Federal Court  Cour fédérale

Date: 20190715

Docket: IMM-5360-18

Citation: 2019 FC 939

Ottawa, Ontario, July, 15, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

JIN GAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision by the Immigration Appeal Division of the Immigration and Refugee Board of Canada dated October 11, 2018, which rejected the Applicant's appeal of an exclusion order. The exclusion order was issued by a

Member of the Immigration Division on the basis that the Applicant was inadmissible to Canada for misrepresentation under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

II. Background

[2] The Applicant, Jin Gao, is a citizen of China born November 24, 1985.

[3] The Applicant came to Canada and married her first husband, Jian Gong, on February 19, 2008. She became a permanent resident of Canada on December 1, 2008, as a sponsored spouse of her first husband. The couple divorced in January 2010.

[4] The Applicant met her second husband, Shou Cheng Li, in April 2010. Mr. Li had entered Canada in February 2010 and claimed refugee status. His refugee claim was denied in October 2011.

[5] The Applicant and Mr. Li married in November 2011. They have twin boys, Rex and Sean (both age 7) and a daughter Iris (age 2). Mr. Li works at three Toronto-area restaurants where he is a chef and part-owner, while the Applicant raises their children.

[6] In August 2012, the Applicant filed an application to sponsor Mr. Li as a permanent resident. This triggered an investigation in potential misrepresentations relating to the Applicant's first marriage.

[7] In submissions to the Canada Border Services Agency dated February 26, 2014, the Applicant described in detail the circumstances of her first marriage, speaking of a romantic relationship that had quickly disintegrated due to her husband making comments about her not wearing makeup, and that her husband had kicked her out of his apartment after three months of living together.

[8] The Applicant was referred to an admissibility hearing before the Immigration Division on April 27, 2015, pursuant to subsection 44(2) of the IRPA. The Applicant was represented by an immigration consultant, and counsel for the Minister of Citizenship and Immigration also appeared. The Applicant testified by way of an interpreter.

[9] The Applicant maintained that her first marriage was genuine, describing how she fell in love, the circumstances of their wedding, her move to Canada to be with her new husband, and the breakdown of their marriage after a few months. The Member gave oral reasons, finding the Applicant not to be a credible witness, and concluding that her first marriage had been entered into solely for the purpose of securing her permanent resident status in Canada.

[10] On this basis, the Member issued an exclusion order dated April 27, 2015, ordering that the Applicant was inadmissible to Canada for misrepresentation under paragraph 40(1)(a) of the IRPA.

III. Decision Under Review

[11] The Applicant appealed to the Immigration Appeal Division [IAD], and was represented by counsel, who is also counsel before this Court. The Applicant testified with the aid of an interpreter, as did Mr. Li.

[12] The Applicant did not contest the legal validity of the exclusion order on appeal, but asked that the order be dismissed or stayed on humanitarian and compassionate [H&C] grounds. The Applicant admitted that she had lied under oath at her hearing before the Immigration Division, that she had in fact entered into a non-genuine marriage with Mr. Gong, and that she (or her parents) paid about $50,000 to obtain her permanent residence as the false spouse of Mr. Gong.

[13] The IAD confirmed that the exclusion order was legally valid. The Applicant does not challenge this finding on judicial review.

[14] The IAD found the Applicant not credible as she had not been truthful in the past, and generally gave no weight to her testimony.

[15] The IAD considered the *Ribic* factors, outlined by the Federal Court in *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059, to determine whether sufficient H&C considerations existed to allow an appeal based on H&C considerations in the context of a misrepresentation:

(i) the seriousness of the misrepresentation leading to the removal order and the circumstances surrounding it;

(ii) the remorsefulness of the appellant;

(iii) the length of time spent in Canada and the degree to which the appellant is established in Canada;

(iv) the appellant's family in Canada and the impact on the family that removal would cause;

(v) the support available to the appellant in the family and the community;

(vi) the degree of hardship that would be caused by the appellant by removal from Canada, including the conditions in the likely country of removal; and

(vii) the best interests of a child directly affected by the decision.

[16] The IAD found that on all fronts, the Applicant failed to support her appeal:

(i) The IAD found that the misrepresentation was very serious, and that the Applicant’s explanation for why she now admitted to a fraudulent marriage – because she wanted to set a good example for her children – was not credible. This factor weighed against exercising discretion.

(ii) The IAD found that while the Applicant expressed remorse for her misrepresentation, it was not genuine remorse. This finding was based on (1) her attempt to shift the blame to her parents, who she stated had paid $50,000 for her to acquire permanent resident status, and (2) the self-serving nature of admitting her misrepresentation after having been caught.

(iii) The IAD also found that the Applicant had demonstrated no long term establishment in Canada, had limited work experience in Canada and no assets of her own.

(iv) The IAD noted that both the Applicant and Mr. Li testified that if one of them had to return to China, the other would also return along with the children. The IAD concluded that as the family would not be separated, there would be little impact to her immediate family in Canada if she were removed.

(v) The IAD found that the only credible evidence of community support were letters of support relating to Mr. Li and his restaurant business. The IAD found that these letters indicated her husband had community support, but not that the Applicant had community support.

(vi) The IAD found that as the Applicant's parents, siblings, and in-laws remained in China, there was no credible risk or hardship if she were removed to China.

(vii) Turning to the best interests of the children, the question before the IAD was whether the best interests of the Applicant's three children were sufficiently powerful to overcome all of the negative factors outlined above:

1) The IAD accepted that Rex was born with a cleft lip, underwent an initial surgery in 2012, and required follow-up surgery at some point in the future. The IAD noted a letter from the Fujian Provincial Hospital in China recommending that, as Rex had his initial surgery in Canada, the follow-up surgery should also be conducted in Canada. The IAD found that there was no documentary evidence suggesting that the surgery could not be conducted in China.

2) The IAD found no evidence that Rex currently suffered from a speech impediment, or that he would be bullied upon return to China. The IAD accepted a doctor's letter stating that Sean had once had a speech impediment but that it was no longer a concern.

3) The IAD misstated Iris' name as "Lily", but found that there was no specific evidence speaking to her best interests.

4) The IAD next considered the availability of public education and health care in China, and found that there was no evidence to suggest that education and healthcare would not be available to the children in China as children of Chinese citizens. The IAD also found that the Applicant's parents would be able to assist her financially if she returned to China.

5) The IAD considered the potential impact of the family planning policy in China, but found that there was no documentary evidence that the family planning policy would apply to the children as they were not born in China, nor was there evidence that the Applicant would be subject to forced

sterilization. The IAD noted that the Applicant herself comes from a three-child family.

6) Lastly, the IAD considered whether the children would be eligible for permanent resident status in China, and found that it was not clear that the children would not be able to access permanent resident status in China.

[17] The IAD concluded that the best interests of the children were not a compelling consideration, and in light of all the other negative considerations, the Applicant should not be granted H&C relief. The IAD considered the alternative remedy of a stay of removal, but found that there were insufficient H&C considerations to warrant a stay.

[18] Therefore the IAD dismissed the appeal in a decision dated October 1, 2018 [the Decision].

IV. Issues and Standard of Review

[19] The issues are:

(A) Did the IAD apply the wrong test when assessing the best interests of the children?

(B) Did the IAD unreasonably assess the evidence regarding the best interests of the children and the other *Ribic* factors?

(C) Did the IAD err by not granting a stay of removal?

[20] The standard of review is reasonableness (*Nguyen-Tran v Canada (Citizenship and Immigration)*, 2010 FC 93).

V. Relevant Provisions

[21] Subsection 40(1) of the IRPA outlines that a permanent resident may be inadmissible to Canada due to misrepresentation:

> 40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation
>
> > (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;
> >
> > …

[22] Subsection 67(1) of the IRPA outlines when the IAD may allow an appeal:

> 67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,
>
> > (a) the decision appealed is wrong in law or fact or mixed law and fact;
> >
> > (b) a principle of natural justice has not been observed; or
> >
> > (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.

[23] Subsection 68(1) of the IRPA outlines when the IAD may stay a removal order:

> 68 (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and

> compassionate considerations warrant special relief in light of all the circumstances of the case.

VI. Analysis

A) Did the IAD apply the wrong test when assessing the best interests of the children?

[24] The Applicant argues that the IAD erred by applying a hardship test, stating that at paragraph 65 of the Decision the IAD required the Applicant to prove hardship to the children.

[25] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (SCC) at paragraph 75, the Supreme Court of Canada set out what the reasonableness standard requires when a decision maker is assessing the best interests of the children:

> … for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.
>
> [Emphasis added]

[26] The IAD did comment at paragraph 65 of the Decision that "[e]ven if Canada would offer the children a better education than in China, not having the best or better education does not equate to hardship to the children." However, as Justice Brown noted in *Osorio Diaz v Canada*

(Citizenship and Immigration), 2015 FC 373 at paragraph 25, mentioning hardship in a BIOC analysis is not enough to trigger judicial review:

> In addition, however, the reasons as a whole must be reviewed to determine if the Officer strayed from a proper BIOC analysis. Mentioning hardship is not enough to trigger judicial review, as the Federal Court of Appeal said. Indeed, even focusing on hardship may not trigger judicial review in its view. Very often if not almost invariably, as the Applicants did here for example, H&C applicants in their BIOC submissions allege numerous negative adverse consequences for the child if he or she is removed, including inferior education, lower standard of living, criminality, and possible violence. Where, as here, the Applicants themselves alleged what may properly be characterized as "hardship" to the child if removed, an H&C Officers [*sic*] should not generally be faulted for using the word hardship in his or her analysis because doing so is simply and accurately summarizing the very consequences alleged by the Applicants.
>
> [Emphasis added]

[27] Reviewing the Decision as a whole, I find that the IAD correctly construed the BIOC test.

B) Did the IAD unreasonably assess the evidence regarding the best interests of the children and the other Ribic factors?

[28] Paragraph 67(1)(c) of the IRPA specifically provides that removal orders issued as a result of misrepresentation may be excused in light of sufficient H&C considerations. Therefore, even though Parliament intended there to be consequences for misrepresentation, it also recognized that there may be circumstances where a removal order issued due to misrepresentation may be cured by H&C relief (*Li v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 451 at para 34).

[29] The weight to be given to the *Ribic* factors is within the discretion of the IAD and subject to deference on judicial review (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 66-67).

[30] However, in this matter the entire tone and tenor of the IAD's H&C analysis appears to be intent on punishing the Applicant and her children for the Applicant's misrepresentation. By adopting this approach, the IAD unreasonably assessed the evidence regarding the best interests of the children, as well as evidence going to the other *Ribic* factors.

[31] The Applicant put forward pertinent evidence of the difficulties her children would have in obtaining permanent resident status, publicly funded education and healthcare, the difficulties surrounding Rex's cleft palate, and the potential for forced sterilization. I note in particular,

(i) A letter from the Public Security Bureau of Changle City, dated November 23, 2015, which writes in reference to Rex: "If the child comes back for reparative therapy, there won't be any reimbursement on all the medical expenses. (Li Haohan is a Canadian citizen who is not eligible for Chinese medical benefits).";

(ii) A letter from a doctor at the Fujian Provincial Hospital, dated November 16, 2015, which recommends that Rex's future cleft palate surgery be done at the same hospital in Canada where his first surgery was carried out;

(iii) A Response to Information Request dated October 1, 2012, which details that children born outside the limits of China's family planning policy have difficulty accessing education and health care;

(iv) Documents detailing the continued occurrence of forced sterilizations to women who met or exceeded the prescribed number of children under China's family planning policy; and

(v) Documents outlining significant fines levied against family who have children outside the constraints of China's family planning policy.

[32] The IAD discounted this evidence piece by piece, on the basis that no single document showed conclusively that the family planning policy would apply to children born abroad to Chinese citizens, and therefore found that the Applicant had failed to establish that the children would not be able to attain residency status, or access public education and healthcare. Similarly, the IAD found no evidence that forced sterilization would occur to the Applicant, as her children had been born outside China.

[33] The IAD's approach unreasonably fails to recognize that the preponderance of the evidence suggests that there would be significant barriers to some or all of the children accessing permanent residence status or citizenship, public education, and public healthcare in China. Similarly, the evidence also suggests that the Applicant may well suffer forced sterilization upon return to China. While no single piece of evidence may conclusively show this to be inevitable, the IAD erred by failing to consider the evidence as a whole.

[34] This erroneous approach is further evidenced by the IAD's repeated mention of testimony by the Applicant and her husband that if one parent were forced to return to China, the entire family would return. The IAD used this testimony throughout the Decision to discount several

H&C grounds, reasoning that if the family would return *en masse* to China rather than live apart, any potential difficulties upon return could not be that severe. Such reasoning, faulting a family for a desire to remain together rather than separate young children from one of their parents, especially when used repeatedly throughout a decision, is unreasonable in a purposive H&C analysis.

[35] The Applicant's conduct, lying repeatedly to immigration authorities for an extended period of time, is reprehensible. However, the clear language of subsection 67(1) of the IRPA entitles the Applicant to a full consideration of her H&C grounds. The IAD's approach in this matter denied her this full consideration. Therefore, this application must be allowed and the matter returned to the IAD for a full reconsideration of whether the Applicant's removal order should be dismissed or stayed, in accordance with these reasons.

JUDGMENT in IMM-5360-18

THIS COURT'S JUDGMENT is that

1. The application is allowed and the matter is referred to a differently constituted IAD for reconsideration.
2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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