

Federal Court



Cour fédérale

**Date: 20191122**

**Docket: IMM-3984-18**

**Citation: 2019 FC 1491**

**Ottawa, Ontario, November 22, 2019**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Applicant**

**And**

**JIN XIU WU**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The Minister of Public Safety and Emergency Preparedness [the Minister] applies for judicial review of the Immigration Appeal Division [IAD] decision dated August 1, 2018 [Decision] which found that the Respondent, Jin Xiu Wu [Ms. Wu] had established sufficient humanitarian and compassionate grounds under section 67(1)(c) of the *Immigration and Refugee*

*Protection Act*, SC 2001, c 27 [the *IRPA*] to warrant setting aside the removal order made against her even though the exclusion order made against her was valid.

## II. **Background Facts**

[2] Ms. Wu is originally from China. She became a permanent resident of Canada on February 8, 2012 as a result of a successful sponsorship based on her marriage to Norman Eng [“Norman”].

[3] The Respondent and Norman resided together for just over two months. They separated in mid-April 2012. Divorce papers were filed by Norman in June 2012.

[4] Norman is unable to work due to a relatively severe disability. He has been receiving support under the Ontario Disability Support Program [ODSP] since 2003. When questioned during the hearing, Ms. Wu did not seem to be aware of Norman’s disability.

[5] The Minister believed that Ms. Wu had entered into a marriage of convenience with Norman in order to fraudulently obtain permanent residence status in Canada, and in doing so she engaged in misrepresentation under paragraph 40(1)(a) of the *IRPA*.

[6] In January 2013, Ms. Wu was referred to an admissibility hearing to determine if she had committed misrepresentation under the *IRPA*. The Immigration Division [ID] heard the matter on May 13, 2013 and then issued an Exclusion Order.

[7] Ms. Wu appealed that order to the IAD. The appeal was heard on April 6, 2016. The IAD dismissed Ms. Wu’s appeal. On judicial review, that decision was set aside with the agreement of the Minister because Ms. Wu had not been granted an adjournment after she retained counsel.

[8] The matter under review in this application is the redetermination by a different panel of the IAD. It found that Ms. Wu was not in a genuine marriage with Norman, based on several inconsistencies in her testimony and various credibility concerns. However, it found there were sufficient humanitarian and compassionate [H&C] grounds under paragraph 67(1)(c) of the *IRPA* to warrant granting Ms. Wu's appeal.

[9] The conclusion by the IAD was that there were, on a balance of probabilities, sufficient H&C grounds to allow the appeal. The penultimate sentence of the decision summarizes the basis for the Decision:

As reviewed above, while the misrepresentation was very serious there are a number of factors that favour granting the appeal, most significantly the best interest of the appellant's young son, a 1 year old infant.

[10] The 1 year old son is the child of Ms. Wu and her current partner, Ken.

[11] For the reasons that follow, the application is allowed.

### III. **Issue and Standard of Review**

[12] The issue in this matter is whether the Decision is reasonable.

[13] The focus of this application is the H&C finding. Granting H&C relief has been described as "a flexible and responsive exception to the ordinary operation of the [*IRPA*]"'. The discretion to grant it is exercised "to mitigate the rigidity of the law in an appropriate case": *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 19 [*Kanthasamy*].

[14] The standard of review that applies to a determination by the IAD of whether special relief under paragraph 67(1)(c) of the *IRPA* is warranted is reasonableness: *Cortez v Canada (Citizenship and Immigration)*, 2016 FC 800 at para 17.

[15] The reasonableness of a decision is determined by examining whether the decision-making process was justifiable, intelligible and transparent, as well as whether it falls within the range of possible, acceptable outcomes defensible on the facts and law. Under the reasonableness standard, this Court owes deference to the expertise of the decision-making tribunal. Deference requires that the Court pay respectful attention to the reasons offered or that could have been offered: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47 and 48 [*Dunsmuir*].

[16] If the decision falls within the range of reasonable outcomes, then the fact that a different outcome is possible does not lead to a finding that a decision is unreasonable. When the reasons allow a reviewing court to understand why the tribunal made its decision and permit the court to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 16 and 17.

#### IV. **The Decision under Review**

##### A. *The IAD Findings*

[17] The IAD found that Ms. Wu's misrepresentation was very serious. A significant amount of positive H&C grounds would be required to overcome it.

[18] The IAD acknowledged that Ms. Wu bore the onus to establish, on a balance of probabilities, that there were sufficient H&C grounds to allow the appeal.

B. *The IAD Credibility Concerns*

[19] While the inadmissibility finding of the IAD is not at issue in this application, it is helpful to set out the credibility concerns the IAD expressed in paragraph 16 of the Decision:

As outlined below in the appellant's evidence there are numerous significant credibility problems which leads the panel to conclude that she is not a credible witness and that her marriage to her sponsor was not genuine on her part and entered into primarily to facilitate her immigration to Canada.

[20] The IAD discussed what it characterized as the "most significant credibility concerns" and stated that the list was far from exhaustive. After reviewing these concerns, the IAD found that "the severe credibility concerns outlined above lead me to conclude that the appellant is not a credible witness." It found, on a balance of probabilities, that Ms. Wu married her ex-husband so that she could immigrate to Canada. For that reason, the exclusion order was found to be valid.

C. *The H&C Analysis*

[21] The IAD identified and applied the factors established in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IADD No 636. These factors outline what matters the IAD should weigh in exercising its discretion to grant H&C relief to allow an appeal from an exclusion order. They are:

- a) The seriousness of the misrepresentation;
- b) The length of time the appellant has been in Canada and the degree to which the appellant is established;
- c) The impact the appellant's removal from Canada would have on members of the appellant's family;
- d) Family in Canada and the dislocation to that family that removal of the appellant would cause;

- e) The support available for the appellant within the community; and
- f) The hardship the appellant would face in the country to which she would likely be removed.

[22] The IAD found that Ms. Wu knowingly and willingly failed to disclose material facts and misrepresented herself in her application for permanent residence status. Her misrepresentation was direct, deliberate, and material to the outcome of her immigration status.

[23] The IAD found that Ms. Wu consistently maintained that she had a genuine marriage, admitted no guilt, and expressed no remorse. Those were negative factors in assessing the merits of her appeal.

[24] In terms of her establishment in Canada, the IAD found that Ms. Wu had been here since April 2012 and had been employed until she gave birth in 2017. She was also studying English at night. Considering various other factors, the IAD found she was moderately established in Canada. As her establishment was enabled by her misrepresentation, it was only a slightly positive factor.

[25] The IAD concluded that the impact on Ken of Ms. Wu's removal was a moderately positive factor. The panel noted that Ken was not called as a witness and that he had provided no statements. It accepted Ms. Wu's statement that she and Ken had been cohabiting since 2014. She said she would take her son to China and that this would negatively affect Ken. She also indicated that Ken was 61 years old with three grown children from a prior relationship. None of Ken's children had been in contact with either Ms. Wu or her son.

[26] Ms. Wu testified that the impact on her and her son if she was returned to China would be that she would have no place to live, and that it would be difficult for her to find work, given that she was 36 years old and had only a high school diploma.

[27] The IAD found that it would be challenging for Ms. Wu to re-establish herself in China, but that it would not amount to undue hardship. It found the impact on her was a positive factor in assessing the merits of the appeal.

[28] The IAD concluded by considering the best interest of the 1 year old child, Howard [BIOC]. Ms. Wu alleged that Howard would have no status in China and would face discrimination as the child of a single parent. She argued that Howard would benefit from having both a mother and father present.

[29] The IAD noted that it had received very little evidence to assist in determining how Howard's separation from his father would likely affect him. In addition to the father not giving evidence, the IAD noted that Ms. Wu had not submitted any documentation regarding the law in China and how Howard would be treated by the Chinese authorities. The IAD found that as a consequence of the lack of evidence, it could only speculate as to what Howard's status and situation would be in China.

D. *The Conclusion*

[30] The IAD accepted, on a balance of probabilities, that if Howard went to China he would be separated from his father for a lengthy period of time. The panel said that this fact was of great concern and "[a]bsent any evidence that this child does not have a present and caring

father” it would not be in the baby’s best interest to be separated from his father. The IAD found that this factor, more than any other, weighed heavily in favour of granting the appeal.

[31] In concluding, the IAD found that Ms. Wu had satisfied her onus of proving that sufficient humanitarian and compassionate considerations existed to warrant the exercise of special relief to allow the appeal.

## V. Analysis

[32] The Minister argues that the finding made by the IAD with respect to the best interest of the child was unsupported by any evidence or analysis. As it was devoid of internal logic, the Decision is unreasonable.

[33] Ms. Wu argues that the Minister is asking the Court to re-weigh the evidence and ignore the uncontradicted, sworn testimony she gave at the IAD. She relies on *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA) [*Maldonado*] to say her testimony must be accepted as it was sworn.

[34] The negative credibility findings made by the IAD provide a basis for doubting the sworn testimony of Ms. Wu and the applicability of *Maldonado*. In addition, Ms. Wu failed to provide any documents to demonstrate the nature of the relationship between Howard and Ken or explain how Howard would be treated in China. As Ken did not testify, corroborative documents of Ms. Wu’s statements of the best interest of Howard in remaining in Canada were expected. The IAD remarked that it was unfortunate there were no such documents and the result was it would have to speculate.



[35] The reasoning process of the IAD is neither transparent nor is it intelligible. The IAD stated that because of the previously listed severe credibility concerns, Ms. Wu was not a credible witness. She knowingly and willingly failed to disclose material facts in her application for permanent residence. The character and integrity of Ms. Wu was further called into question when the IAD identified that Ms. Wu took advantage of Norman, a man with a disability, which was an aggravating factor.

[36] In reviewing the H&C grounds, the IAD clearly stated that a significant amount of positive H&C factors were required to overcome the very serious misrepresentation by Ms. Wu.

[37] In searching for those factors, the IAD found that it has very little evidence to assist in determining the impact of the child's separation from his father or how China would treat Howard as a non-citizen. The IAD terms this lack of information "unfortunate".

[38] The IAD had before it no corroborative evidence from Ken regarding his relationship with Howard. It had no documentary evidence as to how Howard would be treated by Chinese authorities given that he is a Canadian child. The IAD did have, and recognized it in the Decision, evidence that Ms. Wu did not investigate what would happen to Howard if she returned to China with him. The IAD found that it was put in a position to speculate as to Howard's life in China if he accompanied Ms. Wu.

[39] The only factor the IAD identified as weighing heavily was its conclusion that it would not be in Howard's best interest to be separated from his father for a lengthy period of time.

[40] The IAD referred to no evidentiary foundation for that conclusion. It said it "accepts on a balance of probabilities" that is what will occur. It is not possible to discern from the reasons or

the record how or why the IAD arrived at that conclusion. The IAD's use of the word "accept", in the absence of evidence that could have been accepted, demonstrates that the conclusion is speculative.

[41] The IAD recognized that Ms. Wu bore the onus to show that there were sufficient H&C grounds to allow the appeal. Inexplicably, when the IAD found that it is not in Howard's best interest to be separated from his father, Ken, the reason provided was that there was no evidence that the child does not have a present and caring father.

[42] I observe that there is in fact no evidence, other than a few statements by Ms. Wu, that there is a present and caring relationship between Ken and Howard. That is the onus Ms. Wu bore but did not meet. She failed to provide evidence of any real relationship between Ken and Howard.

[43] The IAD cannot turn the onus around and expect the Minister to prove a negative – the absence of a present and caring relationship. Ms. Wu was represented by counsel. It was her choice not to have Ken attend the hearing or give affidavit evidence. Ms. Wu was required to present evidence to support her H&C grounds. Her failure to provide evidence from Ken or anyone else to substantiate Ken's relationship with Howard cannot be overcome by shifting an onus to the Minister.

[44] Ms. Wu argues that the IAD's finding about her lack of credibility did not extend to the H&C analysis, as these are two separate issues.

[45] I disagree. The IAD commented extensively, in strong language, upon the nature and extent of Ms. Wu's misrepresentations. When the IAD found Ms. Wu to be "not a credible witness", it established the starting point for reviewing all of her testimony.

[46] Quite apart from her credibility or lack thereof, Ms. Wu proffered little or no evidence as to the best interest of her child. For example, when Ms. Wu opined that her son would have no status in China and would face discrimination because she was a single parent, she did so without any foundation for her comments. The IAD found that she had not investigated what would happen to her son if he went to China with her.

[47] It has been held that where the only evidence before a tribunal linking an applicant to their claim is from the applicant, a finding or perception that the applicant is not a credible witness "effectively amounts to a finding that there is no credible evidence on which the [tribunal] could allow [the] claim": *Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 238 (FCA), at para 7. That is the situation with Ms. Wu. The only evidence she offered to the IAD was her own testimony, which the IAD generally disbelieved.

[48] The granting of H&C relief is not intended to be an alternate immigration stream. It should be reserved for exceptional cases: *Kanthasamy* at para 90. Keeping that in mind, at a minimum, the IAD had to articulate how it determined, without any reliable evidence before it, that Ms. Wu had shown on a balance of probabilities that it was in Howard's best interest to allow the appeal. This is all the more important as Ms. Wu lacked credibility as a witness.

[49] While the IAD is accorded high deference, this Court has recognized that "[t]he standard of reasonableness requires that the findings and overall conclusion withstand a somewhat

probing examination. Where ... the findings do not follow from the evidence, the decision will not withstand the probing examination”: *Canada (Citizenship and Immigration) v Wright*, 2015 FC 3 at para 68.

[50] Despite the initial findings and observations by the IAD concerning Ms. Wu’s credibility and the lack of evidence to support her H&C request, the IAD somehow determined that her generalized and vague testimony satisfied her onus to prove that there were sufficient H&C considerations to merit granting her appeal.

[51] No clear path exists from the evidence before the IAD to the outcome. Essentially, the conclusion simply appears. The only reason for the conclusion appears to be the “great concern” of the IAD that Howard and Ken will be separated for a long time.

[52] The IAD reached a conclusion without making any credibility findings in favour of Ms. Wu. It found that there was little evidence and that it could only speculate about what Howard’s life would be like in China.

[53] In light of the paucity of evidence received by the IAD, the lack of analysis it performed (other than with respect to making the negative credibility finding) and the failure to explain how or why it reached the conclusion that Ms. Wu met her onus, it is not possible for the Court to assess the reasonableness of the IAD’s conclusion.

[54] It is not clear from the reasons or the underlying record why the IAD reached the outcome it did. Therefore, the *Dunsmuir* criteria have not been met.

[55] Due to the lack of transparency in the reasons for the Decision, it must be set aside and returned for redetermination by a different panel. There is no serious question of general importance for certification.

**JUDGMENT in IMM-3984-18**

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

1. The application is allowed and the Decision is set aside.
2. This matter is returned for reconsideration by a different panel.
3. There is no serious question of general importance for certification.
4. No costs are awarded

"E. Susan Elliott"

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3984-18

**STYLE OF CAUSE:** THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS v JIN XIU WU

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** APRIL 9, 2019

**JUDGMENT AND REASONS:** ELLIOTT J.

**DATED:** NOVEMBER 22, 2019

**APPEARANCES:**

Nadine Silverman

FOR THE APPLICANT

Peter Lulic

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Attorney General of Canada  
Toronto, Ontario

FOR THE APPLICANT

Peter Lulic  
Barrister and Solicitor  
Toronto, Ontario

FOR THE RESPONDENT