Federal Court  Cour fédérale

Date: 20170906

Docket: IMM-1214-17

Citation: 2017 FC 805

Ottawa, Ontario, September 6, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

XUE LI

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks leave for an application for judicial review of a decision of the Immigration and Refugee Board, Immigration Appeal Division ("IAD") dated February 28, 2017, which allowed the Respondent's appeal against the Immigration Division ("ID") of the IAD.

II. Background

[2] Xue Li ("Ms. Li") and Shan Gao ("Mr. Gao") are citizens of the People's Republic of China ("PRC"). The couple had a daughter in May 1990, and were married in July 1990.

[3] In April 2003, Ms. Li completed an application for permanent residence in Canada under the federal skilled worker class. Ms. Li included her husband, Mr. Gao, and her daughter as accompanying dependents on her application form.

[4] On May 11, 2004, Ms. Li's application for permanent residence was reviewed for security screening purposes by a Citizenship and Immigration officer.

[5] On August 24, 2004, Ms. Li's application for permanent residence was approved.

[6] On October 1, 2004, Ms. Li and her family became permanent residents of Canada.

[7] On January 24, 2005, the Public Security Bureau ("PSB") of the PRC issued a warrant for the arrest of Mr. Gao for the alleged offence of negotiable instrument fraud.

[8] In 2005, the Canada Border Services Agency ("CBSA") became aware of the criminal investigation of Mr. Gao in the PRC and began its own investigation into the inadmissibility of Ms. Li and Mr. Gao in Canada.

[9] On November 15, 2006, a report under section 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] ("Section 44(1) Report") was written against both Ms. Li and Mr. Gao. It was alleged that Ms. Li and Mr. Gao were inadmissible to Canada under section 40(1)(a) of the IRPA for misrepresentation.

[10] On April 7, 2008, the admissibility hearings were adjourned *sine die*, as the Gao family had made claims for refugee protection in Canada.

[11] On July 9, 2012, Ms. Li requested to have her refugee protection claim withdrawn.

[12] By letter dated August 31, 2012, Ms. Li requested to have section 44(2) referral to the ID be withdrawn. That request was denied.

[13] By decision dated May 12, 2014, the ID found that Ms. Li was inadmissible to Canada for misrepresentation, under section 40(1)(a) of the *IRPA*, for failing to disclose on her application for permanent residence form that her husband, Mr. Gao, had worked for the Bank of China and was accused of embezzlement while employed by the Bank. An exclusion order was issued against Ms. Li.

[14] Mr. Gao's family and friends were being pressured in China and he subsequently returned to China, was convicted of instrument fraud, and was sentence to 15 years imprisonment.

[15] Ms. Li remained in Canada and appealed the ID's decision to the IAD.

[16] The IAD also found that Ms. Li had deliberately failed to disclose and therefore misrepresented a material fact, that Mr. Gao had worked for the Bank of China, on her application for permanent residence form, where she listed Mr. Gao as her accompanying dependent. Ms. Li had also admitted that in 2005 she knew her husband was wanted by Chinese authorities. Nevertheless, the IAD granted Ms. Li's appeal under paragraph 67(1)(c) of the *IRPA*, determining that there existed sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case:

a) Impact on the family was a neutral factor;

b) Length of time and degree of establishment in Canada was moderately favourable;

c) Community support was a moderately favourable factor;

d) Hardship on return if sent to China was a neutral factor (little evidence of hardship, other than re-establishment and re-integration, which are normal consequences); and

e) The misrepresentation was moderate, not serious, as it did not go to her qualification for the visa.

[17] The Applicant argues that the IAD's decision is unreasonable, in characterizing the misrepresentation as moderate, in failing to consider the gravity of the crimes committed by the Respondent's husband, that Ms. Li also facilitated his efforts to evade prosecution in China and that Ms. Li made an unfounded refugee claim which she withdrew after four years.

III. Issues

[18] Did the IAD err by ignoring or misconstruing evidence when considering the *Ribic* factors evidenced in granting H&C relief to Ms. Li and allowing her appeal from the ID's exclusion order?

IV. Standard of Review

[19] The parties agree that the standard of review is reasonableness. Given that the exercise of an equitable discretion is being challenged, that decision should be afforded considerable deference.

V. Analysis

[20] The relevant provisions of the *IRPA* are paragraphs 40(1)(a) and 67(1)(c):

Misrepresentation	**Fausses déclarations**
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 an error in the administration of this Act;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
Appeal allowed	**Fondement de l'appel**
67 (1) To allow an appeal, the	67 (1) Il est fait droit à l'appel sur

Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	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.

[21] The factors that the IAD should consider when deciding whether to exercise its discretion and grant special relief are set out in *Ribic v Canada (MEI)*, [1985] IADD No 636 ("*Ribic* factors"):

a) The seriousness of the misrepresentation;

b) The length of time the appellant has been in Canada and the degree to which the appellant is established;

c) The impact the appellant's removal from Canada would have on members of the appellant's family;

d) Family in Canada and the dislocation to that family that removal of the appellant would cause;

e) The support available for the appellant within the community; and

f) The hardship the appellant would face in the country to which she would likely be removed.

[22] The factors to be considered in misrepresentation cases are set out in *Wang v Canada (MPSEP)*, 2016 FC 705 at paragraph 8:

> 8 First, the IAD, referring to this Court's decision in *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 [*Wang*], held that the factors to be considered in exercising discretion in cases involving misrepresentation included: (i) the seriousness of the misrepresentation leading to the removal order and the circumstances surrounding it; (ii) the remorsefulness of the appellant; (iii) the length of time spent in Canada and the degree to which the appellant is established in Canada; (iv) the appellant's family in Canada and the impact on the family that removal would cause, including the best interests of the child; and (v) the degree of hardship that would be caused to the appellant by removal from Canada, including the conditions in the likely country of removal.

[23] The Applicant argues that the IAD erred in its considerations of the evidence in weighing the *Ribic* factors on two fronts:

a) The seriousness of the misrepresentation which may have led to inquiries resulting in inadmissibility; and

b) Degree of establishment which was due to delays caused by the Applicant's deliberate unwarranted refugee claims;

[24] The Respondent argues that the IAD did not err in its assessment of the seriousness of the misrepresentation and its assessment of establishment. These are issues of weight and it is not the role of this Court to reweigh the evidence.

[25] As well, the fact that the Respondent availed herself of the legal process of making a refugee claim, which is not being challenged as fraudulent, and abandoned that claim four years

later, should not negatively impact the *Ribic* factor of establishment, as suggested by the Applicant.

[26] Moreover, the Respondent states that the IAD correctly assessed the seriousness of the misrepresentation concerning the Respondent's husband, as the misrepresentation did not impact on her ability to qualify as a skilled worker to obtain her visa, but only served as probably foreclosing a deeper investigation into the Respondent's husband's background as a dependent.

[27] In addition, the Respondent points out that the application form did not require her to list all of her husband's employment and therefore there was no breach of candour, unlike in the case of *Paashazadeh v Canada (Minister of Citizenship and Immigration)*, 2015 FC 327.

[28] Finally, the Respondent also directs the Court's attention to the fact that nothing in the evidence suggests that the Respondent was aware of the investigation of her husband in China before he came to Canada, given their distant and sporadic relationship – she is not culpable of any crime or complicit in her husband's crime. Ms. Li also maintained that her husband is innocent, and that she regrets that she did not review the application form more carefully which resulted in her omission of her husband's work at the Bank of China.

[29] In applying the *Ribic* factors, the IAD under paragraph 67(1)(c) of the *IRPA*, must be satisfied that "sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case".

[30] The Respondent argues that in applying the *Ribic* factors, the IAD should not conflate the test under section 25 of the *IRPA* with the application of the *Ribic* factors. However, in weighing the *Ribic* factors, the IAD cannot ignore the fact that an H&C exemption is an exceptional and discretionary remedy, which acts as a sort of "safety valve" available for exceptional cases (*Semama v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1082 at para 15).

[31] A misrepresentation that is serious that may negate H&C relief would need to be balanced by equal or greater factors under the *Ribic* rubric considered by the IAD, for it to reasonably find that the remedy is justified (*Thavarasa v Canada (Minister of Citizenship and Immigration)*, 2015 FC 625 at para 20; *Canada (Minister of Public Safety and Emergency Preparedness) v Nizami*, 2016 FC 1177 at para 16).

[32] The misrepresentation on Ms. Li's application form, which constitutes the omission of Mr. Gao's employment at the Bank of China cannot be said to be a mere oversight – he was employed by the Bank for 14 years. While Ms. Li may not have known about his alleged criminality until after she and he came to Canada, there is no question that the deliberate omission of his employment with the Bank, whether intentional or made with reckless disregard for her duty of candour, are material and serious in nature, and in this case may well have led to further inquiries by the immigration officer resulting in an inadmissibility finding. This is particularly true in this case where Mr. Gao's criminality was very serious, involving embezzlement of approximately 170 million RMB through activities carried out over four years. The saying "ignorance is bliss" does not excuse Ms. Li's material misrepresentation, or lack of

candour, in waiting for over seven years to "come clean" about her level of knowledge about her failure to disclose Mr. Gao's employment with the Bank of China.

[33] Given this negative factor, the IAD was obliged to consider the other *Ribic* factors, such that in the balancing act to determine if H&C relief was warranted, these other factors were equal or greater factors to reasonably find that the H&C relief was justified.

[34] The IAD made no such finding, instead finding that the other *Ribic* factors were moderately supportative or neutral, at best, characterizing the Respondent's case as "marginal".

[35] I recognize that it is not my role to reweigh the evidence and that I must afford the IAD considerable discretion in reaching its decision. However, in this case, that decision is not reasonable, intelligible or justified in light of the misrepresentation and lack of candour evidenced by the Respondent.

JUDGMENT in IMM-1214-17

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is remitted to a different Board member for reconsideration;

2. No question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1214-17
STYLE OF CAUSE:	MCI v LI
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