Federal Court  Cour fédérale

Date: 20200312

Docket: IMM-4317-19

Citation: 2020 FC 368

Ottawa, Ontario, March 12, 2020

PRESENT: Madam Justice Walker

BETWEEN:

ZHI MING ZOU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Zhi Ming Zou, seeks judicial review of a decision (Decision) of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada dismissing his appeal of an exclusion order made against him. The exclusion order was issued by the Immigration Division (ID) on April 21, 2016 on the basis that Mr. Zou is inadmissible to Canada for misrepresentation pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] Mr. Zou admitted his misrepresentation before the ID and does not contest the validity of the exclusion order. The sole issue before the IAD was whether Mr. Zou's appeal should be allowed on humanitarian and compassionate (H&C) grounds.

[3] For the reasons that follow, the application will be dismissed.

I. Background

[4] Mr. Zou married his first wife, Ms. Laio, on June 8, 2005. Shortly thereafter, Ms. Laio submitted an application to sponsor Mr. Zou for a permanent resident visa. The application was refused in February 2006 and Ms. Laio appealed the refusal to the IAD. The appeal was allowed on September 28, 2006 with the Minister's consent. Mr. Zou obtained permanent residence in Canada on February 27, 2007 upon his arrival in Toronto, Ontario.

[5] Mr. Zou subsequently came to the attention of the Canada Border Services Agency (CBSA). A CBSA officer prepared a report under subsection 44(1) of the IRPA, questioning whether Mr. Zou's marriage to Ms. Liao was genuine. At the ID hearing, Mr. Zou conceded that he had entered into a marriage of convenience solely to acquire immigration status in Canada. The ID found Mr. Zou inadmissible to Canada for misrepresentation pursuant to paragraph 40(1)(a) and issued the exclusion order. Mr. Zou is subject to a five-year exclusionary period following removal in accordance with paragraph 40(2)(a) of the IRPA.

[6] Mr. Zou has been in a genuine relationship with his current spouse, Ms. Ma, since 2011. Ms. Ma was born in China and is a Canadian citizen, having obtained permanent residence in 2005. The couple has three young Canadian-born children.

II. Decision under review

[7] The Decision is dated June 18, 2019. The IAD first reviewed the circumstances of Mr. Zou's misrepresentation of his 2005 marriage to Ms. Liao, concluding that he had intentionally misled Canadian immigration authorities, aware that marrying for a non-genuine purpose was against the law. The panel stated that Mr. Zou had acted in self-interest in manipulating the Canadian immigration process in order to escape poverty in China.

[8] The IAD then structured its review of the H&C considerations in Mr. Zou's case by noting the non-exhaustive list of factors set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) (*Ribic*) and modified by the Supreme Court of Canada (SCC) in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3.

[9] The IAD characterized Mr. Zou's misrepresentation as intentional and serious, and found little evidence of any genuine remorse. The panel reviewed Mr. Zou's evidence of his family's life in Canada and acknowledged that he is established with his wife and children in Toronto where they own a home and where Mr. Zou is employed as a home renovator. These facts weighed positively in the IAD's assessment but, as Mr. Zou's misrepresentation had enabled him to remain in Canada, the panel did not give significant weight to his establishment.

[10] The IAD's analysis of the best interests of the children (BIOC) and of the hardship that would be occasioned to Mr. Zou and his family on removal overlap. The panel considered Mr. Zou's ability to reintegrate in China as a Chinese citizen; his wife's ability to return to China; the family's fluency in Cantonese; the parents' prior work experience in China; and, the presence of Mr. Zou's and his wife's families in China. The IAD also considered at length the

children's circumstances and the disruption to them of moving to a new country. The panel noted that there was little credible evidence before it regarding the availability of education for the children and health care for the family in China.

[11] The IAD concluded that neither any hardship due to Mr. Zou's removal to China, alone or accompanied by the family, nor the children's best interests overcame Mr. Zou's intentional misrepresentation. As a result, the IAD was not prepared to exercise its discretion and allow Mr. Zou's appeal on H&C grounds.

III. Issue and standard of review

[12] The determinative issue in this application is whether the IAD's assessment of the H&C considerations in Mr. Zou's case against his admitted misrepresentation was reasonable.

[13] The parties submit and I agree that the Decision must be reviewed for reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10 (*Vavilov*)). None of the situations identified by the SCC in *Vavilov* for departing from the presumptive standard of review apply in this case.

[14] The majority in *Vavilov* set out guidance for reviewing courts in the application of the reasonableness standard. I have applied that guidance in my review, exercising restraint but conducting a robust review of the Decision for justification and internal coherence (*Vavilov* at paras 12-15, 85-86, 99; see also *Canada Post Corp. v Canada Union of Postal Workers*, 2019 SCC 67 at paras 28-29).

IV. Analysis

[15] Mr. Zou's appeal to the IAD was made pursuant to subsection 63(3) of the IRPA. The circumstances in which the IAD may allow a subsection 63(3) appeal are set out in subsection 67(1) of the IRPA, the relevant provisions of which are:

Appeal allowed	**Fondement de l'appel**
67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67 (1)** Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
[…]	[...]
(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.	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.

[16] The IAD's assessment of H&C considerations under paragraph 67(1)(c) is discretionary and varies based on the facts of each case. Consistent with pre-*Vavilov* jurisprudence, the exercise of that discretion is to be reviewed with considerable deference (*Islam v Canada (Citizenship and Immigration)*, 2018 FC 80 at paras 7-8; *Vavilov* at para 85).

[17] The *Ribic* factors cited in the Decision provide the accepted framework for the IAD's determination of whether to extend H&C relief against removal (*El Houkmi v Canada (Citizenship and Immigration)*, 2015 FC 1306 at para 12). Mr. Zou submits that, in his case, the

IAD unreasonably focussed on his acknowledged misrepresentation such that no H&C considerations could warrant the exercise of its discretion. He argues that the panel failed to adequately consider his other positive *Ribic* factors, most notably his establishment in Canada and the best interests of his children.

[18] Mr. Zou's characterization of the IAD as being "blinded" by its disgust with his 2005 conduct in entering into a marriage of convenience is not reflected in the Decision. The panel reasonably concluded that Mr. Zou and his first wife engaged in a sustained course of conduct that misled Canadian immigration authorities and resulted in Mr. Zou gaining entry to Canada through a marriage of convenience. The IAD viewed the misrepresentation as a serious attempt to manipulate the Canadian immigration system but its unambiguous criticism of Mr. Zou's conduct did not permeate the remainder of its analysis.

[19] In the Decision, the panel reviewed Mr. Zou's establishment in Canada, setting out: the genuine nature of his current relationship; his work history in Canada and the fact that he is the sole source of income for the family; his home ownership and financial position; and, his involvement with the three children. The IAD considered the hardship the family would experience should Mr. Zou be removed to China and the effects of a move to China on the family as a whole and on the three children, with specific attention given to their access to education and health care in China. The panel also considered the effects of removal of Mr. Zou alone. Finally, the IAD undertook a separate BIOC analysis. The IAD's conclusion that the H&C considerations put forth by Mr. Zou did not overcome his serious misrepresentation and warrant special relief does not mean that the panel was blinded by the misrepresentation or that it

unreasonably weighed the *Ribic* factors (*Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 35).

[20] Mr. Zou takes specific issue with the IAD's reference to his 2005 conduct as a manipulation of the Canadian immigration process "which cannot be condoned". He submits that the panel's language ignores the premise of paragraph 67(1)(c) of the IRPA which presupposes that an applicant has engaged in misconduct and directs the IAD to make an H&C assessment and consider special relief.

[21] I do not find Mr. Zou's argument persuasive. The fact that paragraph 67(1)(c) contemplates prior misconduct in no way means that the IAD is precluded from considering the circumstances and severity of that misconduct in its H&C determination. Indeed, the seriousness of the misrepresentation is one of the *Ribic* factors. Further, the Decision must be read as a whole and not as a series of independent statements. As stated above, the IAD's sharp criticism of Mr. Zou's conduct did not cause it to ignore or unreasonably diminish the evidence relevant to the other *Ribic* factors.

[22] Mr. Zou submits that the IAD erred in its assessment of his remorse. He argues that remorse is personal and that the panel's conclusion suggests that, unless an applicant unilaterally confesses to prior misconduct, they can never adequately show remorse. The Respondent submits that the IAD reasonably considered Mr. Zou's stated remorse against the fact that he and his first wife sustained their denials of a marriage of convenience through their 2006 successful appeal to the IAD.

[23] I find no error in the IAD's consideration of Mr. Zou's remorse. He maintained his misrepresentation until investigated by the CBSA and there is no indication in Mr. Zou's 2013 submissions to the CBSA seeking H&C relief that he regretted his 2005 actions. Mr. Zou apologized for the misrepresentation at the ID in 2016, which the IAD acknowledged. However, the panel saw no evidence of genuine remorse, rather Mr. Zou justified his actions and only apologized late in the immigration enforcement process. I find that the record and jurisprudence support the IAD's conclusion (see, e.g., *Pu v Canada (Citizenship and Immigration)*, 2018 FC 600 at paras 17-19).

[24] Mr. Zou also argues that the IAD essentially double counted the severity of his misconduct in 2005. He states that, while the panel determined that his establishment was a positive factor, it also measured that establishment against the misrepresentation and unreasonably discounted Mr. Zou's efforts and achievements. In addition, Mr. Zou argues that the IAD erred in finding that his establishment was made possible by his misrepresentation.

[25] The IAD assessed Mr. Zou's establishment in Canada and stated that it was clearly a positive factor in the H&C evaluation. The panel considered the establishment against Mr. Zou's misrepresentation and accorded the establishment little weight. I find that the IAD made no error in weighing the two *Ribic* factors in the course of its Decision. As Justice Southcott observed in *Shen v Canada (Citizenship and Immigration)*, 2018 FC 620 at paragraphs 24-27 (*Shen*), the IAD is not required to assess each *Ribic* factor separately and then conduct a tally in its concluding paragraphs (*Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 705 at paras 24-25). It is important to note that the panel did not double count the misrepresentation in its conclusions. Having weighed the misrepresentation against the family's establishment in

Canada, the IAD analysed the remaining *Ribic* factors without reference to the misrepresentation. Finally, the IAD did not err in noting that Mr. Zou's misrepresentation facilitated his establishment (*Shen* at paras 25, 27).

[26] The question remains whether the IAD reasonably considered the best interests of Mr. Zou's children. Mr. Zou alleges that the children would be unable to access education and health services in China and that the IAD erred in its analysis of this issue. However, Mr. Zou bore the burden of establishing sufficient H&C considerations to warrant special relief. Having raised the possibility of his family moving to China, it was incumbent on him to provide evidence of impediments to such a move and of any specific, negative consequences to the children beyond that of disruption (*Fouda v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1176 at para 40). There is little evidence in the record in support of Mr. Zou's argument that the children would receive inadequate health care and education in China. The IAD directly addressed this lack of evidence in the Decision, noting the largely illegible documents provided by Mr. Zou regarding health care in China. I find that the IAD's analysis was reasonable based on the record.

[27] Mr. Zou submits that the IAD's analysis is in stark contrast to other IAD decisions that were based on very similar facts and evidence (*Li v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 129859 (September 14, 2018) and *Wang v Canada (Public Safety and Emergency Preparedness)*, IAD File No: TB6-14318 (July 17, 2019) (collectively, the IAD Decisions).

[28] I have considered Mr. Zou's argument and the SCC's recent statement in *Vavilov* of the importance of consistency in administrative decisions (*Vavilov* at paras 129-132). The Supreme

Court emphasized that administrative decision-makers are not bound by their previous decisions and the principle of *stare decisis* but stated that, if a decision maker departs from long-standing practices or established internal authority, it must justify that departure in its reasons (*Vavilov* at para 131):

> [131] Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. …

[29] Mr. Zou does not submit that the IAD Decisions reflect a long-standing practice or established internal authority of the IAD, nor does he submit that the IAD is bound by the decisions. He also acknowledges that the IAD Decisions were not before the panel when it considered his appeal. Mr. Zou argues that it was nevertheless unfair and unreasonable for the IAD to reach a contrary conclusion in his case on similar facts.

[30] I have reviewed the IAD Decisions against Mr. Zou's circumstances, the evidence before the panel and the Decision, bearing in mind that the IAD is tasked in each case with assessing the evidence and testimony before it and with reaching a reasonable conclusion. Here, there was little evidence in the record regarding Chinese law or the availability of health care and/or education in China for the Zou family. In contrast, in the IAD Decisions, the panels describe in detail the evidence before them on these issues and its relevance to the families in question.

[31] In the present case, it was open to the IAD to conclude that Mr. Zou's submissions and evidence in support of his request for H&C relief were not sufficient to warrant discretionary

relief in light of his 2005 misrepresentation and lack of genuine remorse. The panel's reasons for its conclusion are justified in the Decision. As a result, the application is dismissed.

[32] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-4317-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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