Federal Court  Cour fédérale

Date: 20150821

Docket: IMM-6583-14

Citation: 2015 FC 998

Ottawa, Ontario, August 21, 2015

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

XUILAN LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the Immigration Appeal Division [IAD] rendered on August 15, 2014. That decision dismissed the appeal of a removal order issued against the applicant, Ms. Xuilan Li, determining that there were insufficient humanitarian and compassionate [H&C] considerations to warrant special relief.

[2] For the reasons that follow, the application for judicial review is dismissed.

I. Background

[3] Ms. Li is a Chinese citizen who first came to Canada in March of 2005 on a student visa. At the time, she was 20 years old and pursued studies in English and fashion design. On March 12, 2006, Ms. Li married Adam Ryan, a Canadian citizen. The marriage was arranged by two individuals Ms. Li had become acquainted with at a cost to Ms. Li of $30,000.

[4] Mr. Ryan received a fee for the marriage and for sponsoring Ms. Li's application for permanent residency. Ms. Li's application for permanent residency was subsequently assessed without incident and she obtained permanent resident status on March 28, 2007. Ms. Li and Mr. Ryan never cohabited. They were divorced in October 2009 with the assistance of the individuals that had been paid to arrange the marriage.

[5] As part of a Canadian Border Services Agency [CBSA] investigation into a number of suspected "marriages of convenience" a report under subsection 44(1) of the IRPA was made on December 9, 2010 alleging that Ms. Li had filed a sponsored application for permanent residence on the basis of a paid marriage of convenience and was therefore inadmissible for misrepresentation. Three notices to appear for an interview were sent to Ms. Li. She failed to appear without explanation at the first two scheduled interviews and requested a postponement, through counsel, of the third interview. The request for postponement was refused and Ms. Li again failed to appear, advising that she was ill. Ms. Li was not called for another interview but was given 15 days to provide written submissions.

[6] In early November 2011, subsequent to receiving the notice to provide written submissions, Ms. Li and Mr. Ryan both provided statutory declarations attesting to the genuine nature of their marriage. On November 29, 2011, Mr. Ryan admitted his role in a paid marriage of convenience with Ms. Li to the CBSA. As a result a referral was made under subsection 44(2) of IRPA for an admissibility hearing before the Immigration Division.

[7] At the admissibility hearing on November 20, 2012, Ms. Li conceded for the first time that her sponsored application for permanent residence was based on a paid marriage of convenience with Mr. Ryan and that she had never lived with him. The Immigration Division therefore declared her inadmissible to Canada for misrepresentation under paragraph 40(1)(a) of IRPA, and issued a removal order.

[8] On appeal of her removal order to the IAD, Ms. Li did not contest the legal validity of the order but asked that the IAD exercise its equitable discretion and allow her appeal on H&C grounds. In support of her request for special relief she placed evidence before the IAD that she is recently married, is currently employed in her husband's business, is active in her community, involved in charitable activities and that removal to China would create a hardship.

[9] On the question of hardship, her evidence was to the effect that she has not lived in China for over nine years and she has no connections in China (she is an only child, her father has passed away and her mother now resides in Korea). Her current husband also testified to the hardship separation would generate, but acknowledged he had the resources to visit and support Ms. Li in China, and that he would do so if she were removed.

II. IAD Decision

[10] The IAD identified the factors to be considered in the assessment of special relief under paragraph 67(1)(c) of IRPA, citing the Federal Court's decision in *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059, [2005] FCJ No 1309 : (1) seriousness of the misrepresentation, (2) expressions of remorse, (3) the length of time spent in Canada and establishment, (4) family relationships in Canada and the impact of the applicant's removal on them, (5) the degree of hardship that would be caused by the removal, (6) the best interests of a child affected by the decision, and (7) any other exceptional circumstances.

[11] The IAD addressed each of the factors, finding that the misrepresentations were material, multiple, advertent and deliberate, characterizing them as "very serious". The IAD emphasized that the applicant had knowingly engaged in a scheme to obtain permanent residency by fraud for selfish motives, that this type of scheme strikes at the integrity of the Canadian immigration system, and that persons admitted to Canada in this manner can perpetuate the fraud by sponsoring further foreign nationals. The IAD did not accept that she was a victim of deceit, and found that she had entered the marriage of convenience knowingly.

[12] In considering the question of remorse, the IAD recognized that the applicant had expressed some remorse but found these expressions to be largely self-serving as the applicant had ignored the notices for an interview and continued to deny the allegations against her until Mr. Ryan's admission forced her to concede.

[13] In considering the degree to which Ms. Li is established in Canada, the IAD recognized that she had lived in the country for ten years, was employed, and that she was involved in her community. The IAD concluded that this constituted a positive consideration. Similarly, the IAD noted that Ms. Li does not have family in China, and that she would face some hardship from being separated from her husband, but that her husband was in a position to visit her in China. The IAD stated that the hardship identified is a natural consequence of removal not rising to the level of meriting special relief. There were no children whose interests the IAD was required to consider.

[14] The IAD held that the positive factors were insufficient to warrant special relief in light of the seriousness of the misrepresentation at issue and therefore dismissed the appeal.

III. Issues

[15] The applicant raises the following issues in this application:

A. Did the IAD incorrectly fail to consider and address a stay of the removal order pursuant to subsection 68(1) of the IRPA?

B. Was the IAD's assessment of the seriousness of the applicant's misrepresentation unreasonable?

IV. Applicant's Submissions

[16] The applicant relies on this Court's decision in *Lewis v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1227, 173 FTR 291 [*Lewis*] to advance the position that the

IAD was required to consider the possibility of granting a stay of the removal order under s. 68 of IRPA and to provide specific reasons for refusing to grant a stay. Ms. Li argues that stays are often granted in cases where a removal order is issued on the basis of criminality in order to give the person an opportunity to demonstrate rehabilitation. The applicant submits that there was evidence of rehabilitation in her case that would strongly support granting a stay, and that she should have been offered the same consideration as criminals.

[17] The applicant further submits that it is not enough to consider the humanitarian considerations required to allow an appeal of a removal order. The applicant notes that although the factors to be considered are the same, the threshold of humanitarian considerations required to grant a stay is lower than those required to completely quash a removal order. The applicant argues that the IAD fettered its discretion by failing to consider a remedy within its jurisdiction.

[18] With respect to the evidence of the seriousness of the misrepresentation, the applicant submits that the court erroneously focused on the potential consequences of her conduct, that is, that persons who obtain status in this manner can perpetuate the process by sponsoring others, such that even more people can access publically funded services and benefits intended for permanent residents on the basis of that misrepresentation. The applicant argues that she has never used her status to sponsor others in this manner and, as a result, the IAD assessed the seriousness of her misrepresentation in a 'factual vacuum', based on speculation rather than the actual evidence.

V. Respondent's Submissions

[19] The respondent argues that the applicant never actually requested a stay; rather the Certified Tribunal Record [CTR] only shows that the applicant requested that the IAD grant the appeal. The respondent submits that the *Lewis* decision only requires that the IAD give reasons for refusing to grant a stay when a request for a stay was made.

[20] With respect to the evidence of misrepresentation, the respondent emphasizes that the standard of review on this matter is reasonableness, and contends that the decision is reasonable. The respondent argues that the IAD's conclusions with respect to the seriousness of the misrepresentation and other factors were supported by the evidence. The evidence demonstrated that the misrepresentation at issue went to the integrity of the immigration system, had caused an error in the administration of IRPA, that the applicant showed little real remorse and had only confessed when faced with no alternative. The respondent submits that it was reasonable to conclude that the positive factors relating to the applicant's establishment and relationship with her current husband were outweighed by the negative factors.

VI. Analysis and Decision

A. *Standard of Review*

[21] The standard of review to be applied, where it is argued that a tribunal has failed to consider one of the grounds raised and pursued before the tribunal is addressed in *Turner v Canada (Attorney General)*, 2012 FCA 159, [2012] FCJ No 666, [*Turner*]:

> [38] There is some uncertainty over what standard of review to apply to a situation where, as here, the Tribunal has failed to consider one of the grounds which the appellant raised in his complaint and which he pursued before the Tribunal. Should this be dealt with as an issue related to the adequacy of reasons to be addressed within the framework of the reasonableness analysis: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at paras. 14 to 22 (*"Newfoundland Nurses' Union")?* Or should this be viewed as an issue of procedural fairness to be reviewed on a standard of correctness: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817?
>
> [39] Two germane points are clear from the jurisprudence.
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> [40] First, an administrative tribunal need not address each and every argument made. […]
>
> [41] Second, an administrative tribunal must consider the important points in issue, and its reasons must reflect consideration of the main relevant factors: *Via Rail Canada Inc. v. National Transportation Agency (C.A.)*, [2001] 2 F.C. 25 at para. 22. However, the burden is on the applicant to demonstrate that any point or factor was of such importance that the administrative tribunal was legally bound to consider it: *Stelco Inc. v. British Steel Canada Inc. (C.A.)*, [2000] 3 F.C. 282 at paras. 24 to 26.
>
> […]
>
> [43] The issue of whether an administrative tribunal has a legal obligation to consider an argument made before it as part of its duty of procedural fairness is to be determined on a standard of correctness. A reviewing court cannot defer to the choice of an administrative tribunal not to consider an argument where procedural fairness compels it to do so. Consequently, whether the point or argument made before an administrative tribunal was of such importance as to require the tribunal to consider it is a matter to be dealt with on a standard of correctness.
>
> [*Emphasis added*]

[22] I am satisfied that the question of whether or not the IAD incorrectly failed to consider a stay is to be reviewed on a correctness standard.

[23] Issue B, the IAD's determination of the seriousness of the applicant's misrepresentation in considering whether humanitarian and compassionate considerations warrant special relief under paragraph 67(1)(c) of IRPA, is a discretionary decision involving a fact-specific and policy-driven assessment within the IAD's expertise, and is therefore reviewable on the reasonableness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 55-58, [2009] 1 SCR 339).

B. *Did the IAD incorrectly fail to consider a stay?*

[24] Subsections 67(1) and 68(1) of IRPA read as follows:

Appeal allowed	Fondement de l'appel
67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(a) the decision appealed is wrong in law or fact or mixed law and fact;	a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice has not been observed; or	b) il y a eu manquement à un principe de justice naturelle;
(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.

Removal order stayed	Sursis
68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	68. (1) Il est sursis à la mesure de renvoi sur preuve qu'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.

[25] In *Lewis*, Justice Simpson speaks to the requirement to address a stay in written reasons at para 14:

> 14. […] In my view, if a stay is requested and if the facts suggest that there is reason to consider a stay, then, if reasons are given pursuant to section 69.4(5) of the Act, the Applicant is entitled to know why a stay was denied.

[26] After reviewing the CTR, I am of the view that the applicant has failed to demonstrate that a stay was requested: (*Turner* at para 41). I am also of the view that this is not a case where the facts suggest a stay need to have been considered.

[27] The hearing transcript contained in the CTR reveals the following:

A. At the outset of the hearing the Presiding Member advises the applicant that the IAD has three options in considering the applicant's appeal: (1) allow the appeal

in law, (2) allow the appeal on humanitarian and compassionate grounds, or (3) stay the removal under subsection 68(1) of the Act (CTR at 403 lines 35 – 37).

B. The Presiding Member states that the authority to grant a stay is not typically used in the type of case before him (CTR at 403 line 37).

C. In responding to a question from the Presiding Member relating to whether or not the legal validity of the revocation order is being contested under s. 67, the applicant's counsel confirms that the legal validity of the removal order is not being contested but that he is appealing to the Board's equitable jurisdiction under s. 68 (CTR at 404 lines 36-38).

D. The applicant requests on at least three occasions that the appeal be allowed on equitable or discretionary grounds(CTR at 454 line 38, CTR at 455 line 13, CTR 459 line 9).

E. The applicant submits that there is very little, if any chance that the applicant will repeat what she has done. In response, the Presiding Member observes that "She doesn't have to…She's Already won the prize". (CTR at 454 lines 40-47)

[28] The hearing transcript establishes that the Presiding Member is aware that a stay is an option available to the IAD but that the option is typically not used in misrepresentation cases. The view expressed by the Presiding Member reflects the jurisprudence; a stay under subsection 68(1) of IRPA is typically sought and exercised where the ground of inadmissibility relates to criminality: (*Bulgak v. Canada (Minister of Public Safety & Emergency Preparedness)*, [2014] F.C.J. No. 490, 2014 FC 468; *Singh v. Canada (Minister of Citizenship & Immigration)*, [2005] F.C.J. No. 198 43 Imm. L.R. (3d) 262(F.C.).

[29] This use of the stay authority in criminality cases reflects the fundamental distinction between post admission criminal conduct, where there remains a valid and legitimate initial admission decision, and misrepresentation cases where the initial admission decision itself was reached in error as a result of the misrepresentation. In cases of criminality the IAD may exercise the H&C discretion provided for in subsection 68(1) of IRPA to stay a removal order and allow the individual to demonstrate they are unlikely to reoffend. This consideration does not normally arise in misrepresentation cases where there is no incentive to reoffend so long as one is allowed to remain in Canada. In other words it is the circumstances surrounding the misrepresentation that led to the finding of inadmissibility that is of greater relevance in cases of misrepresentation, not the possibility of rehabilitation: (*Tai v Canada (Minister of Citizenship and Immigration)*, 2011 FC 248, [2011] FCJ at paras 82 and 83).

[30] This does not prevent the applicant from seeking a stay in a misrepresentation case, but as stated in *Lewis* this relief needs to be requested if the court is to find fault with the IAD's failure to expressly address the remedy in its reasons.

[31] In this case, the applicant does make reference to relief under section 68 of IRPA early in the hearing. This reference arises in response to a question related to the grounds on which the revocation order is being contested within the framework of the IAD's authority to allow an appeal under s. 67. The applicant's response was that "we are only appealing on the Board's equitable jurisdiction under 68". This statement is at odds with the position advanced at other points in the hearing where the applicant advocates for the appeal to be allowed on equitable or discretionary grounds, i.e. the special relief contemplated in para 67(1)(c) of the IRPA, not

special relief in the form of a stay under s. 68. With the exception of this early reference to section 68 of IRPA at no time does the applicant expressly request a stay as either the primary or alternative remedy. Within this context it is not at all clear if the s. 68 reference by the applicant before the IAD was deliberate or inadvertent.

[32] In addition, the applicant took no issue with the Presiding Member's statement at the outset of the hearing to the effect that a stay is not typically used in the type of case before him. One might reasonably expect the applicant to have responded to the Presiding Member's statement were the applicant actively seeking a stay under s. 68. In argument before this court the applicant was unable to identify any case where a stay had been granted in a misrepresentation situation.

[33] The obligation of a decision maker to expressly address the denial of a stay under s. 68 based on procedural fairness is triggered where a request for a stay is made. The evidence in this case does not lead one to conclude that a stay is an obvious remedy, and I am not convinced that the applicant requested that the IAD consider the granting of a stay as either a primary or alternate remedy.

[34] The mere fact that s 66 of IRPA provides that a stay is one of the options available to the IAD in considering an appeal does not create a positive obligation upon the IAD to consider and address a stay on its own initiative.

[35] In the circumstances, I am not convinced that the IAD erred in failing to consider and address a stay of the removal order pursuant to subsection 68(1) of IRPA in its reasons.

C. *Was the IAD's assessment of the seriousness of the misrepresentation unreasonable?*

[36] The IAD reviewed the evidence in detail and concluded that Ms. Li had knowingly and deliberately entered into a paid marriage of convenience for financial gain, had misrepresented the facts of her marriage to the immigration authorities and had obtained a permanent resident visa on the basis of that misrepresentation. The IAD concluded that the misrepresentation was very serious and struck at the integrity of the immigration system.

[37] The Presiding Member appropriately identified the factors to be assessed by the IAD when considering the exercise of its discretion on H&C grounds. Each of these factors was assessed based on the evidence, with reference to the duty of candour imposed on an applicant for permanent residence: see *Baro v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1299 at para 15, [2007] FCJ No 1667, and the objectives of IRPA as set out in s. 3.

[38] The Applicant takes issue with the IAD's comments relating to the broader potential consequences of the Applicant's misrepresentation, arguing that the IAD was required to restrict itself to a consideration of the actual consequences of the applicant's misrepresentations. I disagree.

[39] The reasonableness of the IAD's decision must be assessed as a whole. The IAD had a number of cogent reasons based on evidence particular to the case to support the conclusion that

the misrepresentation was very serious. That conclusion and the decision to dismiss the appeal fall within the range of possible acceptable outcomes: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190.

[40] I see no basis to interfere with the IAD's discretionary decision to deny special relief.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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