Federal Court Cour fédérale

Date: 20210421

Docket: IMM-772-20

Citation: 2021 FC 328

Ottawa, Ontario, April 21, 2021

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

Xiao ZHANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Mrs. Xiao Zhang seeks judicial review of the January 20, 2020 decision rendered by the Immigration Appeal Division of the Immigration and Refugee Board of Canada [the IAD] upholding a decision of the Immigration Division [the ID] of the same tribunal.

[2] The IAD found the Exclusion Order the ID made against Mrs. Zhang on June 10, 2018, to be legally valid, as Mrs. Zhang misrepresented material facts relating to a relevant matter that induced an error in the administration of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [the Immigration Act]. The AID also found, based on all the evidence before it, taking into account the best interests of a child directly affected by the decision, there were not sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case. The IAD thus dismissed Mrs. Zhang's appeal.

[3] For the reasons detailed below, this Application for judicial review will be dismissed.

II. Factual and Procedural Background

[4] In 2003, Mrs. Zhang, a Chinese citizen, entered Canada as a temporary resident, in order to study.

[5] On July 22, 2006, Mrs. Zhang married Mr. Davis, a Canadian citizen, in an event staged in order for Mrs. Zhang to secure Canadian permanent resident status. Mrs. Zhang paid a considerable sum of money, and even signed the divorce paper, prior to the marriage. Mr. Davis sponsored Mrs. Zhang, and on August 24, 2007, Mrs. Zhang was granted permanent resident status in Canada under the family class. On June 29, 2009, Mrs. Zhang and Mr. Davis were officially divorced.

[6] On July 4, 2010, Mrs. Zhang married her second and current husband, Mr. Jie Xiong Zhang, a Canadian citizen. They have two young children together, both born in Canada, and thus Canadian citizens. Mrs. Zhang is not a Canadian citizen.

[7] The Canada Border Service Agency [CBSA] initiated and conducted "Project Honeymoon", in order to investigate immigration marriage fraud. On June 7, 2017, an officer interviewed Mrs. Zhang who ultimately admitted that she paid a third party to arrange her first marriage to Mr. Davis, for the sole purpose of getting permanent resident status in Canada.

[8] On June 7, 2017, an officer signed a report under subsection 44(1) of the *Immigration Act* wherein opining that Mrs. Zhang, a permanent resident, was inadmissible pursuant to paragraph 40(1)(a) of the Immigration Act for misrepresentation. On the same day, the matter was referred to the ID for an admissibility hearing under subsection 44(2) of the Immigration Act, in order for the ID to determine if Mrs. Zhang is a person described in paragraphs 40(1)(a) of the Immigration Act and paragraphs 4(1)(a)(b) of the Immigration Regulations.

[9] On July 10, 2018, the ID conducted the admissibility hearing, and at the end of the hearing, issued its decision. The ID, given the evidence and admissions, found, on a balance of probabilities, that Mrs. Zhang made a misrepresentation, as entering into a false marriage is a material fact, and did induce an error in the administration of the Act in that she was granted permanent residency status on false pretences. The ID found Mrs. Zhang to be a person described under paragraph 40(1)(a) of the Immigration Act, and issued an exclusion order against her.

[10] Paragraph 40(1)(a) of the Immigration Act states that a permanent resident is inadmissible for misrepresentation, (a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act (..).

[11] Under paragraph 40(2)(a), the permanent resident continues to be inadmissible for misrepresentation for a period of five years following the date the removal order is enforced.

III. The IAD Proceeding

[12] Mrs. Zhang appealed the ID's decision before the IAD. She did not challenge the legal validity of the exclusion order, but submitted that, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warranted special relief in light of all the circumstances of the case, per paragraph 67(1)(c) of the Immigration Act. .

[13] On December 3, 2019, the IAD conducted its hearing, where Mrs. Zhang and her husband testified.

[14] On January 20, 2020, the IAD dismissed Mrs. Zhang's appeal. The IAD panel confirmed the legal validity of the exclusion order made by the ID, and found, based on all the evidence before her, taking into account the best interests of a child directly affected by the decision, that there were not sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case.

[15] The IAD first confirmed that the documentary evidence, interviews, and Global Case Management System (GCMS) notes supported the conclusion that Mrs. Zhang misrepresented her first marriage, which led to an error in the administration of the Immigration Act. The IAD found that Mrs. Zhang was responsible for the misrepresentation even though it occurred through a third party (the immigration consultant) and that the narrow exception for misrepresentations of which the individual was unaware, and which occurred beyond their control, did not apply.

[16] The IAD then considered whether Mrs. Zhang was successful in establishing a case for special or discretionary relief. The IAD first noted there are many factors to be considered by the IAD when exercising its discretionary jurisdiction. In the context of a misrepresentation, these factors include: the seriousness of the misrepresentation leading to the removal order; the degree of remorse expressed by the Appellant; the length of time spent in Canada and the degree to which the Appellant is established in Canada; the Appellant's family in Canada and the impact to the family the removal would cause; the family and community support available to the Appellant; the degree of hardship that would be caused to the Appellant by removal, including the conditions in the likely country of removal; and the best interests of any children affected by the decision.

[17] The IAD also noted that the exercise of its discretion had to be consistent with the objectives of the Immigration Act, which include the protection of the health and safety of Canadians and of the security of Canadian society, as well as the maintenance of the integrity of the immigration system.

[18] In regards to the seriousness of the misrepresentation, and after reviewing the circumstances, the IAD concluded that the misrepresentation was “egregious”. The IAD noted that the deceit allowed Mrs. Zhang to obtain a permeant resident card, that she was aware of the misrepresentation she engaged in, and bore responsibility for the misrepresentation done on her behalf. The IAD concluded that the seriousness of the misrepresentation did not weigh in favour or granting special or discretionary relief.

[19] In regards to the degree of remorse expressed, the IAD did not find Mrs. Zhang to be remorseful for her actions. It noted that any remorse was expressed *after* she was contacted by the authorities and only once the consequences became apparent. After reviewing the circumstances, the IAD did not find that Mrs. Zhang demonstrated an awareness of the depth and egregiousness of her actions. Rather, she demonstrated a regret of the consequences of being caught. Ultimately, the IAD did not find that Mrs. Zhang demonstrated, even at the hearing, the depth of responsibility that she bore for this misrepresentation. The IAD concluded this did not weigh in favour of the granting of special relief.

[20] In regards to the length of time spent in Canada and the degree to which Mrs. Zhang was established in Canada, the IAD reviewed the circumstances and found there was a level of family commitment to establishing in Canada. The IAD noted some positive points, hence that she learned English and French, had an active social and community life, and her involvement and responsibilities in her defined family role. The IAD also noted that Ms. Zhang’s husband left a Ph.D. program to focus on his home-based business, which requires extended work hours. As the business has yet to turn a profit, the family relies on financial support from their parents and

income from their rental properties, the down payment for which was provided by their parents. The IAD found that there was some level of establishment in Canada, but that this establishment was lessened by the fact that it was funded by family. The IAD found this degree of establishment weighed somewhat in favour of the granting of special or discretionary relief.

[21] In regards to family in Canada and the impact to the family the removal would cause, the IAD noted that Mrs. Zhang lives in Canada with her immediate family, while the remainder of the family is in China; only Mrs. Zhang's mother in law lives in Toronto while visiting China regularly.

[22] In regards to the degree of hardship that would be caused to Mrs. Zhang by removal, including the conditions in the likely country of removal, the IAD noted that both Mrs. Zhang and her husband testified that she experienced mental health issues since the misrepresentation became apparent. She also feared telling her mother of the misrepresentation, and was concerned she could not adjust to life in China as she had been away for a significant period of time. The IAD noted that Mrs. Zhang produced no documentary evidence to show that she could not receive support in China. The IAD found the hardship Mrs. Zhang would experience is primarily emotional. It noted also the potential challenges the children would face in attending school in China, but also found that their family is supportive (as evidenced by the financial support they provide) and that Mrs. Zhang's husband and children are Canadian citizens, which would permit her to have options to return to Canada. The IAD concluded that the support available to Mrs. Zhang in the family, and the hardship she would experience did not weigh in favour of granting special or discretionary relief.

[23] The IAD proceeded to consider the best interest of the children affected by the decision, a son, 8 years old and a daughter, 7 years old. The IAD noted that the children have always resided in Canada, save for a one or two, two-month long visits to China. The children speak French, English and Mandarin, with varying degrees of proficiency. The IAD noted that, given their age and foundation in Mandarin, any efforts the children would need to make to a life in China in regards to language would likely be of short duration.

[24] The IAD noted that Mrs. Zhang mentioned that her son experienced a health issue when he returned to China, but no supporting documentation were provided. The IAD made a similar conclusion regarding the assertion that education is more expensive in China, as no supporting documentation was provided. The IAD noted that Mrs. Zhang had provided a doctor's report, which supported her assertions regarding her family role and relationship, but the IAD also noted that the report did not significantly speak to the family's ability to adjust to life in China. The IAD also mentioned that the children would not lose their status in Canada and could thus return at a later date, with or without their parents.

[25] Overall, the IAD concluded that the best interests of the children involved was of limited assistance toward granting discretionary relief.

[26] The IAD concluded that, although Mrs. Zhang's establishment in Canada, and the best interests of a child affected by the decision were factors supporting granting of special or discretionary relief, they were insufficient to overcome the degree of her misrepresentation, the lack of remorse and the evidence of family and community support available to Mrs. Zhang,

should she be removed from Canada. The IAD thus found there were insufficient considerations to allow for the granting of special or discretionary relief.

[27] The IAD's decision is the object of this Application for judicial review.

IV. Parties' Arguments

[28] Mrs. Zhang raises three issues under litigation hence, whether the IAD (1) failed to observe the principles of natural justice; (2) based its decision on erroneous findings of fact, made its decision in a perverse and capricious manner and without regard to the material; and (3) based its decision on allegations of fact and opinions which did not form part of the record or the evidence. However, these issues are not addressed per se or in that manner in her memorandum.

[29] In her memorandum, Mrs. Zhang essentially submits that:

> (1) the decision is unreasonable because it does not take into consideration the effect it has on the applicant, citing paragraphs 133 to 135 of the Supreme court case in *Canada (Minister of Citizenship and Immigration) v Vavilov 2019 SCC 65*;
>
> (2) the main reason and only reason for the refusal is what the decision makers calls "a lack of remorse" which the IAD did not show how she came about to find out there was no remorse while the evidence show there was;
>
> (3) insofar as the children are concerned, the IAD did not take into consideration what would happen to the children if they stayed in Canada with their mother (*Osun v Canada* 2020 FC 295 paragraphs 20, 21, 23; *Duhanaj v Canada* 2015 FC 416);
>
> (4) the current coronavirus epidemic and other events in China will put the entire family in danger and in this case, the impact of the decision on Mrs. Zhang and her family is more that the usual hardships suffered by anybody (*Kanthasamy v Canada* 2015 SCC 61).

[30] The Minister responds that the decision is reasonable.

[31] The Minister cites as useful the non-exhaustive factors developed by the IAD in *Ribic v Canada (MCI)* 1985 IABD no 4, and confirmed by the Court in *Wang v Canada (MCI*) 2005 FC 1059, and reviews how the IAD assessed each.

[32] As per the first of two factors challenged by Mrs. Zhang, remorsefulness, the Minister denies Mrs. Zhang's statement that the lack of remorse is the main or only reason for the IAD's decision, as the IAD addressed the other factors from the case law. The Minister notes that the IAD found that her remorse only came when the CBSA became aware of her actions. The Minister also notes that the IAD found that Mrs. Zhang did not tell her parents, friends, or second husband up to at least the moment the CBSA became aware of her actions some 10 years later. The Minister notes that Mrs. Zhang did not admit the misrepresentation at the first opportunity.

[33] The Minister disagrees that Mrs. Zhang did not mention the misrepresentation to her family because she felt remorseful about it. Instead, the Minister argues that she kept silent until the CBSA investigation not to jeopardise her status, which had been obtained through misrepresentation. The Minister cites the decision in *Ylanan v Canada (MPSEP)* 2019 FC 1063 [*Ylanan*] which is not dissimilar to this case. The Minister thus argues that the IAD's conclusion on this point is reasonable.

[34] On the best interests of the children, the Minister notes that the IAD considered the children's activities and establishment in Canada, language proficiency, and visits to China. The

IAD also considered Mrs. Zhang's assertion that her child had pneumonia in China. However, the Minister notes that there is no documentation as to why that remains an issue seven years later or why the incident suggests that his immune system is deficient. The Minister therefore submits that the IAD committed no error.

[35] On Mrs. Zhang's argument regarding the COVID-19 pandemic, the Minister notes that this argument was not raised before the IAD and cannot be raised before the Court (citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19). The Minister adds that Courts only began taking judicial notice of the pandemic's impact in North America after the hearing and decision by the IAD. The Minister also notes that Mrs. Zhang did not provide documentation for her claim that education is more expensive in China and that the IAD reasonably concluded that the doctor's report discusses primarily Mrs. Zhang's relationship to her children, not their ability to adapt to life in China. The Minister notes, as it did before the IAD, that the presence of children is one factor to weigh in the analysis, and that appeals are not automatically granted because children are involved (citing *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 [*Semana*]). The Minister submits that the IAD reasonably concluded that the best interests of the children did not outweigh the other factors.

V. Analysis

[36] As in *Ylanan*, all issues relate to the IAD's overall assessment of whether the circumstances of Ms. Zhang's case warrant special relief based on sufficient humanitarian and compassionate considerations, as per paragraph 67(1)(c) of the Immigration Act. In *Canada*

(Citizenship and Immigration) v Khosa, 2009 SCC 12 [*Khosa*] at paragraphs 57-59, the Court determined that the standard of review of the IAD's decisions based on humanitarian and compassionate considerations and the exercise of its equitable discretion under paragraph 67(1)(c) of the Immigration Act is that of reasonableness. I also remind the parties, as my colleague did in *Ylanan*, that a request for a humanitarian and compassionate exemption is an exceptional and discretionary remedy (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15). As Justice Gascon stated in *Semana*, "[t]his relief sits outside the normal immigration classes or refugee protection streams by which foreign nationals can come to Canada permanently, and it acts as a sort of safety valve available for exceptional cases" (at para 15).

[37] Where the applicable standard of review is reasonableness, the role of a reviewing Court is to examine the reasons given by the administrative decision maker and determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Canada (MCI) v Vavilov* 2019 SCC 65 *Vavilov* at para 85). "[T]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para 100).

[38] However, while a reviewing Court should ensure the decision under review is justified in relation to the relevant facts, deference to a decision maker includes deferring to their findings and assessment of the evidence. Reviewing Courts should refrain from "reweighing and reassessing the evidence considered by the decision maker" (*Canadian Human Rights Commission*, at para. 55, citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12,

[2009] 1 SCR 339, at para. 64; see also *Dr. Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 SCR 226, at paras. 41-42, cited in *Vavilov*, at para 125) (*Canada Post Corp v Canadian Union of Postal Workers* 2019 SCC 67 at para 61).

[39] Mrs. Zhang's arguments have not convinced me that the IAD's decision is unreasonable, in that it does not bears the hallmarks of reasonableness – justification, transparency and intelligibility – or that it is not justified in relation to the relevant factual and legal constraints that bear on the decision.

[40] On the contrary, I am satisfied that the decision-maker considered the factors dictated by the jurisprudence of the Court and that are relevant as part of the exercise of her discretionary jurisdiction in deciding whether or not to grant special relief on humanitarian and compassionate grounds. The IAD's decision is clear and intelligible. The IAD addresses each factor in turn and supports its findings with the evidence. The decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker".

[41] Second, I do not agree with Mrs. Zhang that the IAD dismissed the appeal solely based on its conclusion regarding her degree of remorse. As described above, the IAD weighed all of the factors, and found that one somewhat in favor, others did not weigh in favor and another was of limited assistance. Furthermore, given the record – particularly Mrs. Zhang's testimony and the 10-year period over which she kept her misrepresentation to herself, and the fact that she

admitted when being investigated, the IAD could reasonably conclude that she had not fully taken responsibility for her actions.

[42] In regards to the best interest of the children, I agree that the presence of children in Canada does not dictate that an appeal be granted. If such were the case, almost all appeals would be granted. Rather, the law is settled that a decision-maker conducting a humanitarian and compassionate analysis must properly identify and define the best interest of the children factor and then balance it against the countervailing factors, as in this case namely the seriousness of the misrepresentation and absence of remorse. The factor relating to the best interests of the children does not necessarily trump other factors for consideration. However, in order to fall within the range of reasonableness, the decision-maker must consider the children's best interests as "an important factor, give them substantial weight and be alert, alive and sensitive to them", stated differently, the presence of children does not call for a certain result (*Semana)*. The Applicant has not convinced me that the IAD erred in its assessment given the evidence on record. Finally, I agree with the Minister that the decisions cited by Mrs. Zhang are distinguishable from the case at bar.

[43] In her memorandum, Mrs. Zhang argues the current coronavirus epidemic will put the entire family in extreme danger and that in this case, the impact of the decision on Mrs. Zhang and her family is more that the usual hardships suffered by anybody (*Kanthasamy v Canada (Citizenship and Immigration)* 2015 SCC 61). In her reply, Mrs. Zhang asks that the Court takes judicial notice of country conditions in China, specifically of "what is going on between China and Canada, and the threat to Canadian citizens living in China" because "three Canadians [are]

being held hostage in China" and "a Chinese citizen is before the extradition Courts of Canada" (at para 4).

[44] These arguments were not before the IAD, and the Court thus cannot consider them.

VI. Conclusion

[45] In essence, Mrs. Zhang disagrees with the IAD's assessment and conclusions, and she asks the Court to reweigh the factors, which it cannot do under judicial review. I am satisfied the IAD rendered a comprehensive and nuanced decision, is based on "an internally coherent and rational chain of analysis" and "justified in relation to the facts and law that constrain the decision maker". For the foregoing reasons, the Application for judicial review will be dismissed.

Judgment in IMM-772-20

THIS COURT'S judgment is that:

1. The Application for judicial review is dismissed;

2. No question is certified.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Me Harry Blank	FOR THE APPLICANT
Me Daniel Latulippe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Harry Blank Montréal (Québec)	FOR THE APPLICANT
Attorney General of Canada Montréal (Québec)	FOR THE RESPONDENT