Federal Court  Cour fédérale

Date: 20150604

Docket: IMM-188-15

Citation: 2015 FC 708

Montréal, Quebec, June 4, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

AIBUTALIFU AISIKAER

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision rendered on December 18, 2014, whereby the Immigration Appeal Division [IAD] found the Applicant inadmissible for misrepresentation under paragraph 40(1)(*a*) of the IRPA.

[2] The IAD further concluded that the Applicant failed to demonstrate sufficient humanitarian and compassionate [H&C] grounds to warrant the exercise of discretionary relief pursuant to subsection 69(2) of the IRPA.

II. Factual Background

[3] The Applicant is a 49-year-old citizen of China of Uighur ethnicity. He became a permanent resident of Canada along with his son, Yeleidousi, on October 16, 2005.

[4] On August 16, 2011, the Applicant was subjected to a report under subsection 44(1) of the IRPA, alleging that he had entered into a marriage of convenience with his second wife in order to obtain permanent residence status in Canada.

[5] Following an inadmissibility hearing held on November 29, 2011, the Immigration Division [ID] found that the Applicant was admissible to Canada and that he met the requirements of the IRPA. The Respondent appealed the ID's decision before the IAD pursuant to subsection 63(5) of the IRPA.

[6] On December 18, 2014, the IAD found that the Applicant directly misrepresented or withheld material facts in regard of his relationship with his second wife Malida Tuerdixi. Accordingly, the IAD issued an exclusion order against the Applicant pursuant to paragraph 229(1)(*h*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[7] The IAD allowed the appeal of the Applicant's son by finding that he had "succeeded in demonstrating the existence of sufficient humanitarian and compassionate considerations, considering the best interests of any children that may be directly affected by this decision and in light of all the circumstances of this case, so as to warrant the exercise of discretionary relief in accordance with subsection 69(2) of the IRPA" (IAD Decision, Certified Tribunal Record, at p 16).

III. Legislative Provision

[8] The relevant provisions of the IRPA are reproduced below:

Misrepresentation	**Fausses déclarations**
40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40**. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(*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;	*a*) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
(*b*) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;	*b*) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;
(*c*) on a final determination to vacate a decision to allow their claim for refugee protection or application for protection; or	*c*) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile ou de protection;
(*d*) on ceasing to be a citizen under paragraph 10(1)(a) of	*d*) la perte de la citoyenneté au titre de l'alinéa 10(1)a) de la

the Citizenship Act, in the circumstances set out in subsection 10(2) of that Act.	Loi sur la citoyenneté dans le cas visé au paragraphe 10(2) de cette loi.
[…]	[…]
Minister's Appeal	**Appel du ministre**
69 (2) In the case of an appeal by the Minister respecting a permanent resident or a protected person, other than a person referred to in subsection 64(1), if the Immigration Appeal Division is satisfied that, taking into account the best interests 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, it may make and may stay the applicable removal order, or dismiss the appeal, despite being satisfied of a matter set out in paragraph 67(1)(a) or (b).	**69** (2) L'appel du ministre contre un résident permanent ou une personne protégée non visée par le paragraphe 64(1) peut être rejeté ou la mesure de renvoi applicable, assortie d'un sursis, peut être prise, même si les motifs visés aux alinéas 67(1)a) ou b) sont établis, sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

IV. Issues

[9] The determinative issue raised by the application is whether the IAD's decision is reasonable.

V. Standard of Review

[10] The IAD's discretionary jurisdiction in determining whether the Applicant falls under paragraph 40(1)(*a*) of the IRPA and whether H&C grounds warrant special relief, which are issues of mixed fact and law, are reviewable on the standard of reasonableness (*Patel v Canada*

(Minister of Citizenship and Immigration), 2013 FC 1224 at para 23 [*Patel*]; *Koo v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ No 1152 at para 20).

[11] As such, the IAD's findings attract considerable deference from this Court (*Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at paras 4 and 59).

VI. Analysis

[12] The Applicant submits that the IAD's decision is unfounded and based on a speculative and arbitrary interpretation of the evidence. Among others, the Applicant claims that the IAD imposed its own "Western modern values" in assessing the Applicant's behaviour (Applicant's Memorandum of Facts and Law, Applicant's Record, at p 388).

[13] Although the Applicant submitted numerous submissions impugning the IAD's findings of fact, the Court does not find that these arguments warrant the Court's intervention.

[14] Rather, the IAD's credibility findings reflect a full consideration of the evidence before it. In its reasons, the IAD identified numerous inconsistencies in respect of significant elements of the Applicant's oral and written testimony, impugning the Applicant's credibility. Moreover, the IAD found that the Applicant failed to provide reasonable and credible explanations addressing the IAD's concerns in respect to its understanding of the case.

[15] Insofar as the IAD's credibility assessment lies within its expertise and jurisdiction, it is not the Court's role to reweigh the evidence (*Patel*, above at para 27; *Cao v Canada (Minister of*

Citizenship and Immigration), 2010 FC 450 at para 27; *Canada (Minister of Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339).

[16] Among others, the IAD made the following observations in respect of a sum of all parts that were considered significant for the understanding of the fulsomeness of the Applicant's narrative as to its inherent logic:

1. The Applicant claims that he has no knowledge of his first wife's whereabouts since their divorce in 2003; this wife was the mother of his child. When confronted by the IAD as to how the Applicant was able to obtain her authorization to bring their child to Canada, the Applicant testified that he saw her once, and that she agreed to sign the necessary papers. The IAD found the Applicant's explanation to lack credibility.
2. The Applicant provided contradictory evidence in respect of his initial meeting with his second wife, Malida, whom he allegedly met through his younger brother and sister-in-law.

   Among others, the IAD raised concern over the fact that the Applicant did not know how his brother and sister-in-law knew Malida, and that the Applicant's brother encouraged the Applicant to pursue a relationship with her, despite her marital status (separated) and the fact that she had a child exactly one month prior to their introduction.
3. The Applicant provided contradictory evidence in respect of his communications with Malida. The Applicant testified that he contacted her by telephone, whereas the evidence indicates that he first contacted via email.

4. The Applicant was unable to explain the reasons of Malida's divorce with the father of her child. The Applicant was also unaware as to who had filed for divorce, whether it was Malida or her husband.

5. The Applicant testified that he first met Malida in person, in March 2004, at the airport in Urumqi, China, when she had traveled to China for their wedding. The Applicant testified that he did not meet Malida's relatives upon arrival to China because it was inappropriate to simply show up at their house, as they were not yet married and that they had to be formally introduced.

   The IAD found the Applicant's explanations to lack credibility, considering that the Applicant met Malida's relatives a few days after her arrival, that the purpose of Malida's trip to China was to marry the Applicant, and that one can assume that it is appropriate for a person to meet their future spouse's relatives prior to entering a marriage.

   Moreover, the IAD noted that the Applicant proposed to Malida without having met her in person and that he also met Malida's relatives a few days after her arrival without any formal introduction.

6. The Applicant provided inconsistent evidence in respect of his marriage proposal to Malida, by testifying that he proposed to her over the telephone, whereas the evidence also shows that he had proposed to her over the internet.

7. According to the Applicant, Malida's parents did not attend the marriage, which took place in China, because they were busy and because they did not approve of their marriage. The IAD noted that the Applicant was unable to explain why Malida's parents did not like him.

8. The Applicant was unable to explain why he married so quickly after his divorce with his first wife.
9. The Applicant claimed that he and Malida did not have a honeymoon because it was not in their custom; however, the IAD noted that the Applicant had a honeymoon with his third wife, who is also Uighur.
10. The IAD raised concern over the fact that the Applicant never visited Malida's son while he was living in China in 2004-2005. The IAD rejected the Applicant's explanation that Malida told him that he did not have to visit her son and found that in the context of a genuine relationship, one could expect the Applicant to want to maintain contact with his stepson.
11. When the IAD inquired of the Applicant as to why he filed for divorce in China in March 2006, considering that both he and Malida were living in Canada, the Applicant explained that in China, there was no mandatory one-year separation period requirement in order to obtain a divorce. The Applicant however failed to explain why he was in such a hurry to divorce, after a two-month separation period.
12. The circumstances surrounding the Applicant's third marriage in China in April 2008, and subsequent divorce in November 2011, are unclear. Notably, the IAD observed that it was only after the identity of the Applicant's third wife was called into question that the Applicant withdrew his sponsorship application for his third wife. The IAD rejected the Applicant's explanation according to which he withdrew his application because his wife was weary of the inherent delays in the sponsorship process, as it is not indicative of a genuine relationship.

[17] Furthermore, it is the Court's view that the IAD's finding of an absence of H&C grounds warranting special relief, the onus of which lies with the Applicant, does not warrant the Court's intervention (*Chieu v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 84 at para 90 [*Chieu*]).

[18] In its assessment of H&C considerations, the IAD relied on the relevant factors set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD 4 and *Chieu*, above. Among others, the IAD considered the Applicant's possibility of re-establishment in China, as well as the tense relationship between the Han people and the Uighurs, in light of the Applicant's claim that he would face undue hardship upon return to China. The IAD also considered the best interests of the Applicant's son, Yeleidousi, who was 18 at the time of the hearing, in its H&C considerations. The IAD concluded that Yeleidousi's removal from Canada would represent a far greater hardship than that faced by his father and that the former should not suffer the consequences of the misrepresentation committed by his father.

[19] The IAD further found that the Applicant had not acted in good faith:

> The tribunal was not convinced of Aisikaer's good faith in this case, on the contrary. The tribunal is convinced that Aisikaer entered into a marriage of convenience in order to secure permanent residency in Canada. Consequently, one must bear in mind that if it was not for his marriage with Malida, he would not have obtained permanent residency in Canada.
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> (IAD Decision, Certified Tribunal Record, at p 21).

[20] Upon review of the IAD's decision, the parties' submissions and the evidentiary record, the Court finds that the IAD's decision falls within the range of possible acceptable outcomes,

which are defensible in respect of the facts and law, and is anchored in the evidence (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47).

[21] The Applicant contends that the IAD's assessment of the evidence and of the Applicant's credibility raises a reasonable apprehension of bias; however, this argument cannot be sustained, as it was not raised before the IAD and lacks any basis.

VII. Conclusion

[22] In light of the foregoing, the application is dismissed.

[23] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, provides that costs may only be ordered where "special reasons" exist.

[24] The Court finds that no such circumstances are present.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-188-15
STYLE OF CAUSE:	AIBUTALIFU AISIKAER v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JUNE 3, 2015
JUDGMENT AND REASONS:	SHORE J.
DATED:	JUNE 4, 2015

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