Federal Court Cour fédérale

Date: 20211122

Docket: IMM-1956-20

Citation: 2021 FC 1253

Ottawa, Ontario, November 22, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JONATHAN SIMBAHAN

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Minister of Citizenship and Immigration [Applicant] seeks judicial review of a February 28, 2020 decision [Decision] of the Immigration Appeal Division [IAD]. The IAD

allowed Mr. Simbahan's [Respondent] appeal of a January 17, 2018 removal order of the Immigration Division [ID]. The ID found the Respondent to be inadmissible to Canada under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for misrepresentation based on his failure to declare his child when he was granted permanent residence.

[2] The application for judicial review is dismissed.

II. Background

[3] The Respondent, a citizen of the Philippines, was married from 2004 to 2015. In 2006, his spouse came to Canada to work as a live-in caregiver. The Respondent applied for permanent residency in November 2008. His spouse had also applied for permanent residency, which was granted in April 2011.

[4] Since 2009, the Respondent and his spouse have had conflicts due to the Respondent's extra-marital affair with a woman [Maria] living in the Philippines. The Respondent and Maria had a child born on August 9, 2011. The Respondent's spouse knew about the child.

[5] In June 2011, the Respondent received his permanent residence visa. On arrival to Canada in February 23, 2012, he was asked if there had been any change in his circumstances and he replied there were none.

[6] The Respondent lived with his spouse in Canada until August 2012, after which they separated. The Respondent returned to the Philippines where he conceived a second child with Maria that was born on May 21, 2013. Currently, the Respondent and Maria live together in Canada and their parents care for their children in the Philippines.

[7] In July 2016, the Respondent’s spouse advised immigration authorities that she and the Respondent ended their relationship in August 2012. This disclosure was the reason for the September 2016 section 44(1) *IRPA* inadmissibility report [Report]. The Report stated that, at the time of landing, the Respondent was not in a genuine marital relationship with his spouse and therefore he was no longer a dependent of his spouse. The report led to a recommendation for an inadmissibility hearing before the ID.

[8] In October 2017, the Minister's Delegate amended the Report to remove the issue of a genuine marriage. Instead, the Minister’s Delegate focused on the fact that the Respondent failed to declare his dependent child at the time of landing.

[9] At the ID hearing, the Respondent conceded that he failed to declare his dependent child. On January 17, 2018, the ID issued the exclusion order against the Applicant pursuant to section 40(1)(a) of the *IRPA* for misrepresentation. The ID specifically acknowledged that the Minister was not pursuing the issue of the marriage but was simply addressing the misrepresentation with respect to the non-disclosure of his dependent child. The Respondent appealed the ID’s decision to the IAD.

[10] Before the IAD, the Respondent did not challenge the legality of his exclusion order. He based his appeal on special relief pursuant to humanitarian and compassionate [H&C] grounds.

III. The Decision

[11] The IAD heard the matter at two sittings. It acknowledged the facts of the situation and found that the exclusion order was valid in law but that there were sufficient H&C grounds to justify granting the appeal.

[12] At the IAD the Applicant submitted that the relationship with Maria was ongoing, which is evidence that it existed at the time the Respondent became a permanent resident of Canada. By not declaring his child, he circumvented any investigation into a marriage that had broken down, which may have prevented him from coming to Canada.

[13] The Respondent acknowledged that he should have declared the child but submitted that the seriousness of the misrepresentation was on the low end of the spectrum.

[14] The IAD noted that the ID stated that the issue of marriage breakdown was to be addressed at the October 17, 2017 ID hearing, but that hearing was adjourned to January 2018 due to the Applicant's decision to amend the Report. Based on the Applicant's amended Report the only issue to be addressed by the IAD, similar to the ID, was the issue of the non-disclosure of the Respondent's dependent child at the time of landing.

[15] The IAD noted that the Applicant did not address why the IAD should not accept the conclusions of the Report and the findings of the ID. While the non-disclosure of the dependent child violated the *IRPA,* the IAD concluded that the seriousness of the Respondent's conduct was on the low end of the spectrum and that there were sufficient H&C grounds to grant the appeal.

[16] In assessing the best interests of the Respondent's two children, who were eight and six years old, the IAD concluded that their interests would be best served by having them reunited with the Respondent and Maria in Canada.

IV. Issues and Standard of Review

[17] The Applicant sets out the issues as follows:

> (1) Did the IAD fail to exercise its jurisdiction by limiting the scope of the analysis regarding the seriousness of the misrepresentation?
>
> (2) Was the Decision reasonable in its analysis of the seriousness of the representation?
>
> (3) Did the IAD improperly rely on speculative evidence to support its analysis regarding the best interests of the children?

[18] These issues do not engage one of the exceptions set out in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*] and are therefore reviewable on the standard of reasonableness (*Vavilov* at paras 16-17, 23-25). In assessing the reasonableness of a decision, the Court is to consider not only the outcome but also the underlying rationale to assess whether the "decision as a whole is transparent, intelligible and justified" (*Vavilov* at para

15). For a decision to be reasonable, a decision-maker must adequately account for the evidence before it and be responsive to the Applicant's submissions (*Vavilov* at paras 89-96, 125-128).

V. The Parties' Positions

A. *Did the IAD fail to exercise its jurisdiction by limiting the scope of the analysis regarding the seriousness of the misrepresentation?*

(1) Applicant's Position

[19] The Applicant states that the Decision was unreasonable because the IAD failed to exercise its jurisdiction to conduct a proper *de novo* appeal and failed to consider an issue simply because the ID did not consider it. The Applicant states that it is clear that the IAD focused solely on the misrepresentation regarding the failure to declare the dependent child. Therefore, the IAD improperly narrowed their *de novo* jurisdiction on appeal. This led to a lack of a fulsome assessment of the seriousness of the Respondent's misrepresentation, which directly affects the outcome of the H&C assessment.

(2) Respondent's Position

[20] The Respondent states that the role of the Court is not to conduct a *de novo* analysis nor is it to inquire into what decision it would have made or determine the range of possible conclusions open to the decision-maker. The IAD applied the law, went through each of the facts, and explained its reasoning clearly. The Respondent states that while the Applicant may have preferred a different outcome, the Decision should not be quashed.

B. *Was the Decision reasonable in its analysis of the seriousness of the misrepresentation?*

(1) Applicant's Position

[21] The Applicant states that the failure of the IAD to conduct a proper analysis of the seriousness of the misrepresentation is a fatal flaw that renders the IAD's assessment of the H&C factors unreasonable. The IAD did not analyze whether the Respondent's failure to declare his child was deliberate or inadvertent. It did not consider how the misrepresentation affected the process and prevented immigration authorities from "obtaining a complete picture of, among other things, an applicant's family circumstances."

(2) Respondent's Position

[22] The Respondent states that the misrepresentation pursued by the Applicant was related to the non-disclosure of the child. Everything relevant to that question was canvased thoroughly, including the break-up of the previous relationship and the history with Maria. There was no narrowing of the issue.

C. *Did the IAD improperly rely on speculative evidence to support its analysis regarding the best interests of the children?*

(1) Applicant's Position

[23] The Applicant acknowledges that the balancing of H&C factors is within the purview of the IAD. However, the IAD's findings regarding the best interests of the children were not supported by real evidence and therefore cannot stand.

(2) Respondent's Position

[24] The Respondent states that the IAD understood Maria's application status and therefore, its finding was not speculative. The finding was also made in light of the overall reality of the family's circumstances, the difficulty the couple would have in living a normal family life in the Philippines, and its effect on the children.

VI. Analysis

(1) Did the IAD fail to exercise its jurisdiction by limiting the scope of the analysis regarding the seriousness of the misrepresentation?

[25] The Applicant submits that the IAD cannot restrict itself to simply stating whether the ID was right or wrong. Rather, the IAD must re-determine the facts and issues that the ID relied on in making its inadmissibility finding (*Castellon Viera v Canada (Minister of Citizenship & Immigration)*, 2012 FC 1086 at paras 10, 26; *Mendoza v Canada (Minister of Public Safety & Emergency Preparedness)*, 2007 FC 934 at paras 19-20).

[26] The Applicant also submits that the IAD improperly narrowed its assessment of the misrepresentation by only focusing on the dependent child and not the genuineness of the marriage (*Canada (Minister of Citizenship & Immigration) v Peirovdinnabi*, 2010 FCA 267 [*Peirovdinnabi*]). In *Peirovdinnabi*, the Court noted that the central question in the appeal was whether the IAD erred by failing to consider an issue simply because it was not addressed by the ID (at para 20). The Applicant states that the Court found that the ID applied a "far too narrow a

view of the *de novo* jurisdiction exercisable by the IAD on an appeal against a removal order" because the IAD did not consider the genuineness of the marriage (*Peirovdinnabi* at para 29).

[27] I find that *Peirovdinnabi* is distinguishable from the present matter. It is true that the Federal Court of Appeal held that the IAD should have considered the genuineness of the marriage even though it was not considered by the ID. However, In *Peirovdinnabi*, unlike in this matter, the issue of the genuineness of the marriage was a central issue throughout the proceedings before both the IAD and the ID (at para 27). Furthermore, in *Peirovdinnabi,* the Minister had not amended the inadmissibility report before the ID. The inadmissibility report in *Peirovdinnabi* focused solely on whether the marriage was genuine (at para 4). In this case, the Applicant amended the original Report so that the issue of the marriage was no longer being pursued. The amended Report focused on the issue of the non-disclosure of the Respondent's dependent child. The Applicant cannot now fault the IAD for basing its analysis on the issue it put forth in the amended Report.

[28] The Applicant next submits that the IAD limited the evidence and submissions that it would accept and barred questioning on material facts related to the misrepresentation, such as the circumstances of the marriage. The Applicant submits it sought to bring forward evidence on the genuineness of the marriage not to revive an additional misrepresentation assertion but to highlight the Respondent's conduct with respect to the immigration processes. Therefore, the Applicant states that this line of inquiry was a matter within the jurisdiction of the IAD when conducting a *de novo* hearing.

[29] I am not persuaded by the Applicant's submissions on this point. In reviewing the record, it is apparent that the Applicant, by amending the Report, clearly and concisely differentiated the genuineness of the marriage from the issue of the disclosure of the child. In any event, the IAD also considered the factual matrix at hand including the complicated relationship and circumstances of the Respondent, his spouse, and Maria. Accordingly, the IAD did not err by disallowing evidence and submissions on this issue.

(2) Was the Decision reasonable with regard to the seriousness of the misrepresentation?

[30] The Applicant submits that the IAD failed to properly analyze the seriousness of the Respondent's misrepresentation. The Applicant refers to the following passage in *Mai v Canada (Minister of Public Safety & Emergency Preparedness*), 2011 FC 101:

> [16] ….Material facts are not restricted to facts directly leading to inadmissible grounds, but are broader. When relevant information affects the process undertaken or the final decision, it becomes material *(Koo v. Canada (Minister of Citizenship and Immigration),* 2008 FC 931, at paragraph 19). The applicant's failure to mention his wife and child prevented immigration officials from investigating them and their relationship to the applicant. The misrepresentation thus affected the process undertaken.

[31] The Applicant also emphasizes the importance of claimants not withholding material facts regarding their dependents (*de Guzman v Canada (Minister of Citizenship & Immigration),* 2005 FCA 436 at para 32). Having failed to take proper account of the misrepresentation, the Applicant states that the Decision lacks an underlying rationale.

[32] The Respondent submits that the IAD clearly identified the factors for assessing the sufficiency of H&C grounds as set out in *Canada (AG) v Ribic*, 2003 FCA 246. At paragraphs 10 to 37 of the Decision the IAD assessed each factor and provided a well-reasoned Decision for concluding that H&C relief was appropriate in the circumstances. The Respondent states that the Applicant is essentially making a collateral attack on the genuineness of the marriage, which it chose not to pursue at the IAD.

[33] I am persuaded by the Respondent's submissions, and on a review of the record, that the IAD carefully outlined to all parties the proper boundaries for inquiry based on what the Applicant chose to argue. At paragraphs 10 to 21 of the Decision, the IAD addressed the entire factual matrix including the marriage and concluded at paragraph 20 that the misrepresentation concerned the undeclared child. The IAD still found that this misrepresentation warranted an exclusion order against the Respondent. These passages indicate that the IAD engaged with the misrepresentation before it, including the seriousness of the misrepresentation.

[34] The IAD did not err in making these determinations.

(3) Did the IAD improperly rely on speculative evidence to support its analysis regarding the best interests of the children?

[35] The Applicant states that the IAD erred in relying on speculative findings regarding the best interests of the Respondent's children and hardship. The IAD assessed the children's best interests based on the following findings:

(1) The children are presently cared for by their grandparents in the Philippines and have no status in Canada;

(2) The Respondent and Maria both have status in Canada;

(3) Maria is in the process of obtaining her permanent residence status; and

(4) Both the Respondent and Maria need to remain in Canada to be able to work to support their children. If they both return to the Philippines, the family would face financial difficulty.

[36] The IAD concluded that it was in the best interests of the children to unite them with the Respondent and Maria in Canada. If the parents remain in Canada and sponsor the children, the children can be close to their parents who would be able to support them.

[37] The Applicant states that there was no evidence regarding Maria's status in Canada and whether she would obtain permanent residency. The only evidence was a work permit, which expired July 1, 2019, prior to the IAD appeal. The IAD's findings, which were based on the submissions of counsel without any proper oral or documentary evidence, were speculative. This evidence cannot support the panel's findings and the balancing of the relevant H&C factors (*Dong v Canada (Citizenship and Immigration),* 2017 FC 229 para 13; *Francois v Canada (Citizenship and Immigration),* 2019 FC 748 at paras 26-27).

[38] The Respondent states that the work permit in question was filed as evidence with the IAD on June 7, 2019, in preparation for what should have been the first hearing on June 27, 2019. Therefore, the work permit was valid and the only one available when it was filed. The

Respondent would have had a copy of the work permit since June 7, 2019, and had Maria's status been an issue, the Applicant had plenty of time to provide evidence to the contrary, which would have been clearly available to them for the hearings of December 17, 2019, and January 20, 2020.

[39] Concerning the alleged lack of evidence of Maria's presence in Canada, the Respondent submits that during the hearing he stated that the children's mother came to Canada on July l, 2017, and that she needed to work in Canada to support the children. Additional documentary evidence was provided including: Maria's May 21, 2019 employment letter, her passport, her work permit, a vehicle lease agreement listing Maria as a co-lessee, a residential tenancy agreement listing Maria and the Respondent as tenants, and Maria's Ontario driver's licence.

[40] The Respondent submits that pursuant to section 67(1) of the *IRPA*, the IAD must be satisfied at the time of dealing with the appeal, that (a) the underlying decision is wrong in law, fact, or mixed law and fact; (b) that a principle of natural justice has not been observed; or (c) sufficient H&C considerations, including the best interests of a child, warrant special relief.

[41] Contrary to the Applicant's submissions, there was evidence before the IAD regarding Maria's presence in Canada as set out above in paragraph 39. I am also persuaded by the Respondent's submissions that if the Applicant took issue with the evidence, it ought to have put forth contradictory evidence.

[42] I agree with the Respondent's submissions that the IAD was alive, alert, and sensitive to the best interests of the children as pointed out at paragraph 33, above. Accordingly, I find that the IAD did not make speculative findings in exercising its discretion under section 67 of the *IRPA*.

VII. Conclusion

[43] The Decision is transparent, intelligible, and reasonable. The application for judicial review is dismissed.

[44] The parties did not raise any question of general importance for certification and none arises.

JUDGMENT in IMM-1956-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review dismissed.

2. There is no question for certification.

3. There is no order as to costs.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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