Federal Court  Cour fédérale

Date: 20220414

Docket: IMM-3534-21

Citation: 2022 FC 542

Ottawa, Ontario, April 14, 2022

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

CHUNXIAO LI

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a decision of the Immigration Appeal Division [IAD] dated April 20, 2021. The IAD dismissed an appeal by the Applicant from the decision of the Immigration Division [ID] that found that the Applicant was inadmissible to Canada for misrepresentation under section 40(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for having been sponsored by a person who was determined to be inadmissible for misrepresentation and thereafter issued a removal order against the Applicant. The IAD dismissed

the Applicant's appeal and denied the Applicant's request for special relief on humanitarian and compassionate [H&C] grounds pursuant to section 67(1)(c) of the *IRPA*.

I. Background

[2] The Applicant is a citizen of the People's Republic of China who came to Canada in 2001 as a foreign student at the age of 21. In October of 2004, the Applicant married Angel Eduardo Rodriguez, who at that time had permanent resident status in Canada. In November of 2004, Mr. Rodriguez applied to sponsor the Applicant for permanent residence. Approximately one month after they married, the couple separated. The Applicant became a permanent resident of Canada in July of 2006 and she divorced Mr. Rodriguez in 2007.

[3] In 2009, the Applicant married her current husband, a Hong Kong national. The Applicant sponsored her current husband, who became a permanent resident in 2011. They now are parents to a Canadian-born six-year old daughter.

[4] In 2016, Mr. Rodriguez was found inadmissible by the ID for misrepresentation for entering into a marriage of convenience with the Applicant and failing to notify the relevant authorities that he never lived with the Applicant. During the investigation into his misrepresentation, Mr. Rodriguez admitted that he had maintained a common-law relationship with another woman since before, and during, his marriage to the Applicant. Mr. Rodriguez appealed the ID's determination to the IAD. Before the IAD, Mr. Rodriguez admitted that he had misrepresented his marriage to the Applicant and sought to have the removal order issued against him set aside on the basis of H&C considerations. While the IAD found that Mr. Rodriguez

"presented as an unremorseful person and, worse, an unrepentant prevaricator", the length of time spent in Canada, the degree of establishment and the impact his removal would have on his two children outweighed the more numerous aggravating elements in his case. As such, in accordance with section 67(1)(c) of the *IRPA*, his appeal was allowed and the removal order issued against him was set aside.

[5] Following a joint investigation by the Canada Border Services Agency [CBSA] and Citizenship and Immigration Canada [CIC] into fraudulent marriages called "Project Honeymoon", in January of 2013, the Applicant was reported for misrepresentation pursuant to section 40(1)(b) of the *IRPA* and was referred to a hearing. Following the hearing in October 2018 (at which the Applicant appeared with legal counsel), the Immigration Division (ID) found that the Applicant was inadmissible pursuant to section 40(1)(b) for having been sponsored by a person who was determined to be inadmissible for misrepresentation. The ID issued an exclusion order against the Applicant.

[6] The Applicant appealed to the IAD. She did not challenge the legal validity of the exclusion order, but requested that the appeal be allowed based on H&C considerations pursuant to section 67(1)(c) of the *IRPA*. By decision dated April 20, 2021, the IAD dismissed the Applicant's appeal and found that the H&C factors in the case did not warrant an exercise of the IAD's discretion to grant special relief.

[7] On this application for judicial review, the Applicant submits that: (a) the IAD denied the Applicant procedural fairness by largely basing its findings of credibility on the evidence and

testimony of Mr. Rodriguez, who was repeatedly determined not to be a credible witness; (b) there was a reasonable apprehension of bias on the party of the IAD; and (c) the IAD's findings of fact in analyzing the *Ribic* factors was unreasonable, as the IAD made numerous erroneous and misconstrued findings and ignored undisputed facts.

[8] For the reasons set out below, this application for judicial review shall be dismissed, as I find that the Applicant has failed to establish that the IAD's decision was unreasonable or that that the conduct of the IAD gave rise to a reasonable apprehension of bias or a denial of procedural fairness.

II. Issues and Standard of Review

[9] The issues for determination on this application are as follows:

A. Whether the conduct of the IAD gave rise to a reasonable apprehension of bias;

B. Whether the Applicant was denied procedural fairness; and

C. Whether the decision of the IAD was reasonable.

[10] With respect to the first issue, whether a determination was tainted by a reasonable apprehension of bias is a matter of procedural fairness and thus must be reviewed on a correctness standard [see *Sosa Trujillo v Canada (Minister of Citizenship and Immigration)*, 2021 FC 438 at para 18].

[11] With respect to the second issue, the Court's review of procedural fairness issues involves no deference to the decision-maker. The question is whether the procedure was fair having regard to all of the circumstances, focusing on the nature of the substantive rights involved and the consequences for the individual affected [see *Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69 at paras 46-47].

[12] With respect to the third issue, the parties submit, and I agree, that the presumptive standard of review is reasonableness and that no exceptions to that presumption have been raised nor apply [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25].

[13] When reviewing for reasonableness, the Court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker. The burden is on the party challenging the decision to show that it is unreasonable [see *Vavilov*, supra at paras 15, 83, 85, 99, 100]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency [see *Adenjij-Adele v Canada (Minister of Citizenship and Immigration)*, 2020 FC 418 at para 11].

III. Analysis

A. The Conduct of the IAD Did Not Give Rise to a Reasonable Apprehension of Bias

[14] As this Court stated in *Zhou v Canada (Citizenship and Immigration)*, 2020 FC 633 at paragraph 39, the burden is on the party alleging a reasonable apprehension of bias (actual or perceived) to show that a reasonable and informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that the decision maker, whether consciously or unconsciously, would not decide the matter fairly. In the absence of such evidence, members of administrative tribunals, like judges, are presumed to have acted fairly and impartially. The threshold for a finding of bias is therefore high and mere suspicion is insufficient to meet that threshold [see *Sagkeeng First Nation v Canada (Attorney General)*, 2015 FC 1113 at para 105; *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369].

[15] An allegation of reasonable apprehension of bias must be supported by material evidence demonstrating conduct that derogates from the standard. It cannot rest on mere suspicion, insinuations or mere impressions of a party or their counsel [see *Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8; *Ramirez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 809 at para 11; *Maxim v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1029 at para 30].

[16] The Applicant asserts that “the Tribunal’s attack on the Applicant’s credibility, cavalierly dismissing any emotion and testimony that she expressed, and her vigorous attack on her

credibility, are indicators of bias". In support of this assertion, the Applicant points to paragraph 19 of the IAD's decision, where the IAD noted that the Applicant's assertion that her marriage was in good faith and that she had been the victim of infidelity was not supported by the evidence obtained during the Project Honeymoon investigation. The Applicant suggests that the IAD improperly found that the Applicant lacked credibility merely because she was investigated by the CBSA and CIC, which constitutes evidence of a reasonable apprehension of bias. Moreover, the Applicant asserts that the transcript of the proceeding discloses unreasonably aggressive questioning or comments about the testimony of the Applicant, which also constitutes evidence of a reasonable apprehension of bias.

[17] I find that the Applicant's reasonable apprehension of bias allegation lacks any evidentiary foundation. There is nothing in the decision, including the paragraph pointed to by the Applicant, that would support a finding that the IAD did not decide this matter fairly. While the Applicant asserts that the transcript of the proceedings supports her allegation, the Applicant has not pointed to any specific questioning of the Applicant on which she relies (which could have been proved by way of affidavit from the Applicant, in the absence of a transcript). Such a bald assertion falls far short of meeting the Applicant's heavy onus.

[18] At the hearing of the application, the Applicant asserted for the first time that the IAD was improperly influenced in rendering its decision by adopting a punitive approach to the IAD's H&C analysis, which she asserted was demonstrative of a reasonable apprehension of bias. It is not open to the Applicant to make new arguments at the hearing that are not raised in her materials. In any event, the issue of any alleged punitive approach taken by the IAD is addressed below in

considering the reasonableness of the IAD's decision and I have rejected the Applicant's assertion that a punitive approach was adopted by the IAD.

B. The Applicant Was Not Denied Procedural Fairness

[19] The Applicant asserts that the IAD chose not to exercise its equitable discretion largely because it had concerns about the Applicant's credibility and sincerity. However, the Applicant asserts that she was largely found to be lacking in credibility in key areas not based on the Applicant's own testimony but on the testimony of Mr. Rodriguez in an entirely different proceeding, who was found not to be a credible witness. The Applicant asserts that she was denied procedural fairness as she was not given an opportunity to challenge the testimony of Mr. Rodriguez on which the IAD relied in making their credibility findings about the Applicant.

[20] I reject this assertion. I find that the IAD's determinations related to the Applicant's credibility and lack of sincerity were based predominantly on the Applicant' own conduct during the investigation, before the ID and before the IAD, without regard to the evidence given by Mr. Rodriguez. The Applicant admitted to the IAD to making misrepresentations regarding her marriage to Mr. Rodriguez, the Applicant was found to have lied to the visa officer about how she met her husband, the Applicant was found to have attempted to justify her misrepresentations after the fact, the Applicant's evidence regarding the marriage proposal was contradicted by the evidence contained in the Applicant's permanent residence application and the Applicant gave contradictory evidence before the IAD as to where she lived with Mr. Rodriguez that did not align with her own earlier evidence. I find that the aforementioned conduct and findings were more than sufficient to support the IAD's findings regarding the Applicant's credibility and lack of sincerity.

While the IAD did refer to certain inconsistencies as between the evidence of the Applicant and Mr. Rodriguez, I find that any credibility findings were not grounded in those inconsistencies alone, but rather were predominantly grounded in the Applicant's own independent conduct. In such circumstances, I am not satisfied that there was any breach of the duty of procedural fairness owed to the Applicant.

C. The Decision of the IAD Was Reasonable

[21] Section 40(1)(b) of the *IRPA* provides that a permanent resident or foreign national is inadmissible for misrepresentation for being or having been sponsored by a person who is determined to be inadmissible for misrepresentations. Pursuant to section 67(1)(c) of the *IRPA*, the IAD may allow an appeal if it is satisfied that, at the time the appeal is disposed of, sufficient H&C considerations warrant special relief in light of all the circumstances of the case, taking into account the best interests of a child [BIOC] who is directly affected by the decision.

[22] In considering whether to exercise its discretionary jurisdiction to grant special relief on H&C grounds, the IAD should consider a number of factors, including: (i) the seriousness of the misrepresentation leading to the removal order; (ii) any expression of remorse; (iii) the length of time spent, and the degree to which the individual facing removal is established, in Canada; (iv) the family and community support available to the individual facing removal; (v) the family in Canada and the dislocation to the family that removal would cause; (vi) the degree of hardship that would be caused to the individual facing removal to their country of nationality; and (vii) the best interests of any children. These factors are not exhaustive and the weight to be given to each one varies depending on the specific circumstances of the case [see *Ribic v Canada (Minister of*

Citizenship and Immigration), [1985] IABD No 4; *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at paras 40, 41 and 90; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 137].

[23] The Applicant alleges that the IAD erred in its consideration of the seriousness of the misrepresentation leading to the removal order, as it improperly permeated the IAD's consideration of the other factors. While the Applicant acknowledges that the offence is serious as it led to the granting of permanent residence, the Applicant asserts, relying on *Li v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 451 at paragraph 35, that the IAD's decision demonstrates that IAD improperly believes its role is to punish the Applicant for the misrepresentation, which prevented the IAD from asking itself whether there were sufficient positive considerations, in light of the *Ribic* factors, to warrant special relief. Moreover, the Applicant asserts that IAD erred in its consideration of the Applicant's degree of establishment in Canada by improperly incorporating the misrepresentation into the weighing of this factor, which resulted in it being under-weighted. The Applicant asserts that establishment cannot be completely dismissed simply because there was a misrepresentation.

[24] This Court has repeatedly held that misrepresentation is a relevant factor when considering a person's degree of establishment as, to do otherwise, would place the "immigration cheat" on an equal footing with a person who complied with the law. Moreover, whether the impact of the misrepresentation is to reduce the establishment to zero or to something more is a question for the discretion of the decision-maker based on the particular facts of the matter before them [see *Canada (Citizenship and Immigration) v Liu*, 2016 FC 460 at para 29; *Ylanan v Canada (Minister*

of Public Safety and Emergency Preparedness), 2019 FC 1063 at para 35]. As a result, I am satisfied that it was properly within the IAD's discretion to reduce the weight given to the Applicant's establishment as a result of the seriousness of her misrepresentation.

[25] Moreover, I am not satisfied that the IAD's decision demonstrates a pervasive attempt to "punish" the Applicant for the misrepresentation. While the misrepresentation was properly considered by the IAD in analyzing the seriousness of the offence and the Applicant's establishment, the remaining factors were considered and analyzed without reference to the misrepresentation.

[26] While the Applicant asserted in her written submissions that the BIOC and family hardship factors were improperly considered and weighed, the Applicant pointed to no specific error made by the IAD, simply citing excerpts of the IAD's decision and excerpts from the case law. In order to meet her burden on this application, the Applicant was required to particularize and establish her alleged errors, which she did not do. It is not open to the Applicant to attempt to do so for the first time at the hearing.

[27] I am not satisfied that that the Applicant has demonstrated that the IAD made reviewable errors or that its decision was unreasonable. Based on the evidence before it, it was open to the IAD to conclude, as it did, that on a balance of probabilities, there were insufficient H&C considerations to allow the appeal.

IV. Conclusion

[28] The judicial review is dismissed.

[29] The parties propose no question for certification and I agree that none arises.

JUDGMENT in IMM-3534-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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