Federal Court  Cour fédérale

Date: 20210409

Docket: IMM-564-20

Citation: 2021 FC 306

Ottawa, Ontario, April 9, 2021

PRESENT: Madam Justice Walker

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

RU LIU

Respondent

JUDGMENT AND REASONS

[1] The Minister of Citizenship and Immigration seeks judicial review of the January 10, 2020 decision (Decision) of the Immigration Appeal Division (IAD) granting the request made by Ms. Ru Liu to reopen her appeal against a departure order issued against her in 2016. The departure order was based on Ms. Liu's failure to observe the Canadian residency obligations imposed under section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] For the reasons set out in this judgment, the Minister's application will be allowed and the Decision set aside. The IAD's analysis lacks justification against the relevant provisions of the IRPA and the evidentiary record. The Decision reflects the IAD's views on the conduct of Ms. Liu's counsel in 2017 against evidence first available in 2019 and lacks a rational assessment of Ms. Liu's 2017 appeal process. I am cognizant of the delay a reconsideration of Ms. Liu's application to reopen will cause but the significance of the errors in the Decision necessitates the Court's intervention.

I. Overview

[3] Ms. Liu is a citizen of China. She became a permanent resident of Canada in 2004 but returned to China in 2014 and lived there for three years. Upon her return to Canada on March 4, 2017, a departure order was issued against her for failure to comply with her obligation to reside in Canada for a minimum of 730 days during the five-year period between March 2012 and March 2017 (s. 28 of the IRPA).

[4] Ms. Liu appealed the departure order to the IAD. Ms. Liu did not appear at her hearing before the IAD on September 15, 2017 and her lawyer indicated that he was under the impression she wished to abandon the appeal. The IAD declared the appeal abandoned pursuant to subsection 168(1) of the IRPA (IAD abandonment decision signed on October 6, 2017).

[5] Two years later, on October 2, 2019, Ms. Liu applied to reinstate her appeal, relying on Rule 51 of the *IAD Rules*, SOR/2002-230 (IAD Rules). Ms. Liu's submissions in support of her application centred on the state of her mental health in the summer of 2017. She stated that she

was in a severely depressive state upon her return to Canada from China and was too afraid to leave the house to attend her hearing. Ms. Liu based her submissions on a psychiatric report from the McGill University Health Centre dated September 24, 2019 (2019 McGill Report).

[6] The IAD granted Ms. Liu's application, resulting in the Decision under review. The IAD concluded that Ms. Liu's counsel at the time of the appeal hearing should not have indicated to the original IAD panel that Ms. Liu wished to abandon her appeal. The IAD questioned counsel's conduct in light of the 2019 McGill Report and the fact that Ms. Liu had provided counsel with H&C evidence in the weeks leading up to her 2017 hearing date.

II. Preliminary matter – Is the Decision a final decision?

[7] Ms. Liu submits that the Decision is not a final decision and should not be reviewed by the Court. I disagree. The Decision finally disposes of a proceeding under either IAD Rule 51 (reinstatement after withdrawal) or section 71 of the IRPA (reopening after abandonment). I reference section 71 because it appears the IAD proceeded on the basis that Ms. Liu had made a request to reopen rather than to reinstate her appeal.

[8] This Court has routinely reviewed IAD decisions made pursuant to section 71 (see, e.g., *El-Hassan v Canada (Citizenship and Immigration)*, 2019 FC 1008 (*El-Hassan*); *Kaur v Canada (Citizenship and Immigration)*, 2014 FC 505 (*Kaur*); *Canada (Public Safety and Emergency Preparedness) v Philistin*, 2014 FC 762; *Canada (Citizenship and Immigration) v Kang*, 2009 FC 941) and I see no reason to depart from the Court's jurisprudence.

[9] Section 71 of the IRPA permits the IAD to reopen an appeal "if it is satisfied that it failed to observe a principle of natural justice". Section 71 is a self-contained provision that sets out the test an applicant must satisfy. The IAD's treatment of that test in the Decision is the focus of the Minister's arguments. Ms. Liu's position, if adopted by the Court, would mean that the Minister is prohibited from seeking judicial review of an IAD decision granting the reopening of an appeal, whether or not the IAD had made any attempt to justify its decision against the relevant legal constraint. Ms. Liu suggests that the Minister would not be precluded in all cases from seeking judicial review of a section 71 decision and could do so for policy reasons but this suggestion introduces unnecessary arbitrariness for both parties.

[10] In addition, Ms. Liu argues that a decision under section 71 is only interlocutory if the IAD concludes in favour of the applicant. Her reasoning is that a decision in favour of the Minister merely reinstates the appeal and the Minister will have his chance to contest the merits of the appeal in the course of the IAD's reopened appeal process. Again, I do not agree. First, the fact that the Minister is still able to dispute the merits of an applicant's appeal does not explain why the Minister should be precluded from requiring the IAD to reasonably apply the test set out in section 71. Further, the Minister would be precluded in the appeal on the merits from raising arguments contesting the IAD's decision to reopen based on lack of relevance. He may also be met with the argument that he should have sought judicial review of the decision to reopen.

[11] Second, Ms. Liu has pointed to no jurisprudence that endorses a characterization of a section 71 decision as interlocutory only when it is made in favour of an applicant. In *Weekes v Canada (Citizenship and Immigration)*, 2008 FC 293, the Court addressed a request for an

extension of time to appeal a removal order. In *Ali v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1153 (*Ali*), the Court considered the rejection of a request to reopen a claim for refugee protection. In other words, the decision maker, the Refugee Protection Division, had ruled in favour of the Minister. The refugee claimant sought judicial review of the rejection and the Court found that his motion to reopen was an interlocutory matter that maintained the status quo (*Ali* at paras 18-19). However, the Court invoked the common law duty of procedural fairness to state that reasons had to be given due to the importance of the decision to the claimant.

[12] The reasoning in *Ali* does not support Ms. Liu's position and runs counter to the interests of applicants generally. In the same way that the IAD should be restrained from making an unreasonable decision to reopen an appeal against the Minister, so too should it be restrained from making an unreasonable decision against an applicant.

[13] An administrative tribunal is required to apply the laws and regulations to which it is subject. Ms. Liu relies on the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*) to argue that the Court must be guided by the principle that administrative justice should be able to run its course with minimal intervention. However, the Supreme Court makes clear the importance of the governing statutory framework to which a tribunal is subject (*Vavilov* at para 68):

> [68] Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority.

> Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it [to] one. […]

[14] I do not suggest that the IAD's interpretation of section 71 is limited to only one reasonable outcome. However, the IAD is required to justify its decision, whether positive or negative, against the test set forth in the section. In the event the IAD grants the reopening of an appeal, the Minister is entitled to contest that decision and make submissions premised on the test in section 71, the applicable jurisprudence and the parameters established by the Supreme Court for review of the decision for reasonableness.

[15] I find that the IAD's Decision made pursuant to section 71 of the IRPA is a final decision and is subject to judicial review by the Court.

III. Standard of review

[16] The substantive issue before me is whether the IAD made a reviewable error in its Decision reopening Ms. Liu's appeal of her departure order. I agree with the parties that the Decision must be reviewed for reasonableness, the presumptive standard of review of the merits of administrative decisions (*Vavilov* at paras 10, 25). None of the situations identified by the Supreme Court in *Vavilov* for departing from the presumptive standard of review apply in this case. A review of the Decision for reasonableness is also consistent with the Court's pre-*Vavilov* jurisprudence on the reopening of IAD appeals pursuant to section 71 (*El-Hassan* at para 11).

[17] A reasonable decision is one that is internally coherent and logical and is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 31-32). It follows that my review begins with the decision made by the IAD and considers whether the IAD applied the relevant law to the facts of the case, and whether its chain of reasoning is internally coherent (*Vavilov* at paras 84-85, 108). In addition to a logical rationale for the decision, the IAD must justify the outcome of its reasoning (*Vavilov* at para 83).

IV. Analysis

[18] I have considered Ms. Liu's submissions and evidence carefully, particularly her medical evidence addressing the 2017-2019 period. As the Minister states, there is no doubt that she has long suffered from her mental health conditions. Nevertheless, I find that the Decision contains significant errors and gaps in logical reasoning such that it must be set aside.

[19] First, although it appears that the IAD proceeded on the basis of section 71 of the IRPA, I am unable to determine whether the IAD exercised its discretionary authority in accordance with the legal constraint set out in the section as interpreted by the jurisprudence. In part, the uncertainty arises due to the failure by the member to cite the section on which he proceeded but more significant is his failure to apply the test in section 71. This latter omission is a significant deficiency in the Decision.

[20] For ease of reference, section 71 reads as follows:

Reopening appeal	**Réouverture de l'appel**
71 The Immigration Appeal Division, on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice	71 L'étranger qui n'a pas quitté le Canada à la suite de la mesure de renvoi peut demander la réouverture de l'appel sur preuve de manquement à un principe de justice naturelle.

[21] The IAD cites *Kaur*, a section 71 decision, for the proposition that the IAD may consider not only its own conduct but also that of others in an application to reopen an appeal. The member stated:

> [9] However, the tribunal is ready to extend the benefit of doubt on some of the issues. Also, the tribunal considers the *Coward* [sic] decision which outlines that decisions to reopen files are not solely restricted to breaches of natural justice conducted by the IAD, as there does not appear to be any in this case. However, other factors such as behaviours or actions of failures by other parties, notably in Appellant's counsel, are also factors that could be taken into consideration[].

[22] In *Kaur*, Justice Noël found that, where counsel incompetence leads to a breach of procedural fairness which changes the result of the claim, the IAD's intervention in permitting the reopening of an appeal would be warranted (at para 23):

> [23] Since counsel acts as an agent, it is generally accepted that counsel's actions cannot be separated from that of his or her client. This well-recognized rule stems from the fact that a client who freely chooses an agent must be willing to bear the consequences resulting from this choice of representation. There are nevertheless exceptions to this rule in cases where conduct of counsel will manifest such negligence that his or her conduct (or incompetence) amounts to a breach of procedural fairness. In cases where counsel incompetence leads to a breach of procedural [fairness] which changes the result of the claim, the IAD's intervention in reopening the appeal pursuant to section 71 of the IRPA would be

> warranted. To this end, the applicant in question must meet a three-pronged test laid out in case law […].

[23] Justice Noël then cited the three-prong test that an applicant must meet to establish counsel's incompetence (*Yang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 269 at paras 17, 24 (*Yang*)).

[24] The IAD's application of the test in section 71 in the Decision is not consistent with the jurisprudence on which it relies. The IAD made no finding of counsel incompetence in the Decision, nor did it consider the three elements of the *Yang* test. Rather, the member stated that he was somewhat surprised that Ms. Liu's counsel informed the IAD in 2017 that she intended to abandon her appeal and that there "would also have been misunderstandings with her former attorney". The IAD made no mention of Ms. Liu's statement in her 2019 Rule 51 application that her failure to attend the appeal hearing was due to her mental health "rather than any fault of her own or even of her former counsel". The member noted that "perhaps it would have been a wise idea" for the IAD to have considered naming a designated representative but acknowledged that the reopening application was not the setting in which that issue should be considered. The IAD concluded that Ms. Liu's former counsel should have been more diligent.

[25] Section 71 requires the IAD to make a finding that there was a breach of a principle of natural justice in the course of an applicant's appeal proceedings. The breach must have been caused by the IAD itself or, for purposes of this case, by the negligence or incompetence of counsel that rises to the level of a breach of natural justice. As stated above, the IAD made no such finding in the Decision. The IAD was also required to consider the three *Yang* factors and

did not. I find that the IAD's analysis is not justified against the statutory and jurisprudential scheme within which it was required to exercise its discretion.

[26] Second, the Decision lacks adequate justification against the evidentiary record. The IAD stated:

> [11] And by considering [Ms. Liu's] mental state, and the fact that she changed medication and would have attempted suicide very close to the time of her appeal, it seems that, on a balance of probabilities, she was not in a state to properly decide for herself at that time.

[27] The IAD relied on the 2019 McGill Report in arriving at its conclusion. Ms. Liu was assessed by Dr. Desmarais (PGY5 in psychiatry) at the request of Ms. Liu's current counsel on September 24, 2019 in anticipation of an upcoming court date. Also present was Ms. Liu's brother. Dr. Desmarais was asked to consider whether a psychiatric condition could have impeded Ms. Liu's capacity to attend her September 2017 appeal.

[28] Based on his own observations and Ms. Liu's and her brother's recollections of her mental state in 2017, Dr. Desmarais concluded that Ms. Liu suffers from a bipolar disorder. His clinical impression was that Ms. Liu was in a severe depressive episode in September 2017. Dr. Desmarais considered that Ms. Liu's mental condition severely impaired her capacity to attend the IAD hearing and to understand the consequences of a failure to attend.

[29] The medical evidence that was available to Ms. Liu's counsel in 2017 and that was before the original IAD panel was a series of reports from Dr. Tran, Ms. Liu's general physician since 2009. Dr. Tran was seeing Ms. Liu monthly in the summer of 2017. Dr. Tran's notes state that:

(1) July 17, 2017: Ms. Liu's behaviour was flat ("affect plat") but she was coherent and her judgment was "OK", she had no hallucinations and no suicidal ideation; Ms. Liu discussed her medications but, despite a recent stress, was not unduly unbalanced. Dr. Tran adjusted Ms. Liu's medication; and (2) August 18, 2017: Ms. Liu stated she was more anxious than depressed. Dr. Tran noted Ms. Liu spoke little but was again coherent and her judgment was "OK".

[30] The IAD did not reference Dr. Tran's medical evidence in the Decision and I find that this omission is a determinative error (*Varatharajah v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 149 at para 25). The IAD member ignored important, contemporaneous medical evidence. The IAD finds fault with a 2017 proceeding based on evidence that was not then available.

[31] The medical evidence in 2017 stated that Ms. Liu was coherent and could exercise judgment. There is no suggestion that it was or should have been self-evident that consultation with a specialist was necessary. The IAD appears to assume counsel was qualified to assess Dr. Tran's medical evidence as inadequate. I find that the IAD was required to explain the reasoning that led to its conclusion that counsel and the original IAD panel should have conducted themselves differently such that a reopening of the abandonment decision was warranted.

[32] In summary, the Decision does not bear the hallmarks of reasonableness: justification, transparency and intelligibility (*Vavilov* at para 99). It is not justified in relation to either the relevant legal constraints that bear on the exercise of the IAD's discretion under section 71 of the

IRPA or the factual framework reflected in the evidence. As a result, the Minister's application for judicial review is allowed and Ms. Liu's application to reopen her appeal will be returned to the IAD for reconsideration.

[33] I direct that the reconsideration of Ms. Liu's application be undertaken by a different member of the IAD.

[34] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-564-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. No question of general importance is certified.

3. No costs are awarded in this matter.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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