Federal Court Cour fédérale

Date: 20191001

Docket: IMM-910-19

Citation: 2019 FC 1236

Toronto, Ontario, October 1, 2019

PRESENT: **Mr. Justice Diner**

BETWEEN:

YI CHEN YANG

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application judicially reviews an Immigration Appeal Division [IAD] decision [Decision] that concluded there were insufficient humanitarian and compassionate [H&C] considerations to overcome the Applicant's misrepresentation. The Applicant, Mr. Yang, is a citizen of China. He came to Canada in 2002 on a study permit. He is a permanent resident, while his wife and two daughters are Canadian citizens. His wife obtained permanent residence

as Mr. Yang's accompanying spouse on his application, which contained the misrepresentation, but she subsequently obtained Canadian citizenship. The Applicant's two daughters were born in Canada.

[2] In 2007, on the advice of a friend, Mr. Yang retained New Can Consultants Ltd. [New Can] to help him secure employment. New Can indicated that it could assist Mr. Yang in securing employment as a Purchasing Agent with an import-export company, Pacific Glory Enterprises Co. Ltd [Pacific Glory], and as a result, obtain a work permit based on that employment. Mr. Yang entered into a written agreement with New Can for his application for a work permit.

[3] After Mr. Yang received his work permit, he was informed the position for which he had been hired did not exist. New Can indicated that he would pay his own salary and benefits to New Can, and Pacific Glory would issue him valid pay cheques and tax documents. Mr. Yang participated in this arrangement, worked without authorization in various jobs to cover his obligation to New Can, and filed taxes based on the false T4 statements.

[4] In 2008, Mr. Yang applied for permanent residence as part of the Federal Skilled Worker class based on this fraudulent employment and included his wife on his application as an accompanying spouse. At this point, Mr. Yang's wife was aware of the fraudulent employment arrangement and was also violating her work permit, working as a sales clerk instead of as a marketing researcher.

[5] In 2009, a visa officer interviewed Mr. Yang regarding his application for permanent residence. Throughout the interview, Mr. Yang maintained the fiction that he was employed by Pacific Glory. In fact, New Can had coached Mr. Yang and one of his fictional co-workers to lie their way through this interview. Both Mr. Yang and his wife were granted permanent residence in 2010.

[6] In 2012, the Canada Border Services Agency [CBSA] undertook a large-scale immigration fraud investigation involving New Can and its owner, Xun "Sunny" Wang. As a result, CBSA opened investigations into a number of New Can's clients, including Mr. Yang. In 2016, CBSA contacted Mr. Yang with concerns he had been granted permanent residence based on misrepresented facts. 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 (Citizenship and Immigration)*, 2019 FC 1237; *Gao v Canada (Public Safety and Emergency Preparedness)* 2019 FC 1238; and *Li v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1235.

[7] Mr. Yang's case was referred to the Immigration Division [ID] pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], which found him inadmissible for misrepresentation. He then appealed to the IAD, conceding the misrepresentation and appealing only on H&C grounds.

[8] In its Decision, the IAD dismissed Mr. Yang's appeal, finding there were insufficient H&C considerations to warrant special relief. The key portion of the Decision relating to the determinative issue is reproduced in the Analysis section of these Reasons.

II. Issues and Standard of Review

[9] The standard of review for IAD appeals on H&C grounds is reasonableness (*Gao v Canada (Citizenship and Immigration)*, 2019 FC 939 at para 20 [*Gao*]). To accept Mr. Yang's argument that the IAD unreasonably exercised its H&C discretion, he must convince this Court that the Decision lacks "justification, transparency and intelligibility within the decision-making process," and does not fall within a "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). While reasonableness is a deferential standard, the Court must still understand <u>why</u> the IAD made its decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

III. Analysis

[10] The purpose of paragraph 40(1)(a) of IRPA "is to deter misrepresentation and maintain the integrity of the immigration process" (*Sayedi v Canada (Citizenship and Immigration)*, 2012 FC 420 at para 24). Further, an applicant's duty of candour "is an overriding principle" of IRPA (*Sidhu v Canada (Citizenship and Immigration)*, 2019 FCA 169 at para 70). However, the IAD can still allow such an appeal if "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" (IRPA, paragraph 67(1)(c)).

[11] In conducting its H&C analysis, the IAD properly identified that the "*Ribic*" factors to be considered when exercising its discretionary jurisdiction for misrepresentation are specific to the individual (see also *Canada (Citizenship and Immigration) v Li*, 2017 FC 805 at paras 21-22). The relevant factors include the seriousness of the misrepresentation, degree of remorse, length of time and establishment in Canada, family and community support, impact of removal on family in Canada, degree of hardship caused, and bests interests of the children [BIOC]. Only the last of these factors is determinative, as explained next.

A. *Best interests of children directly affected by the removal*

[12] According to the Supreme Court of Canada, "attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H&C decision to be made in a reasonable manner" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 74 [*Baker*]). The Supreme Court cited this and other parts of *Baker* when it revisited best interests of the child more recently in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], a case considering Mr. Kanthasamy's application under the successor section 25(1) of IRPA. *Kanthasamy* held, in part, that when considering children's best interests, the decision-maker must do more than simply state that these interests have been taken into account; rather, they must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence (*Kanthasamy* at para 39).

[13] Mr. Yang claims the IAD erred in its BIOC analysis by failing to engage with the children's actual circumstances in the event that their father be removed, instead focusing on mitigating factors, and by minimizing the relationship between Mr. Yang and his daughters, including the significance of physical presence in parenting. Mr. Yang points out that despite plentiful oral and written evidence, the Decision only dedicated one paragraph to BIOC.

[14] The Respondent counters that the IAD reasonably found that the children's best interests weighed in favour of H&C relief, but those interests did not outweigh other valid factors militating against H&C relief. The Respondent points to the IAD's questions and discussion about the children during the hearing, but submits that in any event, the IAD's reasons on the point sufficed. Those read as follows:

> Turning to the best interests of the two children directly affected by the decision, the panel accepts that the Appellant is an involved father. It will more often than not be in the best interests of a child to reside with both parents, but this is but one factor that must be weighed together with all other relevant factors. Appellant's counsel submitted that it would not be in the best interests of the children to live in China. Minister's counsel countered that children are raised and grow up in China all the time. If the Appellant and his wife follow through on their decision that she and the children would remain in Canada, there are ways by which the Appellant could maintain contact with his children and continue to be a part of their lives. The Appellant testified that the family visits China about once a year so that the children can see their grandparents. The family's ability to travel to China is evident. There was little to suggest that the Appellant's children could not visit him in China. There was little to suggest the Appellant could not see and speak with the children daily via the Internet. While the best interests of the children is an important and positive factor in this appeal, it is one factor to be considered and does not override other factors. (Decision at para 23)

[15] I agree with Mr. Yang that this brief, one-paragraph BIOC analysis fails to satisfy the rigour required to examine the particular interests of the two impacted children "with a great deal of attention." As is evident from the paragraph above, the IAD does not identify, define, or examine the children's best interests, despite plentiful evidence presented for each of the children. Rather, the IAD states "it will more often than not be in the best interests of a child to reside with both parents," a highly generic statement that could summarize the reality for almost any parent-child relationship. This generalized treatment, which fails to address the bulk of the relevant evidence, does not concord with the dictates of *Kanthasamy*, which holds that BIOC must be examined "in light of all the evidence" (at para 39). As Justice Abella states in her majority decision at paragraph 35:

> [t]he "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interest": *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, at para. 11; *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 20. It must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity: see *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, at para. 89. The child's level of development will guide its precise application in the context of a particular case.

[16] The Supreme Court goes on to note that – at least in the context of subsection 25(1) H&C consideration – factors relating to a child's emotional, social, cultural, and physical welfare should be taken into account (*Kanthasamy* at para 40). While the IAD must address the H&C factors in the context of overcoming inadmissibility – in this case serious misrepresentation – the language in IRPA at paragraph 67(1)(c) mirrors that of subsection 25(1) with respect to children directly affected.

[17] Here, the IAD did not engage with the evidence of the children's actual situation in two specific ways. First, the IAD failed to consider exactly how the children's specific ages, needs and capacities would be impacted should their father be removed. The family provided significant evidence regarding various aspects about their lives growing up in Canada, including supports, schooling, extra-curricular activities, and health care. Similarly, the family provided significant evidence regarding the consequences of moving to China, including language, schooling, human rights, and environmental, financial, employment, and related concerns. The IAD failed to engage with the evidence presented. It also failed to identify, define, or truly examine the BIOC.

[18] Second, the IAD relied on rationale and conclusions this Court has previously considered to be unreasonable concerning the future ability for the children to communicate with Mr. Yang, given that his wife and two children (all three being Canadian citizens) stated they would remain in Canada rather than face the prospect of living in China. The IAD's conclusion that the two children could communicate with their father electronically or see him once a year while on vacation did not adequately address the concerns that were raised in the evidence, including a detailed psychological assessment from Dr. Weir, which spoke at length about the impact on these two children, and others in analogous situations (by referring to studies of the long-term impacts of separation from a parent at a young age). Indeed, this Court has recognized that infants may simply be too young to establish a relationship with a parent via videoconference (see, for instance, *Oladele v Canada (Citizenship and Immigration)*, 2017 FC 851 at para 61).

[19] While courts have been clear that BIOC is but one factor of several that must be balanced by the decision-maker, and that the children's interests do not predominate or supersede all other factors, they are nonetheless an important factor, as noted in *Baker* and reiterated in *Kanthasamy* (at para 38). As described above, paragraph 67(1)(c) of IRPA specifically mentions BIOC. Failure to accord importance to it ignores the will of the legislator and decisions of the Supreme Court.

[20] Certainly, in some post-*Kanthasamy* contexts, the Courts have conceded that the consideration of H&C factors may – if even considered – be brief, such as where the legislation does not specifically mention the discretion (for instance in the prior section 44 stages that Mr. Yang himself went through: see *McAlpin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 422 at para 70). That is not the case, however, at this stage of the proceedings, where paragraph 67(1)(c) of IRPA specifically requires that the IAD take BIOC into account. I am also mindful of *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 [*Lewis*], which held that *Kanthasamy* only applies to section 25 decisions, and that IRPA "even there, does not mandate that the affected children's best interests must necessarily be the priority consideration" (at para 74). However, *Lewis* considered the refusal of a deferral of deportation by a CBSA enforcement officer, and thus arose in an entirely different context. The same is true of the Federal Court of Appeal's decision in *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189, and my earlier decision that applied it in *Aslam v Canada (Citizenship and Immigration)*, 2015 FC 946, where the context of each differed from that which was before the IAD in this case.

[21] Finally, I refer to two 2019 cases that, like in this situation, addressed deficient IAD H&C analyses. In *Phan v Canada (Citizenship and Immigration)*, 2019 FC 435 [*Phan*], Justice Strickland described a five-paragraph analysis of the children's best interests as "brief" (at para 13). She found the IAD's decision unreasonable because the IAD did not engage in any analysis or make reference to any evidence (*Phan* at para 23). Further, the IAD did not analyse how the parent's physical presence in her children's lives impacted their best interests, and given the lack of analysis or reference to evidence, the Court quashed the IAD decision for unintelligibility (*Phan* at paras 26-27).

[22] Then, in *Gao*, Justice Manson also found that the IAD unreasonably assessed BIOC. There, again, the IAD engaged with the evidence in a more significant way than it did in the present case (*Gao* at para 15). Justice Manson noted that while Parliament intended consequences for misrepresentation, those can be cured by H&C relief (*Li v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 451 at para 34). He found that "the entire tone and tenor of the IAD's H&C analysis appears to be intent on punishing the Applicant and her children for the Applicant's misrepresentation" (*Gao* at para 30).

[23] Here, the IAD simply noted evidence that Mr. Yang and his family had visited China regularly, approximately once a year in the past, and from this gleaned that the children could visit their father in China after his removal. Unlike even in *Gao*, there was simply no analysis of the children's current situation or of their father's physical involvement in their lives and their evolving relationships with him, let alone what the impact would be if he were removed.

[24] Mr. Yang's conduct was decidedly reprehensible. But that reality does not permit the IAD to sweep aside its duty. Indeed, where inadmissibility is conceded, such as in this case, H&C forms the sole basis of the IAD appeal. The children directly affected must be front and centre. They cannot be a sideshow. Despite the fact that their father sinned against the immigration system in a fundamental way, they did not. Serious though his conduct was, so too are their interests.

IV. Conclusion

[25] In failing to properly address the evidence raised concerning the impact on the children, the BIOC analysis fell short. For young children directly affected by a removal of a parent, their evidence and best interests must be assessed with particularity rather than in a general manner – that is, without addressing or assessing the evidence presented. Given the deficient BIOC analysis, the matter will be returned for redetermination.

JUDGMENT in IMM-910-19

THIS COURT'S JUDGMENT is that:

1. The judicial review is granted.

2. This matter will be sent back for reconsideration.

3. No questions were raised for certification, and none arise.

4. No costs will issue.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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