

Federal Court



Cour fédérale

**Date: 20130423**

**Docket: IMM-6538-12**

**Citation: 2013 FC 413**

**Ottawa, Ontario, April 23, 2013**

**PRESENT: The Honourable Madam Justice Simpson**

**BETWEEN:**

**ZHOU XUAN JIANG**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] Zhou Xuan Jiang [the Applicant] seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Immigration Appeal Division [the IAD] of the Immigration and Refugee Board [the Board], dated June 18, 2012 [the Decision], wherein the IAD dismissed the Applicant's appeal from an exclusion order issued by the Immigration Division of the Board on April 9, 2010.

[2] For the following reasons, the application will be allowed.

Background

[3] The Applicant, a 41 year-old male and a citizen of China, arrived in Canada on December 8, 2003 as the sponsored spouse of his first wife. In May 2006, he came to the attention of immigration authorities when he applied to sponsor his second wife for permanent residence in Canada. It was quickly revealed that the Applicant had separated from his first wife less than one month after his arrival in Canada and that he had married his second wife in China in January 2006. His second wife and their two children remain in China where they live with the wife's parents.

[4] Following an interview with Citizenship and Immigration Canada [CIC], a report under section 44(1) of the Act was prepared by the Minister's delegate identifying the Applicant as an individual inadmissible by reason of misrepresentation because he married his first wife only for the purpose of acquiring permanent resident status in Canada. Although the Applicant had maintained the genuineness of his first marriage before CIC officers, he admitted at the admissibility hearing that he married his first wife to obtain status in Canada. As a result, the Applicant was found to be a person described in s. 40(1)(a) of the Act and the exclusion order was issued by the Immigration Division.

[5] The Applicant appealed the exclusion order to the IAD on humanitarian and compassionate grounds. At the hearing on June 5, 2012 he asked the IAD to take into account his establishment in Canada and the best interests of his two nephews in Canada. The Applicant's mother also provided oral testimony while other members of the family, together with the Applicant's employer and a colleague, provided support in writing.

### The Decision

[6] The IAD acknowledged that the exercise of its discretion in assessing humanitarian and compassionate grounds was guided by the factors set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IADD No 4 and supplemented by *Brar v Canada (Minister of Public Safety and Emergency Preparedness)*, [2009] IADD No 2244.

[7] The IAD assessed the impact of the relevant factors as follows:

- |  |   |                       |
|--|---|-----------------------|
| 1A. The seriousness of the misrepresentation | - | Very Negative         |
| 1B. The Applicant's remorsefulness           | - | Very Negative         |
| 2. The degree of establishment in Canada     | - | Minimally Positive    |
| 3. Family and support in the community       | - | Considerably Positive |
| 4. The best interests of the nephews         | - | Neutral               |
| 5. Hardship                                  | - | Minimally Positive    |

### Analysis

[8] The Applicant raised a number of arguments to attack the IAD's treatment of the evidence and its weighing of the relevant factors. However, in my view, there is only one error in the Decision. I am of the view that the IAD erred in the methodology it employed in its review of the factors. The proper approach is to consider all the relevant evidence in relation to each factor, indicate whether that assessment leads to positive or negative impact on the decision to be made and then conclude by weighing the factors against one another to reach an overall result.

[9] In this case, the IAD erred in its assessment of the second factor, the degree of establishment, by failing to give weight to this factor independently of the other factors. This error occurs at paragraph 27 of the Decision where the IAD says:

Considering the appellant's assets and long-term employment, I am satisfied that the appellant is established in Canada however, the positive weight that I attribute to this factor is diminished by the fact that but-for the misrepresentation, the appellant would not have been able to establish himself in Canada. As such, I attribute only minimal positive weight to this factor.

[10] The IAD erred in that it weighed the misrepresentation against the degree of establishment when considering the degree of establishment and then it considered the misrepresentation again, at paragraph 37 of the Decision, where it concluded as follows:

It is never an easy decision splitting up a family but the appellant has nobody to blame but himself. I have carefully weighed all of the factors in this case but I have found that the seriousness of the misrepresentation, together with my finding of lack of remorse with respect to the appellant's behaviour, in my view, outweighs all of the other factors. Granting a stay of removal in these circumstances would serve no purpose.

[11] The problem with this approach is that the IAD essentially double-counted the seriousness of the misrepresentation by using it to reduce the weight attributable to the establishment factor and then using it again in the final weighing.

[12] I cannot say that this error is immaterial because if the IAD had assessed degree of establishment independently of the misrepresentation, the final tally might well have included two "considerable positives" and two "very negatives" as opposed to the result described above. It is therefore possible that the Decision might have been different if the IAD had not erred in its methodology.

[13] For all these reasons the Application will be allowed.

**ORDER**

**THIS COURT ORDERS that**

The Decision is hereby set aside and this matter is sent back for reconsideration by a differently constituted panel of the IAD in accordance with these reasons.

“Sandra J. Simpson”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-6538-12

**STYLE OF CAUSE:** ZHOU XUAN JIANG v.  
THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** March 20, 2013

**REASONS FOR ORDER  
AND ORDER:** SIMPSON J.

**DATED:** April 23, 2013

**APPEARANCES:**

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