorrect travel history and a false residential address had been provided in her application. The ID found her inadmissible based on misrepresentation under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and issued an exclusion order.

[8] Ms. Li appealed the ID's decision, requesting that the IAD exercise its discretion to grant her special relief on H&C grounds.

III. Decision under Review

[9] A three-member panel of the IAD concluded that, taking into account the best interests of Ms. Li's grandchildren, there were insufficient H&C grounds to warrant relief.

[10] In making this determination, the IAD found Ms. Li's misrepresentation to be serious, rejecting the argument that she was not personally responsible for the misrepresentation. Although Ms. Li met her residency obligation when she applied to renew her permanent resident card in 2010, the misrepresentation was not inconsequential given the fact that the application was submitted at the same time as her husband's, who had not met his residency obligation. The IAD noted that Ms. Li had falsely reported an absence at a time when she was in Canada but her husband was absent, and found it not credible that this was a coincidence.

[11] The IAD considered the remorse expressed by Ms. Li, but accorded it reduced weight due to her characterization of herself as a victim, lack of credibility and failure to act in a timely manner after realizing there might be a problem.

[12] The IAD acknowledged Ms. Li's significant efforts to establish herself after arriving in Canada, but found little evidence of any "enduring connection to Canada." The IAD, however, accorded positive weight to the evidence of community and family support in Canada. Despite a "strong preference" for Ms. Li to remain due to close ties with several family members in Canada, the IAD found little evidence that removal would cause undue hardship to Ms. Li or her family.

[13] Regarding the best interests of the children directly affected by the Decision, the IAD found that while it would benefit Ms. Li's granddaughters to have Ms. Li reside in Canada, this factor did not outweigh the other considerations in the appeal. In other words, the IAD found that the negative factors outweighed the positive factors and confirmed the exclusion order's validity.

IV. Issues and Standard of Review

[14] The IAD's H&C assessment is to be reviewed on a reasonableness standard (*Liu v Canada (Citizenship and Immigration)*, 2019 FC 184 at para 19; *Gao v Canada (Citizenship and Immigration)*, 2019 FC 939 at para 20).

V. Analysis

A. *Legal Framework*

[15] An applicant's duty of candour "is an overriding principle" of IRPA (*Sidhu v Canada (Citizenship and Immigration)*, 2019 FCA 169 at para 70). This Court has stated that the purpose of IRPA's paragraph 40(1)(a) (reproduced in full at Annex A) "is to deter misrepresentation and maintain the integrity of the immigration process" (*Sayedi v Canada (Citizenship and Immigration)*, 2012 FC 420 at para 24). Despite an inadmissibility finding by the ID, the IAD can exercise its discretion to allow an appeal if it is satisfied that, taking into account the best interests of a child directly affected by the Decision, there are sufficient H&C considerations to warrant special relief in light of all the circumstances of the case (IRPA, paragraph 67(1)(c), also reproduced at Annex A).

[16] In conducting an H&C analysis, the IAD must consider the so-called *Ribic* factors (*Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (Immigration Appeal Board)). Specifically, in the context of appeals based on section 40 findings, the key H&C factors to be considered are the: seriousness of the misrepresentation; applicant's remorse; length of time spent and the degree to which the applicant is established in Canada; applicant's family in Canada and resulting impact on them; best interests of a child [BIOC] directly affected by the Decision; support available to the applicant in the family and the community; and degree of hardship that would be caused to the applicant by removal from Canada (*Canada (Citizenship and Immigration) v Li*, 2017 FC 805 at paras 21-22). These factors are non-exhaustive, and the weight accorded to each varies with the circumstances (*Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 705 [*Wang*] at para 18).

[17] Granting special relief under paragraph 67(1)(c) has been described as exceptional and discretionary in nature and, as a result, this Court must give considerable deference to the IAD (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57 and 137 [*Khosa*]; *Wang* at paras 19 and 29; *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 58 [*Semana*]).

B. *Was the IAD's Decision Reasonable?*

[18] Ms. Li challenges several aspects of the IAD's Decision which, in her view, render the Decision unreasonable. During the hearing, Ms. Li's counsel helpfully streamlined her arguments and impugned errors in the following five areas.

(1) Seriousness of the Misrepresentation

[19] Ms. Li contends that it was unreasonable for the IAD to find that her misrepresentation was serious. She notes that the IAD unreasonably misconstrued her testimony when it found that she rejected personal responsibility for the misrepresentation. Ms. Li points out that she did indeed accept responsibility.

[20] In response to the IAD's conclusion on the nature of the misrepresentation, Ms. Li argues that the evidence clearly establishes that although careless, it was innocent, because she had spent the required number of days in Canada, and thus qualified for her Permanent Residency [PR] Card. Ms. Li believed Sunny Wang to be a reputable professional on whom she could rely, and points to the lack of any evidence that she was aware of the fraudulent nature of Sunny Wang's operation. To buttress these points, Ms. Li references her low level of education, poor English skills, and reliance on someone who held himself out as a professional in submitting her two applications, including the second, which Sunny Wang explained to Ms. Li was on account of his own errors.

[21] I do not find these arguments to be persuasive. While Ms. Li indeed accepted responsibility for having signed a blank application form on the one hand, she also testified on the other that she "did nothing wrong," and characterized herself as a victim of Sunny Wang's fraudulent scheme. Her testimony wavered in this regard, and it was thus open to the IAD to reject the claim that she was not responsible for the misrepresentation. But even if Ms. Li had fully accepted responsibility, the IAD's central finding regarding the seriousness of the

misrepresentation was that Ms. Li knowingly signed blank application forms for two different applications, that she then allowed her immigration consultant to submit without checking them.

[22] Ms. Li correctly observes that while the nature of a misrepresentation – i.e. deliberate or innocent – is irrelevant to the determination of inadmissibility on judicial review, it may well be relevant to its level of seriousness under an H&C analysis (see, for instance, *Semana* at para 7). The IAD's reasons were consistent with this principal, appropriately considering the circumstances surrounding the misrepresentation. The IAD found that Ms. Li was responsible, noting that she was "careless in signing a blank form and not reviewing the completed form prior to its submission." I find the IAD reasonably concluded that signing a blank form for a PR Card application and allowing a consultant to fill it out unchecked is itself sufficient to render a misrepresentation serious.

[23] Regarding Ms. Li's testimony that she was unaware of any details of her husband's residency and/or his application, also submitted by Sunny Wang, she submits that the IAD's negative credibility findings are not supported by the evidence, in that it was unreasonable to rely solely on one false entry in her application that aligned with her husband's absences to infer a link between the two. The Minister failed to explore the alleged link between the spouses' applications by producing the husband's application or cross-examining him.

[24] Once again, I do not find any reviewable errors in terms of the IAD's credibility findings. The IAD reasonably found the alleged lack of knowledge about, or communication with, her husband vis-à-vis his residency and application not to be credible. This finding of fact was only

made after hearing and carefully considering testimony from both Ms. Li and her daughter. The IAD's reasons in this regard are transparent, and owed deference.

[25] Finally, Ms. Li's arguments concerning her husband's application are not persuasive. Applicants bear the burden of establishing sufficient H&C considerations to warrant special relief. Viewing the matter holistically, and given the testimony in evidence before the IAD, the IAD reasonably concluded that Ms. Li was not credible in her responses regarding her complete lack of knowledge about her husband's application and residency. Had Ms. Li wished to call her husband as a witness, she could have done so. Ultimately, it is her case to make, not the tribunal's to refute.

(2) Remorse

[26] Ms. Li argues that the IAD's minimization of her remorse was based on insufficient evidence. In particular, she contends that it was unreasonable for the IAD to expect a person in her position to immediately contact immigration authorities after learning of the fraudulent scheme, particularly considering that she met her residency obligation and thus thought she had done nothing wrong.

[27] However, I note that Ms. Li testified before the IAD that, after learning Sunny Wang's business was fraudulent, she thought she "must be in trouble," but that she "did nothing at that time" because of her belief that she "did nothing wrong" and that she was "also a victim." The tribunal, in my view, was therefore justified in giving reduced weight to Ms. Li's declared remorse.

(3) Establishment in Canada

[28] Ms. Li argues the IAD's conclusion that she had established a "house but not a home" in Canada was unreasonable; including because it considered her numerous absences from Canada prior to 2015. Indeed, Ms. Li submits that the IAD ignored evidence of her establishment spanning back to her first arrival in Canada, and most notably since the spring of 2015.

[29] Once again, I find no reviewable error. The IAD acknowledged Ms. Li's "significant efforts" to establish herself in Canada, according the establishment factor positive weight. The IAD was not, however, required to mention in its Decision every piece of evidence that spoke to establishment. It was also open to the IAD to consider circumstances such as Ms. Li's absences from Canada in determining her degree of establishment.

(4) Hardship

[30] The IAD noted that Ms. Li's assistance helps her daughter to prepare meals and do housework, and thus enroll in an educational program. However, it drew the following conclusion after considering the evidence, including Ms. Li's townhome in which she lives when she is in Canada, as well as three other investment properties that she rents out in addition to her "substantial investment accounts in Canada":

> While the Appellant's daughter testified that she has no extended family in Canada and therefore could not pursue her educational and career goals without the Appellant's help, she could provide no reasonable explanation why this was the case, especially considering the considerable financial capacity to pay for assistance as required. While the panel finds that there is a strong preference for the Appellant to remain in Canada due to close ties

> with her family here, there was sparse evidence to show any material impact on her family's professional and personal plans should the Appellant not be in Canada. The panel finds that there is little evidence of undue hardship. (Decision at para 24)

[31] The IAD also found that Ms. Li could go back to her husband's home in China, where she had spent considerable time since first arriving in Canada, and that she has immediate family there. Given the totality of evidence, the IAD's findings with respect to hardship were not unreasonable.

(5) Best Interests of the Child [BIOC]

[32] The IAD must be "alert, alive and sensitive" to BIOC, which must be well identified and defined, afforded significant weight, and examined with care and attention in light of all of the evidence (*Phan v Canada (Citizenship and Immigration)*, 2019 FC 435 at paras 21-22, citing *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]).

[33] Ms. Li submits that the IAD's approach to the BIOC factor was inconsistent with *Kanthasamy*. In particular, Ms. Li argues that the IAD did not give substantial weight to BIOC, to which it devoted only one paragraph. Ms. Li supports this argument by pointing to evidence that she has effectively been the primary caregiver of both grandchildren since they were born, and that her grandchildren have since become dependent on her care.

[34] While BIOC should be given considerable weight, this one factor alone does not determine the outcome of an H&C analysis. In this case, rather than simply stating that it considered Ms. Li's grandchildren, the IAD engaged in an analysis of their best interests. It

considered the children's ages, the length of time each has resided in Canada, and the impact their grandmother's care had on them.

[35] Ultimately, the IAD found Ms. Li's care to be beneficial to the children and accorded this factor positive weight. However, in light of the finding that her care was "not essential to the children's well-being," it was reasonably open to the IAD to conclude that the best interests of the children were outweighed by Ms. Li's misrepresentation (see, for instance, *Wang* at para 27). After all, this is not a situation where a child would be separated from a parent or removed to an unfamiliar country. This Court has held that, without more, the separation between a child and an extended family member such as a grandparent is not sufficient to warrant H&C relief (*Tran v Canada (Citizenship and Immigration)*, 2018 FC 210 at para 11).

[36] In situations where the grandparent is the primary or sole caregiver of the child, and particularly where no reasonable alternative means of childcare is available, the Court has on occasion intervened (see for instance *Benyk v Canada (Citizenship and Immigration)*, 2009 FC 950 [*Benyk*]). However, that is not the case here, just as it was not the case in *Gutierrez Ortiz v Canada (Citizenship and Immigration)*, 2019 FC 339 [*Gutierrez Ortiz*], where the Court declined to intervene because although Ms. Gutierrez Ortiz provided care and assistance to her grandchildren, she was not the primary caregiver (*Gutierrez Ortiz* at para 25). Here, a relevant part of the BIOC analysis regarding Ms. Li's grandchildren reads as follows:

> The Appellant's daughter testified that not only do her daughters see themselves as Canadian, she feels that the air and food quality in Canada are much better than in China and wants to continue to have her daughters raised in Canada. The panel acknowledges the beneficial role that most grandparents provide in their grandchildren's lives. The panel finds that while the

> granddaughters have benefit from the Appellant's care, it is not essential to their ongoing well-being. Many Canadian children are in the position of having to live far away from their grandparents. We find that while having the Appellant continue to reside in Canada would be beneficial to her granddaughters, this does not outweigh the other considerations in this appeal. (Decision at para 27)

[37] Certainly, one could argue that in a perfect world, the IAD could have written more on BIOC in the section devoted to it. However, perfection is not the standard in judicial review (see Justice Evans' dissent in *Public Service Alliance of Canada v Canada Post Corporation*, 2010 FCA 56 at para 163, relied on by the Supreme Court in allowing the appeal at 2011 SCC 57 at para 1). Furthermore, in this case, the brevity of the BIOC analysis does not rise to a reviewable error in light of the full context of the facts, and other sections of the decision that related to care and supervision of the children, including the IAD's hardship analysis as discussed above.

[38] On the whole, I am satisfied that the IAD was alert, alive and sensitive to BIOC considerations, and neither find inconsistencies with the Supreme Court's guidance in *Kanthasamy*, nor other elements resulting in an unreasonable analysis of the evidence presented.

VI. Conclusion

[39] The Court's role under the reasonableness standard is a deferential one, resulting in the fact that I must not reweigh the various H&C factors considered by the IAD, or to substitute my own assessment of the matter. Instead, I must simply determine whether the Decision is justified,

transparent and intelligible, falling within a range of reasonable outcomes, and intervene if it is not supported by the evidence or if the tribunal considered inappropriate factors.

[40] Here, the IAD provided a balanced H&C assessment. In essence, Ms. Li is dissatisfied with how the IAD weighed these factors and worded certain portions of the Decision. Just as a judicial review cannot be an avenue to reweigh the evidence, neither can it become a line-by-line treasure hunt for errors (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54).

[41] The IAD's Decision, as a whole, is reasonable. The application for judicial review is dismissed without costs.

JUDGMENT in IMM-1259-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no award as to costs.

3. No questions for certification were argued, and I agree that none arise.

"Alan S. Diner"
Judge

Annex A

***Immigration and Refugee Protection Act,* SC 2001, c 27**	***Loi sur l'immigration et la protection des réfugiés*. L.C. 2001, ch. 27**
Misrepresentation	Fausses déclarations
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	40 (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
Appeal allowed	Fondement de l'appel
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.

FEDERAL COURT

SOLICITORS OF RECORD

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