Federal Court  Cour fédérale

**Date: 20191001**

**Docket: IMM-1095-19**

**Citation: 2019 FC 1237**

**Toronto, Ontario, October 1, 2019**

**PRESENT: Mr. Justice Diner**

**BETWEEN:**

**TING YANG**
**JIAN PING LI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Background

[1] This application judicially reviews a decision [Decision] of the Immigration Appeal Division [IAD or Board], which found that there were insufficient humanitarian and compassionate [H&C] considerations to overcome the Applicants' inadmissibility due to misrepresentations.

[2] The Applicants, Ms. Ting Yang and Mr. Jian Ping Li, are citizens of China. They came to Canada on student visas in 2003 and 2005, respectively. They are both Canadian permanent residents and have three Canadian-born children (two daughters and one son). Ms. Yang has worked at an accounting firm since December 2011. Mr. Li has owned and managed a pizza franchise since June 2014, employing several Canadians. The couple have resided principally in Canada throughout this period.

[3] In June 2009, Ms. Yang retained New Can Consultants Ltd. [New Can] to submit an application to British Columbia's Provincial Nominee Program [BC PNP]. This application listed Ms. Yang as the principal applicant and Mr. Li as an accompanying spouse. The application also indicated that Ms. Yang worked for New Can. This application was rejected in 2010 after a BC PNP officer visited New Can and was not satisfied that Ms. Yang worked there.

[4] The Applicants then submitted a Canadian Experience Class application to the federal government, again relying on Ms. Yang's employment with New Can. This application was approved in 2012, and the Applicants obtained permanent residence as a result.

[5] In reality, Ms. Yang never worked for New Can. Rather, she participated in an organized New Can fraud requiring her to pay New Can her salary, plus employer deductions, in exchange for receiving the salary portion back to create the illusion that she was duly employed. The scheme included producing pay cheques and tax documents, which Ms. Yang used to file her taxes.

[6] In 2012, 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 Ms. Yang. In 2016, CBSA contacted the Applicants with concerns that they had been granted permanent residence based on misrepresented facts. The matter was referred to the Immigration Division [ID] pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. (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*]; *Gao v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1238; and *Li v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1235.

[7] The Applicants conceded before the ID that they had made a material misrepresentation in obtaining permanent residence. The ID found the Applicants inadmissible based on misrepresentation under paragraph 40(1)(a) of IRPA. They appealed the ID decision to the IAD, but restricted their appeal to H&C relief. The IAD dismissed the Applicants' appeal, finding that there were insufficient H&C considerations to warrant special relief.

## II. Issues and Standard of Review

[8] The issue is whether the IAD reasonably exercised its H&C discretion. The standard of review for the IAD's consideration and weighing of H&C factors is reasonableness (*Gao v Canada (Citizenship and Immigration)*, 2019 FC 939 at para 20 [*Gao*]; see also *Yang* at para 9).

## III. Analysis

### A. *Was the IAD's decision reasonable?*

[9] Paragraph 40(1)(a) of IRPA provides that a permanent resident is inadmissible for misrepresentation for directly or indirectly misrepresenting material facts that induce an error in the administration of IRPA. This paragraph's purpose 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).

[10] Under IRPA, the IAD can 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, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case" (paragraph 67(1)(c)). H&C relief has, however, been described as "exceptional" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 57 [*Khosa*]) and "extraordinary" (*Li v Canada (Citizenship and Immigration)*, 2018 FC 187 at para 25). It is not an alternate immigration stream or appeal mechanism, and considerable deference is owed to the IAD's weighing of H&C factors (see *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at paras 15 and 58).

[11] What are the factors that the IAD must weigh? They were originally established in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (Immigration Appeal Board) [*Ribic*], and later refined for misrepresentation cases as the: (i) seriousness of the

misrepresentation; (ii) applicant's remorsefulness; (iii) length of time spent in Canada and the degree to which the applicant is established in Canada; (vi) applicant's family in Canada and the impact on the family that removal would cause; (v) best interests of a child [BIOC] directly affected by the decision; (vi) support available to the applicant in the family and the community; and (vii) degree of hardship that would be caused to the applicant by removal from Canada, including the conditions in the likely country of removal (*Canada (Citizenship and Immigration) v Li*, 2017 FC 805 at paras 21-22). Only the factors contested by the Applicants are discussed below.

(1) *Seriousness of the misrepresentation and the circumstances surrounding it*

[12] The Applicants submit that the IAD erred in its characterization of the test for seriousness of the misrepresentation by using language that suggests an unnecessarily high threshold, and by ignoring the circumstances surrounding the misrepresentation in this case. They argue that the Board went too far in characterizing the Applicants' conduct as a core attack against the immigration system, when it stated that "such a serious offence attacks the integrity of Canada's immigration system to its core."

[13] I disagree. The Applicants knowingly submitted not one, but two permanent residence applications based on fictitious employment. After being caught and having their initial application rejected, the Applicants doubled down with a second application. Even when Ms. Yang obtained legitimate employment, the Applicants allowed the fictitious application to continue rather than withdrawing it and coming clean by submitting a proper application. I therefore find that the IAD had every right to find that the misrepresentation was extremely

serious, striking at the core of Canada's immigration system by allowing the Applicants to fraudulently obtain permanent residence.

[14] Nor have the Applicants persuaded me that the IAD failed to properly consider the circumstances surrounding the misrepresentation, or should have referred to more of the evidence in doing so. For instance, Ms. Yang notes that she explained to the IAD that she was anxious about securing employment that would have qualified her to stay permanently in Canada. The reason for this included her difficult past due to a very strained relationship with her mother, resulting in her suicide attempt in China. She contends that that the IAD overlooked this, amongst other evidence.

[15] Again, I do not agree. The IAD referred to the fact that Ms. Yang qualified for immigration to Canada early on, and both Applicants were keenly aware of the immigration scheme's details, but instead of choosing to proceed with a legitimate employment-based application for which she could have qualified, Ms. Yang rather chose to continue unabated with her fraudulent application scheme. The IAD did not have to look into every piece of evidence or discuss every excuse that Ms. Yang raised to justify her conduct. For instance, a strained relationship with parents does not give licence to abuse Canadian immigration laws. Moreover, if Ms. Yang was indeed suffering from the lingering effects of a difficult family life, she had sufficient time to remedy her situation when her first application failed.

[16] Instead, she chose to stay the immigration course undeterred, applying for a second fictitious application under a different permanent resident category, with the same fraudulent

consultant. The renewed and sustained sham continued until Ms. Yang and Mr. Li were finally notified of an investigation by CBSA. Yet, this still was not enough incentive for them to self-report the issue. Rather, they continued along with the ruse in the hope that it would go away. Not surprisingly, with the section 40 inadmissibility finding, their immigration issues came to a head.

[17] A tarnished immigration application, however, does not have to take down all individuals with it. Rather, H&C discretion provides a lifeline that can, in exceptional circumstances, save the subjects. In this case, primary among these were the Applicants' three young children, who were neither privy nor alive – physically or metaphorically – to their parents' past conduct.

(2) *Best interests of the children*

[18] The mere existence of directly impacted children does not guarantee a positive outcome in any given H&C application. The IAD must, at minimum, properly assess and weigh the children's best interests. As the IAD aptly put it "[w]hile the best interests of the children is an important factor, it is but one factor to be considered in the contest of all the other factors and does not override other factors" (Decision at para 37).

[19] Like subsection 25(1) of IRPA, which permits the general exercise of H&C discretion in a broader array of applications, the IAD-specific paragraph 67(1)(c) also specifies "the best interests of a child directly affected by the decision." IRPA does not in these two – or any other analogous sections that enable H&C discretion – specifically highlight any of the other *Ribic* and *Wang* factors outlined above (in paragraph [11] of these Reasons); the statute singles out only

BIOC among those various factors. As a result, the BIOC ground takes on heightened importance when children are directly affected, in that the IAD must carefully consider the evidence presented (see *Yang* at para 19).

[20] Here, the IAD concluded that the "move to China will be disruptive for the children and it would be in their best interest that their parents not be removed from Canada. However, they will have both parents present, as well as grandparents, to support them and ease their transition to China" (Decision at para 36). In making this statement, the IAD avoided a real assessment of the children's best interests, instead simply making a general comment focusing on their parents, rather than on them. In a BIOC analysis, the bullseye that the IAD must hit in satisfying this crucial factor is the children. The parents are certainly an important component of their children's lives, but they are not at the centre of the target that the IAD must address in the BIOC analysis. Rather, it is the children's interests which must be the focal point of the BIOC analysis.

[21] By simply noting that both parents and grandparents would be present in China to support the children and ease their transition, the IAD seemed to be working from the premise that the children were going to China with their parents, and then illustrating the ways in which their return would be eased. The IAD failed to state whether BIOC was a positive or neutral factor on the overall H&C assessment, or indeed, what the best interests of the children actually were (other than their parents not being removed).

[22] To illustrate this point, we know that the IAD recognized that the Applicants' strong establishment in Canada was a positive H&C factor. Apart from the Applicants' work mentioned

above, they are involved in the community, own a home, and take an active role in their children's school and extra-curricular activities. Indeed, the children are at risk of being removed from the only community, language and lifestyle they have ever known. The Decision mentioned none of this *vis-à-vis* the children, or the impact these factors would have on them if removed to China.

[23] Even as the evidence relates to a potential removal to China, there were important elements of BIOC that the Applicants raised before the IAD regarding the children which were also not addressed in the Decision, including the prospect of their ability to adjust to the education, environment, and other elements of life in China. Justice Strickland recently considered this issue in the subsection 25(1) context in *Phan v Canada (Citizenship and Immigration)*, 2019 FC 435 at paragraph 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).

[24] Like in *Phan*, this Decision lacks a sufficient BIOC analysis. Furthermore, its tone shares certain similarities to that described by Justice Manson in *Gao* at paragraph 30:

> However, in this matter 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. By adopting this approach, the IAD unreasonably assessed the evidence regarding the best interests of the children, as well as evidence going to the other *Ribic* factors.

[25] Here, like in *Gao*, the fact that the parents misrepresented *vis-à-vis* the immigration system cannot seal the fate of their Canadian-born children without the benefit of a complete H&C analysis. That analysis includes addressing the BIOC-related evidence presented. To do otherwise would be to deny the three Canadian children the full benefit of the law as contained in IRPA's paragraph 67(1)(c).

## IV. Conclusion

[26] While the Applicants' misrepresentation was extremely serious, the IAD still had to carry out a complete H&C assessment, particularly with respect to the Applicants' three Canadian-born children, lest the sins of the parents be visited on them without a proper assessment of their best interests. As the IAD failed to properly assess BIOC, the matter will be sent back for a hearing before a different panel.

**JUDGMENT in IMM-1095-19**

**THIS COURT'S JUDGMENT is that**:

1. This application for judicial review is granted.

2. The matter is remitted to the Immigration Appeal Division for reconsideration by a differently constituted panel.

3. There is no award as to costs.

4. No questions for certification were argued, and none arise.

"Alan S. Diner"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1095-19 |
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