Federal Court  Cour fédérale

Date: 20170927

Docket: IMM-4803-16

Citation: 2017 FC 863

Ottawa, Ontario, September 27, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JIGIE PASCUA CACALDA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"), of a decision made by the Immigration Appeal Decision ("IAD") pursuant to paragraph 67(1)(c) of the *IRPA*, to allow the Respondent's appeal of an exclusion order made against her.

II. Background

[2] The Respondent is a citizen of the Philippines. She married her husband in the Philippines on December 29, 2003, and her daughter was born in the Philippines on May 24, 2004.

[3] On November 4, 2002, the Respondent applied for permanent residence; her aunt sponsored her as a member of the family class. On May 5, 2006, her visa was issued in the Philippines and on June 5, 2006, she entered Canada and was landed as a permanent resident.

[4] The Respondent failed to declare her spouse and daughter as dependents during the processing of her application for permanent residence, as well as at the port of entry where she was granted permanent residence status.

[5] On May 22, 2007, the Respondent applied to sponsor her spouse and daughter as members of the family class. In the application, she listed her date of marriage as May 28, 2006. She also submitted a fraudulent marriage certificate that showed May 28, 2006, as her date of marriage.

[6] On June 21, 2007, a visa officer refused the sponsorship application. The officer found that the Respondent failed to declare her spouse and daughter at the time of her arrival in Canada; therefore, they were excluded from being members of the family class pursuant to paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227

("*Regulations*"). On February 26, 2008, the IAD dismissed the Respondent's appeal of that decision.

[7] On March 2, 2012, the Respondent was advised that she may be inadmissible to Canada for misrepresentation as a result of her failure to declare her spouse and daughter in her application for permanent residence.

[8] On March 19, 2012, the Respondent replied with a solemn declaration under oath, in which she maintained that she married her spouse on May 28, 2006. She also stated that she did not declare her spouse because she thought the application was finalized and the decision was made, and did not declare her daughter because her aunt's income was insufficient to sponsor both her and her daughter.

[9] On February 12, 2013, the Respondent was interviewed by an immigration officer (the "Officer"). Once the Officer confronted her with a copy of her true marriage certificate, which showed that she was actually married on December 23, 2003, the Respondent admitted to misrepresenting the date of her marriage and submitting a forged marriage certificate. On May 8, 2013, the Officer submitted a section 44 report based on misrepresentation.

[10] On May 20, 2013, the Immigration Division ("ID") determined that the Respondent had misrepresented material facts that were relevant to her eligibility to acquire permanent residence in Canada and therefore induced an error in the administration of the *IRPA*. An exclusion order

was issued against her on the grounds that she was inadmissible pursuant to paragraph 40(1)(a) of the *IRPA*.

[11] The Respondent appealed the exclusion order and did not challenge the validity of the exclusion order, but argued that humanitarian and compassionate ("H&C") considerations warranted relief.

[12] On October 26, 2016, the IAD found that there were sufficient H&C considerations to waive the Respondent's inadmissibility, pursuant to paragraph 67(1)(c) of the *IRPA*.

[13] While the IAD found that the Respondent had shown serious disregard for Canada's immigration laws, she was genuinely remorseful and there was evidence in favour of rehabilitation. The IAD also further noted the evidence in favour of the Respondent: her consistent employment in Canada and financial support for her family and particularly for her daughter's education in the Philippines; the lower standard of living and lack of employment in the Philippines and letters of support from colleagues and friends. The IAD incorrectly held that it is in her daughter's best interests to be reunited with the Respondent in Canada, as the daughter was and is currently ineligible to be reunited in Canada as being excluded under paragraph 117(9)(d) of the *IRPA*.

[14] On November 16, 2016, the Applicant applied for judicial review of the IAD's decision.

A. *Legislation*

[15] Relevant excerpts from the legislation are attached as Annex “A” hereto.

[16] Paragraphs 40(1)(a) and (b) of the *IRPA* provide that a permanent resident is inadmissible for misrepresenting material facts that could induce an error in the administration of the *IRPA*, or for having been sponsored by such a person.

[17] Subsections 63(2) and (3) of the *IRPA* provide an appeal to the IAD against removal orders.

[18] Paragraph 67(1)(c) of the *IRPA* provides that the IAD can allow an appeal based on H&C considerations.

[19] Section 65 of the *IRPA* provides that the IAD cannot consider H&C factors in appeals respecting membership in the family class.

[20] Paragraph 117(9)(d) of the *Regulations* provides that a foreign national cannot be a member of the family class if they were not examined at the time their sponsor applied for permanent residence.

III. Issues

[21] The issues are:

A. Did the IAD err in its assessment of the best interests of the Respondent's child; and

B. Did the IAD err by providing insufficient reasons regarding the seriousness of the Respondent's misrepresentation and the Respondent's remorse?

IV. Standard of Review

[22] Findings of fact in an IAD decision, including credibility findings, are reviewable on a standard of reasonableness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12).

V. Analysis

A. *Did the IAD err in its assessment of the best interests of the child?*

[23] The Applicant argues that the IAD erred in its BIOC analysis for the following reasons:

- the IAD failed to consider its previous decision that refused sponsorship to the Respondent's daughter;
- allowing the Respondent to remain in Canada perpetuates the separation between her and her daughter;
- the IAD failed to indicate that paragraph 117(9)(d) of the *Regulations* precludes the Respondent's daughter from being sponsored as a member of the family class;
- the IAD failed to indicate how the Respondent's daughter would be able to be reunited with her mother in Canada; and
- the outcome of another application by the daughter is speculative.

[24] The Respondent argues that the IAD did not err with respect to the best interests of the child because:

- the previous refusal of sponsorship was before the IAD in the appeal record;
- the IAD considered the consequences that reunification in the Philippines would have on the Respondent's ability to continue to support her daughter financially;
- the fact that the Respondent's daughter was excluded pursuant to paragraph 117(9)(d) of the *Regulations* was before the IAD in the appeal record;
- the Respondent acknowledged at the IAD hearing that a separate H&C application was required for her daughter to join her in Canada; and
- all immigration applications are speculative.

[25] In my opinion, the IAD's BIOC analysis was reasonable: the IAD was rightly focused on the consequences of removing the Respondent from Canada. The previous refusal of sponsorship and the separation of the Respondent and her daughter, while factors in the analysis, were not determinative. Although removal would lead to reunification of the Respondent and her daughter, it would cause them both financial hardship and may preclude the possibility of them ever living together in Canada.

[26] I disagree with the Applicant's argument that the IAD failed to consider its 2008 decision, which refused sponsorship to the Respondent's daughter. In that decision, section 65 of the *IRPA* precluded the IAD from considering H&C factors in its analysis. Here, the Respondent appealed her removal order pursuant to subsection 63(3) of the *IRPA* and the IAD could consider H&C factors. Therefore, the 2008 decision was significantly different and its impact on this decision was not determinative.

[27] As well, the Applicant's argument that allowing the Respondent to remain in Canada perpetuates the separation between her and her daughter, and is therefore at odds with the IAD's

conclusion that allowing the Respondent to remain in Canada is in her daughter's best interests, does not reflect the record when considered in its entirety and given a contextual analysis. In its decision, the IAD stated:

> The appellant testified and provided evidence of the remittances she sends her husband and daughter, which has been consistent. If she were to return, she would have to find a job, and due to her age and lack of university education, she believes it would be very difficult for her. The lack of financial support would cause hardship to her family, although they would be reunited. […] The Panel gave a lot of positive weight to the appellant's support of her family…
>
> [Emphasis added]

[28] The IAD acknowledged that reunification of the Respondent and her daughter in the Philippines would likely cause hardship. The Respondent has consistently sent her family financial support during her time in Canada, and that support would cease if the Respondent was removed from Canada. The separation of the Respondent and her daughter is only one factor to consider in the BIOC analysis, and the IAD was aware of this.

[29] Finally, the Applicant's argument that the IAD failed to acknowledge that the Respondent's daughter is precluded from being sponsored in the family class and can only become a permanent resident of Canada with a H&C application pursuant to section 25 of the *IRPA* is also not supported on a contextual review of the evidence.

[30] It was not necessary for the IAD's reasons to explicitly find that the daughter can only become a permanent resident with an H&C application. The fact that the outcome of an H&C application is speculative was only one factor for the IAD to consider in the BIOC analysis and

when viewed with the other factors considered by the IAD, the decision was not unreasonable (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[31] The IAD was rightly focused on the consequences of removing the Respondent from Canada on all fronts. The IAD stated that it was in the daughter's best interest to be reunited with the Respondent in Canada. Although the possibility of reunification in Canada is speculative, the Respondent's removal from Canada may preclude that possibility altogether.

[32] Furthermore, as noted above, even if the daughter made an unsuccessful H&C application, the IAD acknowledged that she benefits from the Respondent living in Canada through the Respondent's financial support.

B. *Did the IAD err by providing insufficient reasons regarding the seriousness of the Respondent's misrepresentation and her remorse?*

[33] The Applicant argues that the IAD incorrectly stated that the Respondent told the truth when interviewed by the Officer about her false marriage certificate. Furthermore, the IAD unreasonably found that the Respondent's admission of misrepresentation was evidence of rehabilitation, because she only made her admission after she was caught lying. Finally, the IAD did not adequately consider the severity of the Respondent's misrepresentation.

[34] The IAD has expertise in these matters and is entitled to deference with respect to its findings and analysis. Its finding with respect to the BIOC falls within a range of possible,

acceptable outcomes which are defensible in respect of the facts and law and was therefore reasonable.

[35] The Respondent argues that the IAD did not incorrectly state that the Respondent told the truth when interviewed by the Officer. Furthermore, the IAD considered many factors in its assessment of rehabilitation. Finally, the IAD clearly recognized the severity of the misrepresentation.

[36] The IAD's findings were reasonable. The IAD was not incorrect in stating that the Respondent told the truth when interviewed by the Officer. Nor was the IAD incorrect in finding that the Respondent's admission was evidence of rehabilitation. As well, the IAD only failed to mention one instance of misrepresentation, and that omission did not render the IAD's decision unreasonable.

[37] Firstly, the IAD stated, "…she told the truth when she was interviewed by an Immigration officer about the marriage certificates." This is true: the Officer confronted her with the marriage certificates and she admitted to misrepresenting the date of her marriage and submitting a forged marriage certificate. The IAD's statement does not make it clear that the Respondent's admission came after being confronted, but this does not make it incorrect.

[38] Secondly, while the Respondent only admitted her misrepresentation after she was confronted by the Officer, the Respondent fully admitted her mistake and took responsibility for it, without making excuses or blaming others.

[39] Furthermore, that admission was just one of many factors in the IAD's rehabilitation analysis. The IAD referred to several statements made by the Respondent, including that she wanted to tell the truth now and she did not want to continue making mistakes. The IAD also referred to the fact that she appeared genuinely remorseful and that she was 33 years old at the time and is now 42.

[40] Finally, I find that the IAD's reasons do adequately consider the severity of the Respondent's misrepresentation. The IAD clearly recognized multiple instances of misrepresentation: her failure to disclose dependents on her permanent resident application; her fraudulent marriage certificate; and her misrepresentations to the Officer prior to being confronted with her real marriage certificate. While the Court may not agree with the IAD's conclusion on that evidence, it is not the role of the Court to reweigh the evidence, but only to determine if it was a reasonable decision.

[41] The IAD does not refer to the Respondent's misrepresentation in her solemn declaration under oath; however, it was not necessary for the IAD to do so. As this Court stated in *Cepeda-Gutierrez v Canada (MCI)*, [1998] 157 FTR 35 at paragraph 16, "…the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence'…"

[42] The Respondent's solemn declaration was not of sufficient significance that the IAD's failure to mention should cause this Court to find an erroneous finding of fact. The IAD's overall

conclusion on the severity of misrepresentation was that "…there is in this case a serious disregard for our immigration laws." The IAD also referred to multiple instances of misrepresentation, as noted above. The solemn declaration would have had a minimal impact on that finding.

[43] For those reasons, the IAD's findings with regard to rehabilitation and severity of the misrepresentation were reasonable.

JUDGMENT in IMM-4803-16

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. There is no question for certification.

"Michael D. Manson"
Judge

ANNEX "A"

Immigration and Refugee Protection Act (S.C. 2001, c. 27)

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;

Right to appeal — visa and removal order

63 (2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.

Droit d'appel : mesure de renvoi

63 (2) Le titulaire d'un visa de résident permanent peut interjeter appel de la mesure de renvoi prise en vertu du paragraphe 44(2) ou prise à l'enquête.

Right to appeal removal order

(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.

Droit d'appel : mesure de renvoi

(3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise en vertu du paragraphe 44(2) ou prise à l'enquête.

Humanitarian and compassionate considerations

65 In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

Motifs d'ordre humanitaires

65 Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.

Appeal allowed

67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

(c) other than in the case of an appeal by the Minister, 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.

Fondement de l'appel

67 (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

c) sauf dans le cas de l'appel du ministre, 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.

Immigration and Refugee Protection Regulations (SOR/2002-227)

Family Class	**Regroupement familial**
Member	**Restrictions**
Excluded relationships	
117 (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	117 (9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
(d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.