Federal Court Cour fédérale

Date: 20210608

Docket: IMM-6624-19

Citation: 2021 FC 567

Ottawa, Ontario, June 8, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

ZIHAO DENG

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Immigration Appeal Division of the Immigration and Refugee Board of Canada [the IAD], dated October 11, 2019 [the Decision]. The Respondent was the subject of a removal order that had been issued against him because of his failure to comply with his residency obligations as a permanent resident of Canada. In the Decision, the IAD found that there were sufficient humanitarian and

compassionate [H&C] circumstances to grant the Respondent special relief under s 67(1)(c) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA], and set aside the removal order. The Minister of Citizenship and Immigration [the Minister] has applied for judicial review of that Decision.

[2] As explained in greater detail below, this application is dismissed, because I have considered the Minister's arguments and find the Decision to be reasonable.

II. **Background**

[3] The Respondent, Zihao Deng, is a Chinese citizen who became a permanent resident of Canada in February of 2010, when he entered Canada at the age of ten as a dependent of his father. The Respondent and his father returned to China approximately two weeks after landing in Canada. The Respondent next entered Canada in August 2014 and began studying at Markville Secondary School [Markville]. With the exception of two short visits to China in 2014 over school holidays, the Respondent remained in Canada while studying at Markville.

[4] Section 28 of the IRPA provides that a permanent resident must be physically present in Canada for 730 days in respect of any five-year period. In the five-year period following his initial entry into Canada, the Respondent was physically present in Canada for only 296 days. Therefore, when the Respondent applied to extend his permanent residency in 2015, a removal order was made against him on the basis that he was inadmissible to Canada pursuant to s 40(1)(b) of IRPA, for failing to comply with the residency obligation as set out in s 28 of IRPA.

[5] The Respondent appealed the removal order to the IAD on the basis that there were sufficient H&C grounds to grant him special relief under s 67(1)(c) of IRPA and set aside the removal order. This initial appeal was dismissed by the IAD on January 29, 2018. The Respondent then voluntarily left Canada and returned to China on June 26, 2018, pursuant to the removal order. At the time of his departure, he was three credits short of qualifying for a high school diploma from Markville. He has not completed his high school education since returning to China.

[6] The Respondent applied for judicial review of the IAD's January 29, 2018 decision. Justice Zinn allowed that application for judicial review in a decision issued on March 19, 2019. Based on a finding that the IAD had erred in failing to conduct a best interest of the child [BIOC] analysis, Justice Zinn set aside the initial IAD decision and remitted the appeal to a different panel of the IAD for re-determination (see *Deng v Canada (Citizenship and Immigration)*, 2019 FC 338). In the Decision that is the subject of this present application for judicial review, the IAD re-determined the Respondent's appeal, granted his request for special relief based on H&C grounds, and therefore found that he had not lost his permanent resident status and set aside the removal order against him.

III. **IAD Decision under Review**

[7] The IAD began its analysis by evaluating the extent of the Respondent's non-compliance with the residency obligation. The IAD noted that he was a child throughout the period under review and found that his comings and goings in that period were mostly the result of decisions made by his parents. The IAD was therefore of the view that the Respondent could not be held

fully responsible for the extent of his breach of the residency obligation in the same way as someone who was an adult throughout the period of permanent residence. Therefore, it attached limited weight to the Respondent's non-compliance, such that a lesser degree of H&C considerations was necessary to overcome the non-compliance.

[8] The IAD then evaluated the Respondent's family ties and establishment in Canada. It found that the Respondent has no family but has many friends in Canada. The IAD explained that it would not expect the Respondent to have any further establishment, given that he was a high school student for most of his time in Canada.

[9] The IAD next considered the Respondent's assertions that he is suffering hardship in China. The Respondent testified that he could not complete his high school education in China, claiming that there were no continuing education programs in China for adults whereby he could obtain the necessary credits. The IAD stated that it would discuss this point in greater detail later in its decision.

[10] The Respondent also testified that he started attending church while in Canada, but he could not go to church in China. The IAD doubted the correctness of this assertion, as there are churches in China overseen by the state as well as informal "underground" churches, which in many areas are tolerated by the state. The Respondent also claimed that he could not get a job in China without a university education. The IAD found that this is not true, as there are millions of employed people in China without a university education. However, the IAD understood the Respondent to mean that he could not find a job that he would like without a post-secondary

education. With respect to hardship, the IAD concluded that, while it believed that the Respondent would have more opportunities in Canada, it did not find his assertions that he is suffering hardship in China to be credible.

[11] Turning to BIOC, the IAD noted that Justice Zinn's judicial review decision indicated that it was an error for the visa officer and the IAD in the earlier appeal to have not considered the best interests of the child, because the Respondent was a minor at the time the visa officer considered his immigration status and issued his removal order. The IAD therefore considered the Respondent a child for the purposes of the appeal and examined his best interests.

[12] The IAD held that there was no question that it is in the Respondent's best interest to complete his high school education. Therefore, the IAD characterized the question to be decided as whether it is in his best interests that the completion of his high school education happen in Canada or China.

[13] The Respondent testified that he would like to complete his high school education in Canada. He testified and provided supporting documentation indicating that he made three student visa applications to Canada that were rejected. The Respondent also testified that it is not possible to transfer his Canadian high school credits to a high school in China. In post-hearing submissions, the Respondent provided a letter from his father, stating that his parents were told that he would have to start in the first year of high school in China and attend for three years in order to graduate. The IAD also noted the Respondent's evidence that he made attempts to

continue his high school education at Canadian institutions online but was not successful and that there is no system of continuing education for adults in China.

[14] The IAD explained that both parties were given an opportunity to submit post-hearing documentary evidence on the issue of continuing education opportunities that might be available in China to allow the Respondent to complete high school. The Minister provided three references to online material regarding adult education in China: an article by the Secretary General of the Chinese Adult Education Association; a National Report presented at the UN by the same association; and a Wikipedia entry.

[15] The IAD did not consider these pieces of information to be helpful, explaining that it is to be expected that the Secretary General of Chinese Adult Education would portray China as being at the cutting edge of adult education and that the Wikipedia entry lacked detail. The IAD was willing to believe that a wide variety of education is available to adults in China. However, it found that the Minister's evidence lacked specifics on the availability of education programs for persons who had started, but not completed, high school in a foreign jurisdiction, which the Respondent testified did not exist.

[16] The IAD found that there was no concrete evidence one way or the other as to the possibility of the Respondent completing his outstanding high school credits in China. However, the IAD found that it was not beyond belief that the Chinese education system would not accept credits earned in Canada and would therefore require him to start high school from the beginning. It determined that it is in the Respondent's best interests to proceed to complete high

school as soon as possible, that the best evidence is that obtaining a high school diploma could be quite quickly and easily achieved in Canada, and that the picture of what is available in China is murkier.

[17] The IAD concluded, based on the reasons for his non-compliance, his circumstances, and his best interests as a minor, that there were sufficient H&C circumstances to warrant the exercise of special relief. The IAD therefore set aside the removal order against the Respondent.

IV. **Issues and Standard of Review**

[18] In this application for judicial review, the Minister seeks to set aside the IAD's Decision and have the Respondent's appeal returned again to a differently constituted panel of the IAD for re-determination. The sole issue articulated by the Minister in this application for judicial review is whether the Decision is reasonable. The parties agree that the standard of reasonableness applies to the arguments raised by the Minister.

V. **Analysis**

[19] The Minister identifies that the Decision turned principally on the IAD's BIOC analysis, which focused almost entirely on the Respondent's ability to complete his high school education in China. As explained above, the IAD considered his best interests to lie with the completion of high school as quickly as possible. The IAD found that the best evidence was that he could obtain a high school diploma quickly and easily in Canada, but that the picture of what was

available in China was murkier. On that basis, the IAD found that Respondent had raised sufficient H&C circumstances to warrant relief.

[20] In challenging the reasonableness of the Decision, the Minister argues that the IAD erred in this analysis, because the Respondent adduced no evidence supporting his position that he could not resume and complete his high school education in China, while the Minister introduced country condition evidence contrary to the Respondent's position. The Minister therefore submits that the Decision was made without regard to the evidence and represents a reversal of the applicable onus of proof.

[21] The Respondent submits that the Minister is merely taking issue with the IAD's weighing of the evidence, the re-assessment of which is not the Court's role in judicial review (see *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at para 125). The Respondent argues that there was evidence on both sides of the question of the prospects for completing high school in China, that the IAD weighed that evidence and arrived at an intelligible conclusion based thereon, and that there is therefore no basis to interfere with the Decision.

[22] As a starting point, I agree with the Respondent that it is easy to follow the IAD's reasoning. Other than concluding that a lesser degree of H&C considerations would be required in this case to overcome the Respondent's non-compliance with his residency obligation, because he was a child when that obligation was breached, the Decision to grant relief turned on the BIOC analysis and, in particular, the evidence surrounding the prospects of him completing high school in China.

[23] The principal evidence in the Respondent’s favour on this point was his testimony, which the IAD described as being that he could not complete his high school education in China, because there was no continuing education program for adults whereby he could obtain the necessary credits. As post-hearing evidence, the Respondent also submitted a letter from his father, stating that the family had been told that, because the Chinese education system is different from that in Canada, the Respondent would be required to start from the first year of high school in China and complete another three years in order to graduate.

[24] The principal evidence on which the Minister relied was also submitted post-hearing. As previously explained, this consisted of an article by the Secretary General of the Chinese Adult Education Association, a National Report presented to the UN by the same association, and a Wikipedia entry.

[25] In analysing the evidence before it, the IAD found that the post-hearing evidence submitted by the Minister was not particularly helpful in the circumstances of this appeal. While noting the Minister’s submission that there were programs of adult and continuing education available in China, the IAD concluded that the Minister’s evidence was short on specifics. The IAD was willing to believe that a wide variety of education and training was available to adults in China. However the particular question with which it was concerned was whether there were programs available for persons who had started, but not completed, high school in a foreign jurisdiction, and wished to complete the program in China. The IAD acknowledged that there was no concrete evidence one way or the other about this possibility. However, the Respondent

had testified that no such possibility existed, and the IAD reasoned that there was no basis to disbelieve that evidence.

[26] I accept that there was no objective country condition or other documentary evidence before the IAD in support of the Respondent's position. However, there was evidence before the IAD in the form of the Respondent's testimony and his father's letter. The IAD preferred that evidence to the country condition evidence adduced by the Minister, because that country condition evidence was short on specifics. I do not regard this analysis as demonstrating that the IAD reached a conclusion either in the absence of evidence or through a reversal of the applicable onus of proof.

[27] However, in support of the position that there was no evidence from the Respondent upon which the IAD could reasonably rely, the Minister also argues that, earlier in the Decision, the IAD concluded that the Respondent's evidence on the possibility of completing high school in China was not credible. Therefore, the Minister submits that it was illogical and unreasonable for the IAD to subsequently rely on that evidence in support of its conclusion in the BIOC analysis.

[28] In my view, the difficulty with this submission is that it misconstrues the credibility finding upon which the Minister relies. The IAD made this credibility finding in the context of its analysis of the Respondent's hardship submissions. The IAD commenced that component of the analysis by noting the Respondent's testimony that he cannot complete his high school education in China, claiming that there were no continuing education programs available for

adults where he could obtain the necessary credits. The IAD then stated that this would be discussed in greater detail later in the Decision.

[29] The IAD then proceeded to consider the Respondent’s testimony that he does not have friends in China, that he cannot go to church in China, and that he cannot get a job without a university education. The IAD doubted the Respondent’s assertion surrounding his ability to attend church, because of the existence of state churches and “underground” churches to which the authorities turned a blind eye in many areas of China. The IAD also doubted the Respondent’s claim that he could not get a job without a university education, because millions of people in China find employment without having completed high school. The IAD recognized that what the Respondent meant was that he could not find a job that he would like without some kind of post-secondary qualification.

[30] The IAD concluded its hardship analysis with the credibility finding upon which the Minister relies, stating that it did not find the Respondent’s assertions that he is suffering hardship in China to be credible. I acknowledge that, as noted above, the hardship section of the Decision begins with a reference to the Respondent’s testimony about his inability to complete high school in China. However, reading this portion of the Decision as a whole, it is clear to me that the adverse credibility finding is not intended to apply to that evidence. Rather, the IAD indicated that it would address that evidence later in the Decision.

[31] The IAD’s treatment of that evidence is found in the BIOC analysis and the subsequent analysis in the Conclusion portion of the Decision, where the IAD refers to the evidence of the

Respondent and reasons that it is not beyond belief that this would be true. As such, the IAD did not make inconsistent findings on the credibility of the Respondent's testimony surrounding the prospects for completing high school in China. Rather, the IAD believed that evidence and relied upon it to support its BIOC analysis. I find nothing unreasonable in this aspect of the Decision.

[32] Finally, I note the Minister's argument that the BIOC analysis is deficient, because it did not focus upon any factor other than the completion of the Respondent's high school education. The Minister submits that the IAD did not consider the impact of the Respondent's separation from his Chinese resident parents, if he were to return to Canada, or his lack of establishment or other meaningful connections in Canada. I find little merit to this submission. From reading the Decision as a whole, it is clear that the IAD was aware of the Respondent's minimal connections to Canada, including the fact that both his parents resided in China. However, the IAD concluded that the factor most influencing his best interests was the ability to complete his high school education and then analysed the evidence relevant to that factor. Again, I find nothing unreasonable in the IAD's analysis.

[33] Having identified no basis to interfere with the Decision, this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-6624-19

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-6624-19
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v ZIHAO DENG
PLACE OF HEARING:	HEARD VIA VIDEOCONFERENCE
DATE OF HEARING:	MAY 10, 2021
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	JUNE 8, 2021

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