Federal Court  Cour fédérale

Date: 20210422

Docket: IMM-4931-19

Citation: 2021 FC 358

Ottawa, Ontario, April 22, 2021

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

DONG JUN LI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Mr. Dong Jun Li, seeks judicial review of the decision of the Immigration Appeal Division [“IAD”] denying his appeal of the exclusion order made against him on humanitarian and compassionate [“H&C”] grounds.

II. Background

[2] Mr. Li was found by the Immigration Division ["ID"] of the Immigration and Refugee Board to be inadmissible for misrepresentation pursuant to section 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, C 27 ["*IRPA*"]. An exclusion order was made against him.

[3] He became a permanent resident ["PR"] of Canada on April 30, 2005, and his wife, daughter and grandson are all Canadian citizens.

[4] Shortly after landing in Canada, he returned to China to consult for the large company he had sold. His evidence is he was worried that he did not have enough days in Canada to maintain his PR status. He hired New Can Consultants Ltd ["New Can"], owned by Xun "Sunny" Wang ["Mr. Wang"], in order to manage his residency requirements. Subsequently, there was a finding of serious and large-scale fraud by Mr. Wang and New Can against the Canadian immigration system (see *R v Wang*, 2015 BCPC 302).

[5] Mr. Li was absent from Canada for 1414 days, and did not meet his residency requirements. His application prepared by Mr. Wang indicated that he had only been absent for 959 days, and also that he was working for a Canadian company in China.

[6] Mr. Wang had removed pages from Mr. Li's passport and submitted a false application regarding his days absent in Canada. In addition, it was found that Mr. Li was receiving phony

payments as part of the scheme orchestrated by New Can and Mr. Wang to retain his PR status by having him work for a Canadian company in China (see *IRPA* s 28(2)(a)(iii)).

[7] An admissibility hearing was held at the ID where it was determined, in a decision dated May 10, 2018, that Mr. Li was inadmissible to Canada because of misrepresentation, and an exclusion order was issued.

[8] He appealed to the IAD and was not successful. The IAD, in a decision dated July 19, 2019, did not find there were sufficient H&C or Best Interests of the Child ["BIOC"] factors to warrant special relief, and dismissed the appeal. That decision is the subject of this judicial review.

III. Issue

[9] The determinative issue is:

A. Did the tribunal err in law in its exercise of its discretion because it made serious factual errors that undermine its conclusions?

IV. Standard of Review

[10] The parties agree, as do I, that the standard of review is one of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 ["*Vavilov*"]; *Zhao v Canada (Minister of Citizenship and Immigration)*, 2021 FC 38 at para 8).

V. Analysis

A. *Did the tribunal err in law in its exercise of its discretion because it made serious factual errors that undermine its conclusions?*

[11] Mr. Li acknowledged that the jurisprudence is clear that significant deference must be given to the IAD in these situations (see *Vavilov*, at para 125; *Kusi v Canada (Minister of Citizenship and Immigration)*, 2021 FC 68 at para 20). He also acknowledged that the IAD set out the correct factors to be considered, listed at paragraph eleven of the IAD decision.

[12] Though Mr. Li presented a number of other issues in submissions, his oral submissions were focused on the fact that there were five factual errors that were so material to the decision that, even respecting the officer's discretion, the decision is unreasonable.

[13] I agree.

[14] The cumulative errors take the decision outside the realm of one that is justified, transparent and intelligible, as is required by *Vavilov*. Considered separately, I do not believe that the errors would make the decision unreasonable, but when taken together it is difficult to determine what was reasonable and what was not, because it is impossible to unpack the influence of each error to each related factor.

[15] The errors have produced a flawed unreasonable decision.

[16] Now that being said, even without the errors, I am not sure that the decision would have been different. However, the Applicant has a right to have the decision based on the evidence filed, and to have coherent and reasonably factually accurate reasons why.

(1) Decision under Review

[17] Mr. Li did not challenge the legal validity of the misrepresentation finding, but rather whether sufficient H&C considerations or BIOC warranted special relief pursuant to paragraph 67(1)(c) of the *IRPA*.

[18] The IAD found that the application for his renewal of his PR contained false information, which could induce an error in the administration of the *IRPA*, and that he had signed a blank form, which facilitated the misrepresentation.

[19] Mr. Li does not dispute the admissibility finding and that the determination of misrepresentation was legally valid. This only left any special relief to be determined before the tribunal. He does, however, dispute some of the facts in the decision of the IAD.

[20] The IAD identified the test as them being satisfied that "at the time the appeal is disposed of, taking into account the best interest 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". They also noted that the considerations could include:

> a) the seriousness of the misrepresentation leading to the removal order and the circumstances surrounding it;
>
> b) the remorsefulness of the Appellant;

> c) the length of time and degree of an Appellant's establishment in Canada;
>
> d) the impact of removal on an Appellant's family member in Canada;
>
> e) the support available for the Appellant in the family and community;
>
> f) the degree of hardship that would be caused to the Appellant by the removal from Canada, including the conditions in the likely country of removal; and
>
> g) the best interests of a child directly affected by the decision.

[21] The IAD pointed out that the exercise of discretion must be consistent with the objectives of the *IRPA*, and that means that the health, safety and security of all Canadians must be considered.

[22] The IAD found that Mr. Li's claim of innocent misrepresentation was of no consequence because jurisprudence has consistently shown that a deliberate or intentional act is not required for a finding of misrepresentation, and that a third party's actions can be found to cause a misrepresentation.

[23] The IAD also found that someone with Mr. Li's business acumen would not have signed a blank PR card renewal application without having had it translated, and that it did not make sense that he would not immediately be suspicious of being in receipt of paycheques without doing work for them. While he did refund the payments received, he took no further steps to determine the legitimacy of his PR card renewal. Based on this, the IAD found that he was responsible for the misrepresentation. The decision then goes on to explain that because Mr. Li

was aware of his residency obligations; the misrepresentation did induce an error in the administration of the *IRPA*; that it undermined the integrity of the immigration system and was a grave misrepresentation.

[24] The IAD then found that Mr. Li did not express remorse or take responsibility for the false information, blaming instead the consultant. The IAD found that despite his returning the money, Mr. Li continued to use New Can and that there was unreported income in his tax returns. The IAD held that he characterized himself as a victim, and that this was not indicative of remorse.

[25] The IAD found that Mr. Li has not worked in Canada, did not pay taxes to Canada (apart from false paycheques), but he does have property, bank accounts, and financial investments in Canada. The IAD said that his immediate family resides in Canada, and that he is involved in a local faith community, concluding that there is establishment in Canada, but that it is mitigated by the fact that but for the misrepresentation, he would not have been in Canada to establish here. Overall, though, the IAD found that his establishment in Canada was a positive factor.

[26] The IAD then turned to the impact on the family, and noted the 2016 diagnosis of esophageal cancer. They note that there was little evidence to show the amount or type of care Mr. Li's wife gives to his daughter and grandchild, and what kind of hardship would be encountered if she accompanied her husband to China. The IAD also noted that his wife already travels to China several times a year, and stays for around two months per trip, and that this

shows that there would be little hardship if she were to accompany Mr. Li to China. There was some finding or hardship to the family if they were to care for Mr. Li in another location.

[27] The IAD found that the support from community and family represented a positive factor.

[28] Next, the IAD turned to the medical hardship Mr. Li might face if he were removed. They considered health care outside of Canada, and noted that there was little evidence to substantiate that the health care in China was lacking. Mr. Li submitted two letter from doctors, but one was from a family friend who was not treating him. The other letter pointed out the 23% survival rate, but the IAD noted that this prognosis was potentially not considering the treatment he had already received. The IAD noted that Mr. Li had sought treatment in the United States. They noted a discrepancy which brought into doubt that Mr. Li had stopped treatments in the United States, and that there is evidence that he has the means to seek treatment outside of China or Canada. Because of this, they found that there was little evidence of undue medical hardship should Mr. Li return to China.

[29] Regarding BIOC, the IAD found that there was little evidence of any hardship, and that Mr. Li's presence was not essential for his grandson's well-being.

[30] The IAD noted that counsel provided the Member with related past IAD decisions to consider, and that despite not being bound by them, they stated that they have reflected upon them in their consideration.

[31] The five factual errors alleged by Mr. Li are:

- whether he signed a blank form;
- whether he declared his income;
- in finding that his misrepresentations induced an error in the administration of the IRPA;
- in finding that he would not be in Canada but for his misrepresentation; and
- misconstruing the evidence regarding his medical prognosis.

[32] While the Respondent conceded some were errors in the decision, they valiantly defended that others were not errors, or if they were that they were not central to the decision and the decision could stand as reasonable despite them. As well there were disagreements between the parties as to what was an error by the decision-maker and what were not errors only different interpretations of the evidence.

[33] In oral arguments, counsel for Mr. Li argued that when exercising discretion, you may use it as you like, but you should get the evidence right. If one of the errors was not fatal, cumulatively the errors together are.

(2) Blank Form

[34] Mr. Li proffered that because the IAD made an error in the signing of the blank form, that this shows that the tribunal failed to understand and consider the evidence that was before it. He testified before the tribunal that he did not see any form with inaccurate information, and that he adduced expert evidence to show that the form with the correct information had been signed by him, and that the form with the incorrect information had a forged signature. There were two

forms, one with accurate information and signed by him, and one with inaccurate information and a forged signature. He argues that the finding that he signed a blank form is central to their decision, and represents a gross error on the part of the tribunal.

[35] The Respondent concedes that there was an error with respect to the finding that Mr. Li signed a blank form, but argues that it is not significant.

[36] I find this to be a determinative error given that this could affect the credibility assessment of the officer as well as the assessment of the remorse factor and possibly others. Given the importance of the seriousness of the representation, Mr. Li is entitled to a decision free of this serious error that was stated twice and is integral (or could be) to many of the officer's other determinations.

(3) Undeclared Income

[37] Mr. Li goes on to argue that the tribunal erred in finding that the he did not declare his income. He testified that he provided all of the information related to his income in China to his accountant, and instructed him to file the necessary tax returns. He raised the fact that the tribunal did not make an adverse credibility finding regarding this point, and yet that they were required to state their disbelief in clear terms with reasons. He also asserted that the IAD misstated the evidence when they said that he testified to not having declared the income he earned consulting.

[38] The Respondent disagrees. They argue that the transcript appears to acknowledge that income was not included in his tax returns, and they reproduced the following exchange from the IAD hearing:

> Board Member: Okay. So, you were paid for this consulting?
>
> Appellant: Yeah, they pay me.
>
> Board Member: Why is it not reported in your 2008 tax returns?
>
> Appellant: I cannot remember exactly. I did that consulting job for three years. I don't know.
>
> Board Member: Did you report that income in Canada?
>
> Appellant: Yes, I did.
>
> Board Member: It's not in the records we have.
>
> Appellant: I don't know if it was not clearly spelled out. All the taxes I file is here.
>
> (Certified Tribunal Record at page 536)

[39] In paragraph 17 of the IAD decision, the Member finds that Mr. Li testified to not paying taxes.

[40] While I agree with the Respondent that the onus is on the Applicant to produce the evidence, and would have access to documents to clear up what has become muddy, I do not agree that Mr. Li said he acknowledged that he did not include income in his tax returns. From the transcript above at paragraph 38, I can only interpret him saying "yes, I did" as him saying yes he included the income. So with this review of the evidence, I find a factual error.

(4) Induce an error in the administration of the *IRPA*

[41] Regarding whether the misrepresentation induced an error in the administration of the *IRPA*, Mr. Li argues that because the PR card was never issued, there was no error in the administration of the act, as was found in the reasons of the IAD. His position is that a finding of misrepresentation can be made when incorrect information could induce an error, but submits that there are important differences between one that could, and does induce an error. In the case of an actual error, he says, there is a clear benefit from the misrepresentation.

[42] The Respondent disagrees, and says that the PR card was prepared and ready to be picked up. They contend that it was issued because the Cambridge Dictionary defines "issues" as "to produce or provide something official". They cite other similar dictionary definitions, and state that because the PR card was prepared as a result of a misrepresentation, that means an error was induced.

[43] The Respondent then submits that there is no reason to distinguish between when an error is or could be induced in the language of the *IRPA*. They maintain that he knew when he applied for his PR card that he was short of the residency obligation, and that he should not suffer lesser consequences from his misrepresentation just because it was caught before it was given to him.

[44] It is unnecessary for me to make a determination if this is an error or not because I do not find that this in itself would be enough to find this decision unreasonable though it is part of the cumulative assessment.

(5) Establishment in Canada / Only present in Canada but for the misrepresentation

[45] Regarding establishment, and whether he would be in Canada despite the misrepresentation, Mr. Li asserts that the finding that but for his misrepresentation he would not be in Canada to establish himself was an error. He was granted PR is 2005, and there was no allegation of misrepresentation on that application. He returned to Canada in 2009, and did not rely on any misrepresentation to enter on that occasion. The only way he could lose his status would be if a removal order was issued against him. Immigration, Refugees and Citizenship Canada became aware of his misrepresentation in 2010, but no action was taken to revoke his status until 2015, and during that time, he maintained his status.

[46] The Respondent responded that it was reasonable for the IAD to apply the principle that misrepresentation is a relevant factor in considering a person's establishment. They go on to argue that the misrepresentation began in 2008 when Mr. Li contacted New Can and that when he returned to Canada in April of 2020 he was not complying with the residency requirements absent his fraudulent work. They say, finally, that the IAD concluded that Mr. Li's establishment was a positive factor, and that this is an "overzealous, microscopic examination" of the tribunal decision. The Respondent points out that the error must be material to the decision reached, as set out in *Miranda v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 437 at paragraph 5, and this clearly is not such an error. The Respondent pointed out that it was found that establishment was a positive factor whether there was an error or not.

[47] I agree with the Respondent that it is difficult to find that this determination by the officer, in itself, would be cause to grant the application, especially because the officer did weigh establishment as a positive factor. Nevertheless, when viewed as a whole this negativity can only pervade and bleed in to some of the other factors so when added to the mix it makes it a cumulatively unreasonable decision.

(6) Mr. Li's prognosis

[48] The Respondent submitted that there is no evidence about the survival rate of Mr. Li himself as the evidence is only general of all people who suffer from the type of cancer that Mr. Li does after treatment and that Mr. Li has not fully relied on the Canadian health care system for his treatment.

[49] In response, Mr. Li contends that this was an error, and that the tribunal did not consider the letter from his treating doctor, who states that there may be a recurrence of the tumor, and that the five-year survival rate is 23% from the date of the initial diagnosis. Mr. Li says the letter is very specific to his survival rate.

[50] The Respondent replies, saying that the IAD noted that this statement does not seem to take into account any benefit he might have received from his treatments at the Mayo Clinic in the United States and that the IAD did not dispute the seriousness of Mr. Li's condition—they were just pointing out that it was unclear whether the 23% survival rate was general to all those who suffered from the same sort of illness as him, or if it took into account the treatments he received.

[51] I find this to be an error of some gravity that is central to the factors weighed and considered by the officer. The Member brings into question the benefits of any treatment received by Mr. Li to the prognosis, but does not explain why they have doubt. They could have noted dates of treatment in relation to the date of the letter, vagueness of the Dr's letter, or any number of factors. Without more complete reasoning, it must be seen as an error.

[52] The cumulative effect of what are clearly error and what could be misinterpretations over all make this decision unreasonable.

[53] I am granting this application. I will quash the decision and send it back to be redetermined by a different decision-maker.

[54] No questions were presented for certification and none arose from the arguments.

JUDGMENT IN IMM-4931-19

THIS COURT'S JUDGMENT is that:

1. The Application is granted. The matter is sent back to be redetermined by a different decision-maker;

2. No question is certified

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4931-19
STYLE OF CAUSE:	DONG JUN LI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN VANCOUVER, BRITISH COLUMBIA AND TORONTO, ONTARIO
DATE OF HEARING:	APRIL 8, 2021
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	APRIL 22, 2021

APPEARANCES:

Lorne Waldman	FOR THE APPLICANT
David Cranton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT