Federal Court Cour fédérale

Date: 20180615

Docket: IMM-4687-17

Citation: 2018 FC 620

Ottawa, Ontario, June 15, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

WEIZHOU SHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board [IAD], dated October 13, 2017 [the Decision], rejecting the Applicant's appeal, on humanitarian and compassionate [H&C] grounds under s 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a removal order made against him.

[2] As explained in greater detail below, this application is dismissed, because I have found the IAD's consideration of the factors relevant to the Applicant's appeal on H&C grounds to be reasonable.

II. **Background**

[3] The Applicant, Weizhou Shen, is a Chinese national. He arrived in Canada in December 2000 as a student. In June 2005, his request for renewal of his study permit was rejected. Mr. Shen attempted to stay in Canada by fraudulent means, entering into a marriage of convenience [MOC] with a female acquaintance in April 2006. Shortly after their marriage, he gave her $6,500. He maintains that this was as a gift — not payment for marrying him. Mr. Shen obtained permanent residence by way of the MOC in January 2008 through sponsorship under the family class as his wife's spouse. The couple filed for divorce in 2013, and the divorce was finalized in July 2017.

[4] Mr. Shen is self-employed. He works as a consultant, tour guide, and freelance mover. He also derives rental income from three residential properties that he owns in Canada. Mr. Shen does volunteer work and is involved in his local church.

[5] The fact that Mr. Shen had engaged in a MOC came to the attention of Canadian immigration authorities and Mr. Shen then admitted that he had married primarily to acquire status in Canada. Misrepresentation proceedings were initiated against him before the Immigration Division [ID], which found him inadmissible to Canada for misrepresentation and made an exclusion order against him. Mr. Shen then appealed to the IAD. He conceded the legal

validity of the ID’s decision but submitted that there were sufficient H&C grounds to allow the appeal.

III. **The IAD Decision**

[6] The IAD found the exclusion order to be valid in law and proceeded to consider whether the H&C considerations raised by Mr. Shen merited special relief based on the factors from *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IADD No 4 [*Ribic*].

[7] With respect to the seriousness of the misrepresentation and Mr. Shen’s remorsefulness, the IAD considered it a positive factor that he had admitted to the misrepresentation. However, it noted that he did not do so on his own initiative, either before or shortly after obtaining permanent residence. Rather, he admitted to the misrepresentation only when it had already come to the attention of immigration authorities and he was subsequently questioned about it, six years after he was granted permanent residence. The IAD stated that it had seen little evidence of remorse from Mr. Shen and concluded his admission to be self-serving and to come “too little too late”. It concluded that he should have told the truth, at the very least, before he obtained permanent residence.

[8] Turning to Mr. Shen’s establishment in Canada, the IAD noted that he has no family in Canada but that he has spent half his life here. It noted his assertion that he runs two businesses, and referred to the businesses licences submitted as evidence therefor. However, the IAD gave the businesses little weight in the absence of corroborating evidence that they are operational and generated income declared to the Canada Revenue Agency.

[9] The IAD also noted as a positive factor that Mr. Shen owns property in Canada but stated that, had it not been for his misrepresentation, he likely would not have acquired permanent residence when he did and then have been in a position to obtain the properties. In reference to his volunteerism and civic engagement, the IAD noted that Mr. Shen may have contributed positively to his community in Canada but held that this positive contribution did not tip the scale in his favour based on the seriousness of his actions. The IAD stated that Mr. Shen's establishment at any level must be measured and assessed on the backdrop of the misrepresentation. It held that his establishment was not of such significance that it would represent sufficient evidence for the IAD to exercise its equitable jurisdiction on H&C grounds.

[10] With respect to hardship, Mr. Shen submitted that he had been in Canada a long time and would have difficulty finding employment in China and reintegrating into Chinese society. However, the IAD noted that he had returned to China every year since obtaining permanent residence in Canada, that his parents still live in China, and that he has maintained contact with them. It also observed that he speaks the language and that there was no evidence substantiating his claim that he would have difficulty finding employment in China. The IAD noted that Mr. Shen also made health-related hardship claims but gave this factor little weight because there was no corroborating medical documentation. Finally, the IAD noted that Mr. Shen has a girlfriend in Canada with whom he has been in a relationship since 2003, but it held that there was nothing to suggest that their relationship could not continue if he was required to return to China.

[11] Finally, referring to the *Ribic* factor of the best interests of any children directly affected by the decision, the IAD observed that Mr. Shen has no children and had not provided any evidence that a child would be negatively affected if his appeal was dismissed.

[12] In conclusion, the IAD held that there were insufficient H&C factors to warrant special relief and to allow the appeal.

IV. **Issues**

[13] The Applicant articulates the following issues for the Court's consideration:

A. Did the IAD err in law by setting an impossible standard for demonstrating remorse, and by elevating the Applicant's inadmissibility to become a factor that could not be overcome on humanitarian grounds?

B. Did the IAD err in law by negating the Applicant's degree of establishment based on his inadmissibility, and by elevating the Applicant's inadmissibility to become a factor that could not be overcome on humanitarian grounds?

V. **Standard of Review**

[14] The parties agree that the Decision is reviewable on a standard of reasonableness. However, Mr. Shen takes the position that in considering his first argument, related to the IAD's assessment of his remorse, the Court's application of the reasonableness standard should be

informed by the reasoning expressed by the Ontario Court of Appeal in *E.T. v Hamilton–Wentworth District School Board*, 2017 ONCA 893 at para 125:

> 125 I would be reluctant to apply a robust concept of “reasonableness” burdened by a standing obligation of judicial deference to a line decision-maker’s discretionary decision. There is a real risk that a claimant’s *Charter* rights will not be understood and will not be given effect by the line decision-maker. I would prefer a more sensitive application of the nostrum that “reasonableness takes its colour from the context,” and “must be assessed in the context of the particular type of decision-making involved and all relevant factors,” as Stratas J.A. observed in *Re: Sound v Canadian Association of Broadcasters* 2017 FCA 138 at para 34, 148 C.P.R. (4th) 91, citing several Supreme Court decisions. It is one thing to defer to an educator on educational materials, but something else to defer to an educator on constitutional matters.

[15] Mr. Shen’s position is that the Decision demonstrates that the IAD misunderstood the concept of remorsefulness that it was required to take into account in its consideration of the *Ribic* factors and that its consideration of that factor should therefore be afforded little deference. I appreciate that whether a particular decision is reasonable can be influenced by the context of the type of decision-making involved. However, I do not consider the context of the Decision presently at issue to warrant the application of any particularly nuanced understanding of the reasonableness standard. I will address in more detail, later in these Reasons, Mr. Shen’s argument that the IAD unreasonably considered the remorsefulness factor prescribed by *Ribic*. However, the application of the *Ribic* factors is the heartland of the jurisdiction of an immigration officer conducting an H&C analysis under s 25 of IRPA. I therefore consider it appropriate to apply the reasonableness standard, including affording to the Officer the deference typically contemplated by that standard.

VI. **Analysis**

A. *Did the IAD err in law by setting an impossible standard for demonstrating remorse, and by elevating the Applicant's inadmissibility to become a factor that could not be overcome on humanitarian grounds?*

[16] Mr. Shen takes issue with the fact that, in assessing his remorsefulness, the IAD was critical that he did not admit to his misrepresentation before or shortly after obtaining permanent residence. Comments to this effect appear in two portions of the Decision. The IAD first notes that it is a positive factor that Mr. Shen admitted his misrepresentation to the immigration officer investigating the genuineness of his marriage, to the Immigration Division member who presided over his admissibility hearing, and to the IAD at the appeal hearing. However, the IAD then comments that Mr. Shen did not choose to come forward on his own before or shortly after obtaining permanent residence, admitting to his wrongdoing only when the investigation was initiated six years after he attained that status. Later in the analysis of his remorsefulness, the IAD refers to his admission as coming "too little too late" and being self-serving, stating that he should have told the truth, at the very least, before he obtained permanent residence.

[17] Mr. Shen's position is that it is not in keeping with the concept of remorse, and therefore is irrational, to expect a demonstration of remorse before completion of the relevant wrongdoing. Rather, remorse represents recognition that a previously completed act was wrong and indicates a readiness for rehabilitation. In support of his position as to how the concept of remorse should be understood, Mr. Shen relies on *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 66, where the Supreme Court of Canada explained how the IAD should assess a person's prospects for rehabilitation. The Supreme Court described the issue before the IAD as whether

the prospects for rehabilitation are such that, alone or in combination with other factors, they warrant special relief from a valid removal order.

[18] I accept that remorse represents a reformed attitude to a wrongful act already committed, as opposed to a decision not to commit the wrongful act in the first place. However, I cannot conclude therefrom that the IAD's reasoning in the present case is irrational. Mr. Shen initiated arrangements for an MOC, proceeded to enter into the MOC, sought permanent residence in the spousal class, and ultimately received the benefit of permanent resident status as a result of the MOC. Even if the early stages in this process can only be characterized as developing an intention to commit a wrongful act, he had committed such an act by the time he sought permanent residence based on the MOC. However, he acknowledged his wrongdoing only once it was being investigated by immigration authorities many years after his permanent residence status had been received.

[19] Nor do I read the Decision as setting an impossible standard for demonstrating remorse or as treating Mr. Shen's inadmissibility as a factor that could not be overcome on humanitarian grounds. He submits that s 25 of IRPA is intended to afford the possibility of relief from circumstances including having obtained permanent residence through misrepresentation and that it would defeat this objective if the remorse necessary to engage s 25 can only be demonstrated by the admission of wrongdoing prior to permanent resident status been obtained. However, inadmissibility can result from misrepresentation at any stage in an immigration process, regardless of whether the process has run its course and resulted in status been conferred. I see nothing unreasonable in a conclusion that remorse may be more easily

demonstrated by an early acknowledgement of wrongdoing. Nor do I read the Decision as concluding that remorse can be demonstrated only by an admission of wrongdoing at an early stage of such a process, thereby precluding someone who obtained permanent resident status by misrepresentation from being able to establish remorse. Rather, on the facts of the present case, with the IAD having identified little evidence of remorse, it was not satisfied that genuine remorse was demonstrated at the stage at which Mr. Shen acknowledged his misrepresentation.

[20] Mr. Shen relies upon *Lin v Canada (Citizenship and Immigration)*, IMM-8219-12, July 26, 2013 [*Lin*], in which Justice Heneghan found that it was unreasonable for the IAD to have expected to see signs of contrition from what the IAD described as the “get go”. That case also involved an applicant who had obtained permanent resident status through an MOC and was subsequently referred to an admissibility hearing before the ID, resulting in an exclusion order against her. The analysis by the IAD, that Justice Heneghan found to be unreasonable, appears as follows in *Lin*:

> I do not agree with counsel for the appellant’s argument that the appellant’s testimony should be viewed as an admission of remorse. I am on the view that had the appellant be truly remorseful, she would have told the truth to Immigration officials at the get-go. Instead she chose to utilize the immigration system to its fullest and continue with the charade until such time she realized that any further testimony with respect to the events that occurred would be useless. I agree that her any further testimony n that regard would probably muddy the waters even more, however, I am not prepared to glean from a concession that the appellant in remorseful [sic].

[21] I agree with the Respondent’s submission that the finding in *Lin* represents a conclusion on the facts of that particular case and should not be regarded as a principle of law to the effect

that the IAD cannot consider the timing of a concession in assessing an applicant's remorse. I note that, in *Thavarasa v Canada (Citizenship and Immigration)*, 2015 FC 625 at para 23, Justice O'Reilly concluded that the IAD reasonably found an applicant lacked remorse in a circumstance where he admitted to a misrepresentation only after he was confronted by an immigration officer with contradictory evidence. Similarly, in the present case the IAD found little evidence of remorse in Mr. Shen's willingness to admit to his misrepresentation only after immigration officials had commenced their investigation of his MOC. I find this aspect of the Decision to be reasonable.

B. *Did the IAD err in law by negating the Applicant's degree of establishment based on his inadmissibility, and by elevating the Applicant's inadmissibility to become a factor that could not be overcome on humanitarian grounds?*

[22] Mr. Shen argues that the IAD erred by relying on his misrepresentation to reduce the weight to be afforded to his establishment in Canada. He focuses in particular on his ownership of property in Canada and submits that the IAD gave no weight to his establishment based on these properties because of the IAD's conclusion that he would not have been in a position to purchase them but for his misrepresentation.

[23] First, Mr. Shen argues that the IAD's analysis is illogical, as there is no requirement for someone to be a permanent resident in order to acquire real estate in Canada. I find little merit to this submission. As argued by the Respondent, I read the IAD's reasoning to be that Mr. Shen acquired real estate in the place where he was living and that he was living here because he had successfully obtained permanent residence through fraudulent means. I do not find this reasoning unreasonable.

[24] Mr. Zhang also argues that reasoning akin to that of the IAD in the present matter has been found to represent a reviewable error in other cases. He relies on the decision in *Jiang v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 413 [*Jiang*], in which Justice Simpson concluded that the IAD erred in its assessment of an applicant's degree of establishment by double counting the applicant's misrepresentation. In that case, the IAD had used the misrepresentation to reduce the weight attributable to the establishment factor and then used it again as a negative factor in the final weighing of all factors. In *Lin*, in addition to the conclusions on remorse canvassed above, Justice Heneghan relied on *Jiang* in concluding that the IAD erred by diminishing the applicant's establishment in Canada on the basis that it resulted from her misrepresentation.

[25] In contrast, in *Ngyuen v Canada (Citizenship and Immigration)*, 2017 FC 27 [*Ngyuen*] at paras 31 to 34, Justice Brown referred to a general principle to the effect that applicants should not be rewarded for accumulating time in Canada when they have no legal right to do so. Justice Brown upheld as reasonable the H&C decision under review in *Ngyuen* which assigned little weight to the applicant's establishment on the basis that it could not have occurred without her acquiring her immigration status through fraudulent means. In the Decision in the present case, the IAD relied on passages from *Ngyuen*, including the following statement at paragraph 35:

> … I do not see the breach permeating the decision; rather, it is considered where it is relevant. The consequence of ignoring it would be to allow all those who entered Canada illegally to be assessed as if they entered legally, which, according to this Court's jurisprudence, is not the entitlement of such claimants.

[26] Mr. Shen argues that *Ngyuen* does not conflict with *Jiang* and *Lin* but rather is distinguishable as a decision based on the particular facts of that case. The Respondent takes a similar position and relies on the decisions in *Dhaliwal v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 157 [*Dhaliwal*] and *Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 705 [*Wang*], which expressly distinguish *Jiang*. In *Wang*, Justice LeBlanc acknowledged the principle in *Jiang*, that it is a reviewable error to double count misrepresentation, but relied on paragraphs 106 to108 of Justice Boswell's decision in *Dhaliwal* in distinguishing *Jiang*. Justice Boswell explained that the weighing process contemplated by an H&C application is a qualitative, not quantitative, exercise and that it is not an error to compare positive and negative factors against each other rather than adding up the positive factors and then subtracting the negative ones.

[27] In my view, *Jiang* is similarly distinguishable in the case at hand. In the relevant portion of the Decision, the IAD notes that it is a positive factor that Mr. Shen owns property in Canada. It then states that, had it not been for his misrepresentation, he likely would not have acquired permanent residence when he did and then be in a position to obtain the properties. Consistent with *Ngyuen*, such a statement is not in itself a reviewable error. The IAD continues by finding that Mr. Shen may well have contributed to some degree positively in his community in Canada, but it comments that any good deeds must be balanced with his serious violation of IRPA. The IAD states that, because of the seriousness of his actions, Mr. Shen's positive contribution in his community does not remotely tip the scale in his favour. The IAD concludes that Mr. Shen's accomplishments with respect to establishment at any level must be measured and assessed

against the backdrop of the misrepresentation and that his establishment is not of such significance for the IAD to grant H&C relief.

[28] My conclusion is that this analysis does not demonstrate the IAD double counting the misrepresentation. It does not assign weight to his establishment and then reduce that weight based on the misrepresentation before weighing the factors. Rather, the IAD weighs the establishment against the misrepresentation and finds that it does not tip the balance. It might have been preferable for the IAD to have assigned weight to and added up all the positive factors and then balanced them against the misrepresentation. However, as explained in *Dhaliwal,* it is not a reviewable error for the IAD to have conducted its analysis as it did.

[29] Nor can I conclude that the misrepresentation permeates the Decision in a manner that renders it unreasonable or that the IAD elevated misrepresentation as a factor to a level that made it impossible to overcome on an H&C analysis. I appreciate that the IAD refers to the misrepresentation not only in the context of its establishment analysis but also in its consideration of Mr. Shen's remorsefulness, in expressing its views as to the seriousness of the misrepresentation itself, and in arriving at its decision to dismiss the appeal. However, I reach the same conclusion as did Justice Brown in *Ngyuen*, that the misrepresentation was considered where it was relevant.

[30] Finally, Mr. Shen refers to the IAD having made a careless statement in expressing its conclusion, by stating that it was taking into account the best interests of a child directly affected by the decision. He offers this as support for his position that the IAD was cavalier in its

approach to his application. However, the IAD expressly noted that Mr. Shen is not married and has no children and that he had not provided any evidence that a child would be negatively affected if his appeal were to be dismissed. The IAD's reference to taking into account the best interests of a child represents an expression of the process it was obliged to undertake and does not suggest that it had lost sight of the factors and evidence that were relevant to Mr. Shen's particular appeal.

VII. **Certified Question**

[31] At the hearing of this application, Mr. Shen's counsel provided for the Court's consideration the following possible question for certification for appeal:

> Whether, contrary to Parliament's provision of a right of appeal to the Immigration Appeal Division on humanitarian grounds, a permanent resident who obtained permanent residence by misrepresentation is prohibited from relying on humanitarian grounds.

[32] The Respondent opposes certification of this question. Indeed, Mr. Shen's counsel stated that he considered it unlikely that the decision on this application for judicial review would raise this question, unless the Court were to take *Ngyuen* as authority for a principle that a permanent resident who obtained status by misrepresentation is prohibited from bringing an appeal to the IAD based on H&C considerations. I do not read *Ngyuen* in this manner, and my decision is not based on any such interpretation of the applicable jurisprudence. As such, the proposed question would not be determinative of an appeal in this matter and is not appropriate for certification.

JUDGMENT IN IMM-4687-17

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

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4687-17
STYLE OF CAUSE:	WEIZHOU SHEN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 23, 2018
REASONS FOR JUDGMENT AND JUDGMENT:	SOUTHCOTT J.
DATED:	JUNE 15, 2018

APPEARANCES:

Raoul Boulakia	FOR THE APPLICANT
Brad Gotkin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raoul Boulakia Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT