Federal Court  Cour fédérale

Date: 20191001

Docket: IMM-1346-19

Citation: 2019 FC 1238

Toronto, Ontario, October 1, 2019

PRESENT: Mr. Justice Diner

BETWEEN:

DIANYI GAO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This application judicially reviews a decision [Decision] of the Immigration Appeal Division [IAD] dismissing Mr. Gao's appeal of his removal order issued by the Immigration Division [ID] based on inadmissibility resulting from misrepresentation. Mr. Gao did not contest the validity of the removal order. Rather, the sole issue before the IAD was whether the appeal should be allowed on humanitarian and compassionate [H&C] grounds. The application is dismissed for the following reasons.

I. Background

[2] Mr. Gao is a 69-year-old citizen of China. He, his wife and his daughter immigrated to Canada in 2007 under the investor class. His wife and daughter have since been granted Canadian citizenship. Mr. Gao's daughter is married and has three children – two sons and a daughter – all of whom were born in Canada and are Canadian citizens.

[3] Mr. Gao did not comply with the residency obligation requiring him to reside in Canada for 730 days in the first five years after being landed. Rather, he testified that he spent time in China dealing with his properties that had been expropriated by the Chinese government.

[4] Mr. Gao used the services of New Can Consultants Ltd. [New Can], paying them $3000, signing a blank application form, and leaving it with his immigration consultant to complete. Mr. Gao testified that he was aware that he was short on the 730-day residency obligation at that time. The submitted application indicated that he had been absent from Canada for 989 days in the previous five-year period, while he had actually been absent for at least 1310 days. There was no indication on the application form that Mr. Gao was represented by a consultant.

[5] Mr. Gao attempted to collect his renewed permanent resident card in February 2012 and was advised by an officer that it appeared he had not complied with the residency obligation. Mr. Gao told the officer that he worked for a Canadian business overseas. He was given one month to provide proof of his employment overseas. When he did not respond to the request, his application was declared abandoned, and his permanent resident card was not renewed.

[6] At this time, the Canada Border Services Agency [CBSA] had initiated an investigation into New Can and discovered large-scale immigration fraud orchestrated by its owner Xun “Sunny” Wang, who ultimately pleaded guilty to several offenses, and was sentenced to seven years in jail. In the course of these CBSA investigations, individual fraud was also identified against New Can’s clients. This included information regarding Mr. Gao declaring inaccurate information on his permanent resident application. I note in passing that this is one of four judicial reviews argued before the Court over the span of two weeks in August 2019, in which Sunny Wang had represented all applicants in these various immigration applications, and each of which resulted in misrepresentation findings. The other three decisions may be found at *Li v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1235 [*Li*]; *Yang v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1236 [*Yang*]; and *Yang v Canada (Citizenship and Immigration)*, 2019 FC 1237.

[7] Turning back to this application, Mr. Gao was sent a procedural fairness letter with respect to his misrepresentation. In responding to the letter, counsel acknowledged that Mr. Gao had failed to meet the residency obligation, but explained that Mr. Gao lacked English skills and had trusted the consultant to prepare his application without reviewing it.

[8] A section 44 report was completed in June 2017. The officer found that Mr. Gao had misrepresented the number of days he was absent from Canada contrary to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The officer further found that there were insufficient H&C grounds to overcome the seriousness of the allegation.

[9] The matter was referred to an admissibility hearing, where the ID confirmed the inadmissibility, and issued an exclusion order against Mr. Gao. He appealed to the IAD on H&C grounds alone. That IAD Decision is the subject of this judicial review.

II. Decision under Review

[10] The IAD dismissed Mr. Gao's appeal, finding that Mr. Gao's misrepresentation was serious and he was, at the least, willfully blind about the information provided in his permanent resident application. The IAD acknowledged that Mr. Gao was sorry, but found that he had "little insight into the gravity of the misrepresentation and his involvement in it" and that his apology was "rooted in his regret in being caught in the scheme rather than the implications to Canada's immigration system of illegal practices by unscrupulous consultants."

[11] The IAD observed that Mr. Gao had indicated on the application that absences from Canada in between May 2009 and April 2010 were due to his "parents' health issues," but he had also told an officer that he worked for a Canadian company overseas and this was a reason for his non-compliance. The IAD further noted that neither of these reasons was provided in his testimony at the IAD hearing. Rather, he testified that he felt an obligation to be in China in order to deal with issues related to the expropriation of his property in China. The IAD found that Mr. Gao had the opportunity to report the dishonesty of his consultant had he indeed been victimized, but failed to explain the situation to the investigating officer in 2012. The IAD noted that instead, he told the officer that he worked for a Canadian company in China, for which he failed to provide proof.

[12] The IAD also found it “disturbing” that Mr. Gao had traveled to and entered the United States on a cancelled Chinese passport after having reported it missing and having been issued a new passport, noting that “the inconsistency and vagueness of his testimony did not assist Mr. Gao in asking for discretionary relief.”

[13] The IAD acknowledged that Mr. Gao had “some” establishment in Canada and noted his increased presence since 2014. The IAD also found his continued presence to be in the best interests of his grandchildren, given that when in Canada, he lived with his Canadian family and helped with the grandchildren. However, the IAD also found that there had been a “workable” solution when he was away and unable to assist, with little evidence that alternative arrangements for childcare could not continue in the future.

[14] Overall, the IAD found that the positive factors were not compelling enough to overcome the seriousness of the misrepresentation.

III. Issues and Standard of Review

[15] Mr. Gao argues that the IAD unreasonably erred in its H&C assessment. The reasonableness standard of review applies (*Liu v Canada (Citizenship and Immigration)*, 2019 FC 184 at para 19; *Yang* at para 9). The Court’s role under the reasonableness standard is not to reweigh each of the various H&C factors considered by the IAD, or to substitute its own assessment of the matter (*Hammo v Canada (Citizenship and Immigration)*, 2019 FC 983 at para 27). Nor is it a line-by-line treasure hunt for error (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54).

Rather, it is to determine whether the decision is justified, transparent and intelligible and whether it falls within a range of reasonable outcomes (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

IV. Analysis

A. *Legal Framework*

[16] This Court has stated that 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). The IAD can, however, exercise its discretion to allow an appeal of inadmissibility for misrepresentation 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)).

[17] In conducting an H&C analysis, the IAD must consider the *Ribic* factors (*Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (Immigration Appeal Board)). Specifically, in H&C relief cases for misrepresentation, these factors include the seriousness of the misrepresentation; applicant's remorse; length of time spent, and degree to which the applicant is established, in Canada; applicant's family in Canada and the impact on the family that removal would cause; 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). Granting relief under section 67(1)(c) is exceptional and discretionary.

B. *Is the Decision Reasonable?*

[18] Mr. Gao argues that the IAD ignored evidence and relied on irrelevant considerations in its assessment of the misrepresentation, remorse, establishment, hardship and BIOC, and that these errors led to an unreasonable exercise of discretion under paragraph 67(1)(c) of IRPA. I will address each in turn below.

(1) Seriousness of the Misrepresentation

[19] Mr. Gao argues that the IAD erred in characterizing his misrepresentation as serious. In particular, he submits that the IAD failed to account for his vulnerability as a person with minimal English knowledge, in addition to health issues and ongoing property disputes in China. Further, Mr. Gao contends that the IAD ignored the fact that he never actually received a permanent resident card based on the application submitted by New Can; thus, he did not actually benefit from the misrepresentation. Finally, Mr. Gao asserts that the IAD failed to take into account that he was not an active participant in the fraudulent scheme.

[20] Despite highly able submissions from his counsel, I find no reviewable error in the IAD's analysis of the seriousness of Mr. Gao's misrepresentation. The IAD considered Mr. Gao's

circumstances. However, the IAD also acknowledged its responsibility to exercise the paragraph 67(1)(c) discretion in a way that maintains the integrity of the immigration system.

[21] Further, as discussed in *Li* at paragraph 22, whether a misrepresentation is deliberate or innocent is one of several factors that the IAD may consider in determining its level of seriousness. Mr. Gao's misrepresentation was central to his permanent residence card application, namely the amount of time he spent in Canada. The IAD noted that Mr. Gao was aware of this requirement, but failed to meet it when he signed a blank application and took no further steps to address the issue when he had the opportunity to "come clean" to the investigating officer. The IAD found that Mr. Gao was at least willfully blind in his conduct. In light of Mr. Gao's intentional or reckless disregard for his duty of candour, and of the importance of the residency requirement, the IAD, in my view, reasonably characterized the misrepresentation as serious.

(2) Remorse

[22] Mr. Gao argues that the IAD unreasonably minimized his remorse by failing to consider his conduct following the misrepresentation, which he claims demonstrates that he learned from his mistake, and that his remorse was genuine.

[23] The IAD acknowledged Mr. Gao's expression of remorse, and also considered his conduct leading up to the hearing. Yet the tribunal found that Mr. Gao had several opportunities to fulfill his duty of candour, but failed to do so until after he received a procedural fairness letter. The IAD also found that at the hearing, Mr. Gao continued to view himself as a victim of

New Can, and that some of his testimony was inconsistent and vague. Based on my reading of the evidence, it was thus reasonable for the IAD to give reduced weight to Mr. Gao's remorse.

(3) Establishment in Canada

[24] Mr. Gao submits that the IAD's finding on establishment ignored relevant evidence, including his employment as a construction worker for a few months in Canada in 2007, relationship with two churches in Canada, and significant property investment in Canada.

[25] I disagree. The IAD's reasons need not reference all evidence presented, or details included therein, in reaching its conclusion. Here, the IAD acknowledged that Mr. Gao has four residential properties in Canada, worked in Canada "for a short time" after his arrival, and has some friends in Canada who provided support letters. The IAD found that Mr. Gao's presence in Canada has increased in recent years, and ultimately concluded that he has some establishment here. In short, the IAD found nothing remarkable about Mr. Gao's establishment, and had every justification to find as it did on this factor.

(4) Hardship

[26] Mr. Gao submits that the IAD unreasonably found that he would not face hardship in China, discounting the possibility that his medical conditions could worsen and prevent him from returning to Canada on a permanent basis after the five-year ban.

[27] Once again, the IAD intelligibly and justifiably considered hardship, including Mr. Gao's medical situation. The IAD acknowledged, for instance, that heart problems are worrisome as people age, but that Mr. Gao's appeared stable. The IAD also mentioned that Mr. Gao had received medical care in China in the past, and that there was no evidence that this care was inadequate. The IAD also discussed the possibility that his condition could worsen such that he would be ineligible to enter Canada in five years, but found this to be speculative. I find that the IAD's analysis on this ground was complete and transparent.

(5) Best Interests of the Children

[28] BIOC is a central factor where children are involved. The IAD must be "alert, alive and sensitive" to the best interests of a child affected by its decision. The child's interests 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).

[29] Mr. Gao submits that the IAD failed to examine the "unique and personal consequences" that the removal would have on his grandchildren, aged 3, 7 and 9 years respectively (*Tisson v Canada (Citizenship and Immigration)*, 2015 FC 944 at para 19). In particular, Mr. Gao argues that it was unreasonable to presume that professional childcare could replace the care Mr. Gao provides, given the close emotional bond formed with his grandchildren.

[30] I find, however, that the IAD was alert, alive and sensitive to the best interests of the three grandchildren, which were addressed at paragraph 27 of the IAD decision as follows:

> The appellant indicated that he helps his daughter and son-in-law with his grandchildren and spends time with the grandchildren doing several activities. I acknowledge that it is in the best interests of his grandchildren that he remains in Canada to spend time with them. I also acknowledge that the appellant has only one child (his daughter) and she wants to see him remain close to the family. However, I do not find these factors compelling enough to overcome the seriousness of the misrepresentation. The grandchildren spend time with the appellant's wife and their paternal grandparents. The appellant's daughter and son-in-law were both raised and educated in China and speak Mandarin. The appellant's son-in-law owns a house in the Lower Mainland where the children live and his son-in-law earns a substantial income to support his family. Although the grandchildren might miss their grandfather, they have travelled to China to visit in the past and also to places in the United States for holidays with the appellant. There is no evidence that travel to the USA for holidays with his daughter and grandchildren could not continue in the future. Furthermore, there is no evidence that they could not remain in contact by telephone and through online connections.

[31] This was a reasonable finding of the tribunal, and is consistent with other cases in which the grandparent is not a primary caregiver (see *Li* at para 36). Indeed, while Mr. Gao helps his daughter and son-in-law with his grandchildren in some capacities, he is not their primary caregiver and there was no evidence that alternative means of childcare were unavailable. Separation between a child and extended family member is undeniably difficult, and this hardship is inherent when family members reside in two distant countries, such as Canada and China. But this acknowledged hardship alone does not render the refusal of H&C relief unreasonable (*Khaira v Canada (Citizenship and Immigration)*, 2018 FC 950 at para 25).

[32] As shown in the above excerpt, the IAD accorded the BIOC factor positive weight, concluding that it would be in the best interests of the grandchildren for Mr. Gao to remain in

Canada. Notwithstanding this finding, it was open to the IAD to conclude, as it did, that the BIOC factor was not sufficiently compelling to outweigh the others.

V. Conclusion

[33] After reviewing the IAD Decision and all key findings in light of the arguments presented, I find that the IAD provided a balanced assessment of the H&C factors. In essence, Mr. Gao disagrees with how the IAD weighed these factors and is dissatisfied with how it worded certain portions of the Decision. However, neither that disagreement or dissatisfaction renders the Decision unreasonable. The application for judicial review is accordingly dismissed without any certified question or costs.

JUDGMENT in IMM-1346-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

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

3. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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