Federal Court  Cour fédérale

Date: 20130228

Docket: IMM-7573-12

Citation: 2013 FC 195

Montreal, Quebec, February 28, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

NADIA ZANCHETTA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant is a Canadian citizen whose spouse applied for permanent residence as a member of the family class on the basis of his relationship to the Applicant pursuant to subsection 12(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Applicant seeks judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board, wherein it was determined that humanitarian and compassionate [H&C] considerations did not warrant an exemption from the inadmissibility criteria in paragraphs 36(1)(*b*), 36(2)(*b*) and 40(1)(*a*) of the *IRPA*.

II. Judicial Procedure

[2] This is an application under subsection 72(1) of the *IRPA* for judicial review of the decision of the IAD, dated June 29, 2012.

III. Background

[3] The Applicant, Ms. Nadia Zanchetta, was born in 1968 and her spouse, a citizen of the United States, was born in 1975. The Applicant and her spouse married in 2001. They have three children together, aged ten (10), six (6), and three (3), who are Canadian citizens.

[4] The Applicant's spouse was convicted in New Jersey of burglary in 1995 and possession of a weapon in 1996. At the hearing, he testified that he was convicted for burglary when caught in an unattended store, the door of which was open when he entered. He alleges that he plead guilty to the offence to avoid a prison sentence. He testified that the weapon for which he was convicted of possessing was a dart pen.

[5] The Applicant's spouse entered Canada as a visitor in 2005 and has been living and working illegally since 2005.

IV. Decision under Review

[6] The IAD found that H&C considerations did not warrant an exemption from the inadmissibility criteria pursuant to: (i) paragraph 36(1)(*b*) of the *IRPA*, which deems foreign nationals inadmissible on grounds of serious criminality if they have been convicted of an offence outside Canada that would constitute an offence under an Act of Parliament punishable by a

maximum term of imprisonment of at least ten (10) years if committed in Canada; (ii) paragraph 36(2)(*b*) of the *IRPA*, which deems foreign nationals inadmissible on grounds of criminality if they have been convicted outside Canada of an offence that would constitute an indictable office under an Act of Parliament if committed in Canada or of two offences not arising out of a single occurrence that would constitute offences under an Act of Parliament if committed in Canada; and, (iii) paragraph 40(1)(*a*) of the *IRPA*, which deems foreign nationals inadmissible for misrepresentation for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in administering the *IRPA*.

[7] The IAD noted that paragraphs 36(1)(*b*) and 36(2)(*b*) applied because: (i) committing burglary (of a dwelling-house) is an indictable offence subject to imprisonment for life or (of a place other than a dwelling-house) an indictable offence subject to imprisonment for a term not exceeding ten years under section 348 of the *Criminal Code*, RSC 1985, c C-46 [*Code*]; and, (ii) possessing weapons or devices knowing one does not hold a license is an indictable offence subject to imprisonment for a term not exceeding ten years under subsection 92(2) of the *Code*.

[8] The IAD did not accept that the Applicant's spouse was convicted of possessing a dart pen as the Applicant did not present evidence supporting this allegation.

[9] The IAD held that paragraph 40(1)(*a*) of the *IRPA* applied due to the following misrepresentations and withholdings of material fact that did or could have induced an error in the administration of the *IRPA*: (i) giving false residential information and cohabitation dates and information concealing that the Applicant's spouse was living illegally in Canada; (ii) giving false

employment information concealing his illegal employment; and, (iii) giving false information with regard to travelling between Canada and the United States.

[10] The IAD held that, if criminality were the only ground of inadmissibility, the family situation of the Applicant's spouse would militate in his favour, despite his crimes; however, as he came without "clean hands", "demonstrated a blatant disregard for the law" (para 14), and intentionally sought to mislead immigration authorities, the IAD would not grant discretionary relief. The IAD was persuaded by his failure to correct his immigration status earlier and pay taxes in Canada or the United States.

[11] On the best interests of the Applicant's spouse's children, the IAD accepted that they would benefit from the continued presence of their father and would be prejudiced by his removal. This factor, however, was insufficient since the Applicant's spouse could continue to provide for his family in the United States and there was no evidence before the IAD that the family could not live with him in the United States or that they could not visit him. The IAD stressed that the best interests of any child directly affected by a decision is a factor to be considered seriously but was not dispositive.

[12] On the basis of the misrepresentations and withholdings of material fact, the IAD found that the Applicant lacked credibility. The IAD did not believe the Applicant's explanation that her spouse did not understand the distinction between his mailing and residential addresses when completing his forms or her characterization of his misrepresentations as mistakes.

V. Issues

[13] (1) Was the IAD's equivalency analysis reasonable?

(2)Was the IAD's analysis of the H&C factors reasonable?

VI. Relevant Legislative Provisions

[14] The following legislative provisions of the *IRPA* are relevant:

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25.** (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
…	[...]
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
…	[...]

(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

…

[...]

(2) A foreign national is inadmissible on grounds of criminality for

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

...

[...]

(*b*) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

...

[...]

40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation

40. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :

(*a*) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce

a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une

an error in the administration of this Act;	réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
…	[...]

VII. Position of the Parties

[15] The Applicant submits that the IAD's decision is unreasonable because it does not analyze the factors [*Ribic* factors] in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4, and endorsed by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84. The Applicant also contends that the IAD failed to apply the relevant H&C factors, a balancing of which operates in her spouse's favour.

[16] The Applicant claims the IAD minimized the best interests of the children by paying lip service to this factor without examining and weighing it. According to the Applicant, her spouse's criminal history and the misinformation on his immigration forms does not outweigh the best interests of the children, nor does his illegal employment militate against relief since he was employed to support his family.

[17] Finally, the Applicant claims that the IAD was not open to hearing further evidence as to whether her family could relocate to the United States and in regard to her father's illness.

[18] The Respondent counters that the IAD implicitly examined the *Ribic* factors but was not obliged to conduct a point-by-point analysis, that the Applicant merely disagrees with the weight the IAD gave to the *Ribic* factors and the evidence, and that this Court is not permitted to reweigh the

evidence. The Respondent further submits that the IAD was required to consider the immigration history of the Applicant's spouse.

VIII. Analysis

Standard of Review

[19] The IAD's equivalency analysis of the New Jersey law under which the Applicant's spouse was convicted is reviewable on a standard of reasonableness (*Sayer v Canada (Minister of Citizenship and Immigration)*, 2011 FC 144). The IAD's analysis of the H&C factors, including the best interests of the child, is also reviewable on this standard (*Sinniah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1285).

[20] Where reasonableness applies, the Court may only intervene if the IAD's reasons are not "justified, transparent or intelligible". A reasonable decision must fall in the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

(1) Was the IAD's equivalency analysis reasonable?

[21] The Applicant's spouse was convicted of burglary pursuant to Article 2C:18-2 of the *New Jersey Code of Criminal Justice* [*Jersey Code*] and possessing certain weapons under Article 2C:39-3(*e*) of the *Jersey Code* (Certified Tribunal Record [CTR] at p 73).

[22] Article 2C:18-2 of the *Jersey Code* defines burglary to mean entering or surreptitiously remaining in, and with a purpose to commit an offence, a research facility, structure, or a separately

secured or occupied portion thereof (CTR at p 76). It was reasonable to find this prohibition analogous to section 348 of the *Code*, which prohibits breaking and entering a place with intent to commit an indictable offence therein. Since section 348 is an indictable offence punishable by a maximum term of imprisonment of at least ten (10) years, the IAD reasonably found the Applicant's spouse criminally inadmissible pursuant to paragraph 36(1)(*b*) of the *IRPA*.

[23] Article 2C:39-3(*e*) of the *Jersey Code* prohibits knowingly possessing any gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckle, sandclub, slingshot, cestus or similar leather band studded with metal filings of razor blades imbedded in wood, ballistic knife, without any explainable lawful purpose (CTR at p 77). It would be reasonable to consider this analogous to subsection 92(2) of the *Code*, which prohibits possessing a prohibited weapon or device by a person knowing they do not hold a license. Subsection 92(2) *Code* is an indictable offence punishable by a maximum term of imprisonment of at least ten (10) years. It was reasonable to determine the Applicant's spouse criminally inadmissible pursuant to paragraph 36(1)(*b*) of the *IRPA*.

[24] The Applicant's submission that her husband was convicted for having a dart pen, which is not a prohibited weapon or device under the *Code*, was not supported by other evidence. It would be reasonable to accord little weight to this submission.

(2) Was the IAD's analysis of the H&C factors, including the best interests of the child, reasonable?

[25] The *Ribic* factors apply to determine if H&C considerations warrant an exemption from the inadmissibility provisions in paragraphs 36(1)(*b*) and 36(2)(*b*) of the *IRPA* and paragraph 40(1)(*a*)

of the *IRPA* (*Tabuyo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 425 at para 10; *Palmer v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1277). The IAD, however, is not obliged to conduct an express, point-by-point analysis of the *Ribic* factors (*Iamkhong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 355, 286 FTR 297 at para 43).

[26] While the IAD did not expressly cite the *Ribic* factors, it considered them implicitly by noting the seriousness of the spouse's offences and misrepresentations, the hardship on him and his family that would result from his removal, and the possibility of reunion in the United States (Decision at para 12 and 29).

[27] In reviewing the IAD's implicit analysis of the *Ribic* factors, this Court recalls that these factors are non-exhaustive and their weight, discretionary and that the "weight to be accorded to any particular factor will vary according to the particular circumstances of a case" (*Philistin v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 1333 at para 17; *Chieu*, above at para 40).

[28] The *Ribic* factors require the IAD to consider the seriousness of the criminal offences, likelihood of rehabilitation and the seriousness of the misrepresentations (*Tabuyo*, above, at para 12-14; *Patel v Canada (Minister of Citizenship and Immigration)*, 2012 FC 686 at para 32). The criminal offences at issue occurred almost twenty (20) years ago, when the Applicant's spouse was young, and are not of such severity to find that he could not have rehabilitated. It would be reasonable to conclude that the seriousness of the criminal offences would militate in his favour. In

finding that these offences on their own, attract "leniency", the IAD essentially made this finding (at para 12).

[29] It was, however, reasonable to conclude that the misrepresentations of the Applicant and her spouse are serious since they undermine the integrity of the *IRPA*.

[30] While the Applicant's spouse had been illegally living, working, and cohabiting with the Applicant since 2005, he stated on his application for permanent residence that: (i) his residential address was in North Carolina; (ii) he had been unemployed since 2005; (iii) he lived from 2000 until the date of the application in North Carolina and omitted any Canadian addresses held in this period; (iv) he lived with his brother and parents in the United States but traveling to live with his wife in Canada between 1999 and 2009; and (v) he cohabited with his spouse in the 1998 – 1999 period but was not currently living with the Applicant on the date of the application (CTR at pp 40, 43, 45, 53 and 120). From these representations, it was reasonable to conclude that the Applicant's spouse was directly or indirectly misrepresenting or withholding the material facts of his illegal sojourn and employment in Canada, matters that could induce an error in the administration of the *IRPA*. Even the fourth misrepresentation engages paragraph 40(1)(*a*) of the *IRPA* since it suggests that the Applicant's spouse only lived with his wife in Canada occasionally and that he lived permanently in the United States; this misrepresentation withholds the material fact of his illegal sojourn in Canada. In light of this pattern of misrepresentations, the IAD could reasonably disbelieve the Applicant's explanation that her spouse misunderstood the distinction between mailing and residential addresses.

[31] It was reasonable to give little weight to the length of time the Applicant's spouse spent in Canada, his degree of establishment, the degree of community support for him, the impact of his deportation on his family, and the hardship that his removal would cause. Since the Applicant can return to the United States, it was reasonable to conclude that none of these factors establish disproportionate hardship. While the Applicant's family depends economically on her spouse, it was reasonable to find this a neutral factor since he can legally work in the United States. Similarly, it is in the acceptable spectrum of choices to infer from the geographic and cultural proximity of the United States that his removal would cause some hardship but not unusual and undeserved or disproportionate hardship. The jurisprudence is clear that hardship must rise to a level of unusual and undeserved or disproportionate hardship (*Ambassa v Canada (Minister of Citizenship and Immigration)*, 2012 FC 158 at para 46).

[32] As for the Applicant's father's health issues, this Court observes that decision-makers may reasonably give little weight to health issues unsupported by medical evidence (*Koonjoo v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 1211, 298 FTR 255 at para 22). The Applicant mentioned her father's health issues at the hearing before the IAD but the record shows that no attempt was made on her part to present medical evidence in support of her allegations.

[33] Finally, the IAD must be "alert, alive and sensitive" to the best interests of affected children in disposing of H&C requests (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75). In *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555, the Federal Court of Appeal held that the best interests of the child under

subsection 25(1) of the *IRPA* is applied "by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad" and weighing hardship "with other factors, including public policy considerations, that militate in favour of or against the removal of the parent" (at para 4 and 6). The Federal Court of Appeal stated, in *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125, [2002] 4 FC 358, that the presence of children is not dispositive and only one factor a decision-maker must consider and weigh (at para 12).

[34] The IAD was reasonable to conclude that "in the circumstances of this case, [the best interests of the child] factor in and of itself, [was] an insufficient [H&C] consideration" (at para 28). The panel member found that there would be a benefit to the children in having their father in Canada and that his removal would be to their prejudice. Nonetheless, the IAD was entitled to weigh this factor against the strong public policy considerations militating in the disfavour of the Applicant's spouse; namely, his misrepresentations that undermined the integrity of Canadian immigration laws. In light of the geographic and cultural proximity of Canada and the United States, it would not be unreasonable to find that these public policy considerations outweighed the best interests of the children. In any event, this Court is not permitted to re-weigh the H&C factors that have been considered and weighed by a decision-maker (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360 at para 24).

IX. Conclusion

[35] For all of the above reasons, the Applicant's application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be dismissed.

No question of general importance for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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