

Federal Court



Cour fédérale

Date: 20170224

Docket: IMM-1593-16

Citation: 2017 FC 229

Ottawa, Ontario, February 24, 2017

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

YUTAO DONG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Yutao Dong [Ms. Dong], challenges an Immigration Appeal Division [IAD] decision dated April 1, 2016. Ms. Dong paid for a marriage of convenience for the purpose of immigrating to Canada. She is now in a relationship with the man who helped arrange the marriage of convenience and they have a child together. She requested humanitarian and

compassionate [H&C] relief based on the best interests of her children but the IAD denied her appeal. For the reasons that follow, I am dismissing this application for judicial review.

II. Background

[2] Ms. Dong is a citizen of the People's Republic of China. She first entered Canada in 2002 on a four year study permit in Nanaimo, British Columbia. After six months, she left school for China. She then returned to Canada and began unauthorized studies in Toronto, Ontario. Ms. Dong was ordered to leave Canada but she remained illegally. In July of 2006, Ms. Dong married a Canadian citizen, Benjamin Weigensberg . As a result of this marriage she gained permanent resident status through a spousal application on May 26, 2011. She started her divorce in 2012, and it was finalized in 2013.

[3] In late 2012, the Canada Border Services Agency investigated Ms. Dong's suspected marriage of convenience. On February 21, 2014, an officer referred Ms. Dong's case to the Immigration Division. The Immigration Division found Ms. Dong inadmissible to Canada for misrepresentation and an exclusion order was issued against her. Ms. Dong did not dispute the validity of the determination and instead appealed for H&C relief.

[4] The IAD reviewed the facts as determined by the Immigration Division and agreed to by counsel. Ms. Dong was introduced to two individuals by Mr. Allen Lu Chun Chen [Allen Chen] who owned a restaurant where fake wedding receptions were often held. When Allen Chen and Ms. Dong met he was married with two children. Allen Chen and Ms. Dong allege to have started a relationship in 2006. He allegedly slept at home with his wife but saw Ms. Dong every

day. He is currently separated from his wife but not divorced and does not intend to do so until his children (born in 1992 and 1999) are in university. Not only did Allen Chen introduce Ms. Dong to the two people for her fake marriage, he paid \$25,000 on her behalf.

[5] Allen Chen and Ms. Dong had a child together, William, in June of 2014. They say that they started to reside together after the birth of William. Allen Chen's other children have never met Ms. Dong and it does not seem that his wife or children know of their relationship. He says he sees his children most days and supports them. At the time of the IAD hearing, William was 20 months old and Ms. Dong was pregnant with their second child, a girl, who was due to be born in March of 2016, and is now born.

[6] The IAD considered the applicable statutory provisions and case law provided by her counsel. After conducting a new hearing it determined that Ms. Dong had failed to provide sufficient evidence to grant discretionary H&C relief.

[7] Having balanced all of the factors, the IAD determined that Ms. Dong's misrepresentation was a violation of the integrity of the immigration system which must be deterred. Despite the serious impacts removal would have on her family and the favourable weight placed on the best interest of the child, Ms. Dong had to take responsibility for her serious and deliberate misrepresentations over many years. The IAD dismissed her appeal.

III. Issues

[8] Ms. Dong presented 6 issues which could render the IAD decision unreasonable:

- A. Did the IAD err in their assessment of the best interest of the child, particularly her unborn child at the time of the hearing?
- B. Did the IAD effectively exclude balancing factors due to a fixation on the severity of Ms. Dong's misrepresentation?
- C. Did the IAD unreasonably conclude that Ms. Dong was not remorseful?
- D. Did the IAD inappropriately disregard Ms. Dong's current common law relationship without regard to the evidence?
- E. Did the IAD fail to recognize that Ms. Dong could be sponsored by her current common law partner at the conclusion of a five-year ban for misrepresentation?
- F. Did the IAD err by failing to consider a stay of removal as a compromise?

[9] I find the issue I must determine is whether the IAD's refusal to grant H&C relief was reasonable?

IV. Analysis

[10] The standard of review that the Court must use when reviewing an IAD decision on H&C relief is reasonableness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12).

Considerable deference is owed to this exceptional and discretionary relief.

[11] In making a determination whether to grant H&C relief, the IAD must use the guidance of *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) [Ribic factors] as adapted for misrepresentation. The Ribic factors are neatly summarized in *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 at para 11:

...I regard the following factors to be the appropriate considerations in the exercise of discretionary jurisdiction in the context of an appeal based on misrepresentation. The factors are...:

- the seriousness of the misrepresentation leading to the removal order and the circumstances surrounding it;
- the remorsefulness of 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 on the family that removal would cause;
- the best interests of a child directly affected by the decision;
- the support available to the appellant in the family and the community; and
- the degree of hardship that would be caused by the appellant by removal from Canada, including the conditions in the likely country of removal

[12] The IAD has significant discretion in assigning weight to the various factors.

[13] Ms. Dong presented no evidence to the IAD regarding her then unborn child separate from her 20 month old child. As both children are very young there is little to distinguish their best interests. At the time of the IAD hearing, the child was not yet born so it would have been difficult for the officer to do more than what he did in the best interests of the child analysis.

Were the officer to do more it would have constituted mere speculation.

[14] Ms. Dong argued that since her children were young and Allen Chen had a busy job their children would not stay in Canada with him. Ms. Dong's evidence is that she would have to "live with my parents in a rural part of China where schools are no good and the economy is poor, so this would impose financial and other hardships on myself and our children." She added that the children would struggle to learn English and be exposed to pollution without health care.

[15] Before me it was argued that the IAD did not assess the added difficulty of a single mother caring for two children instead of one. At the same time Ms. Dong did not put evidence or argument before the IAD regarding this issue. When the record is reviewed, including the transcript, there is no doubt the yet unborn child was considered the same as the 20 month old. The IAD used the plural "children" when discussing the best interests of the child. Given the proximity of age between the newborn and unborn child, the assessment of each child is nearly identical and I can find no error simply because the IAD did not repeat the same analysis twice. I am satisfied that the IAD considered the best interests of both the 20 month old child and that of the then unborn child.

[16] Ms. Dong relied heavily on *Li v Minister of Public Safety and Emergency Preparedness* 2016 FC 451 [*Li*], emphasizing that it was analogous to her own case. While there are some similar facts, it is distinguishable. Justice Shore found in *Li*, above, at paragraph 35, that the IAD seemed to "believe that it is its role to punish the Applicant for his initial misrepresentation" and then found that the IAD had not decided if there were sufficient positive factors to grant H&C relief. That is not what occurred in this case as the IAD correctly assessed the Ribic factors and then decided H&C relief was not warranted. Although Mr. Li's wife and Ms. Dong were each

pregnant at the time of their hearings, Mr. Li had no other children for a best interest of the child analysis. By contrast Ms. Dong benefitted from a complete best interest of the child assessment.

[17] In the remaining issues presented by Ms. Dong, she argues that the IAD did not consider relevant factors or came to erroneous conclusions. I cannot agree. The onus is on her to present sufficient evidence for the IAD to make a decision. Ms. Dong asks me to reweigh the evidence which it is not my role to do.

[18] Reasonableness requires that the decision must exhibit justification, transparency and intelligibility within the decision making process and also the decision must be within the range of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12). The IAD made their determination on the material before them and I find that the conclusions were within the range of reasonable outcomes.

[19] The application is dismissed. No question was presented for certification and none arose.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;
2. No Question is certified.

"Glennys L. McVeigh"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1593-16

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