Federal Court  Cour fédérale

Date: 20160421

Docket: IMM-5217-14

Citation: 2016 FC 451

Ottawa, Ontario, April 21, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

FANGYUN LI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] One must always ask oneself: Is one's decision (in perspective, in anything, and, overall) good for children? If we have not considered that, then, have we, in the three separate branches of government, executing policy, legislating, or simply, but, interpreting legislation (as judges should), actually fulfilled our mandates, recognizing that Canada is a signatory to the *United Nations Convention on the Rights of the Child*. It is with this, that the Supreme Court of Canada

grappled; and, then, decided in its recent landmark judgment on the consideration of the best interests of the child, in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*].

[2] *Kanthasamy* is a judicial time capsule decision as it genuinely addresses all present and future decisions in respect of the best interests of a child. The judgment of the Supreme Court has been launched as to how to consider in all cases the best interests of a child; yet, nevertheless, to consider the best interests of the child together with all other factors to be balanced, ensuring that the rights of a child and by extension those of an unborn child, are considered significantly and profoundly in view of all circumstances, situations and ramifications of cases.

> [36] Protecting children through the "best interests of the child" principle is widely understood and accepted in Canada's legal system: *A.B. v. Bragg Communications Inc.*, [2012] 2 S.C.R. 567, at para. 17. It means "[d]eciding what ... appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention": *MacGyver v. Richards* (1995), 22 O.R. (3d) 481 (C.A.), at p. 489.
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> [37] International human rights instruments to which Canada is a signatory, including the *Convention on the Rights of the Child*, also stress the centrality of the best interests of a child: Can. T.S. 1992 No. 3; *Baker*, at para. 71. Article 3(1) of the *Convention* in particular confirms the primacy of the best interests principle:
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> > In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration*.
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> [38] Even before it was expressly included in s. 25(1), this Court in *Baker* identified the "best interests" principle as an "important" part of the evaluation of humanitarian and compassionate grounds. As this Court said in *Baker*:

> ... attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for [a humanitarian and compassionate] decision to be made in a reasonable manner...
>
> ... for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying [a humanitarian and compassionate] claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable. [paras. 74-75]
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> [39] A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply state that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12.
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> [Emphasis added.]
>
> (*Kanthasamy*, above at paras 36-39)

[3] Reference is also made in the *Kanthasamy* decision to *Kim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 149, [2011] 2 FCR 448 at para 58:

> [58] In addition to recognizing the rights of children, the RPD should also be aware of the particular vulnerabilities of children

> when assessing whether particular acts amount to "persecution" of a child. The Preamble to the CRC states "[b]earing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'". Since the CRC recognizes the vulnerabilities of children, it is appropriate for the RPD to consider their physical and mental development when assessing whether the harm feared by a claimant amounts to persecution. Children, because of their distinct vulnerabilities, may be persecuted in ways that would not amount to persecution of an adult. It is incumbent on the RPD to be empathetic to a child's physical and mental state and to be aware of the fact that harming a child may have greater consequences than harming an adult.

[4] Significant reference is also made to the life, work and ultimate sacrifice of Dr. Janusz Korczak. Dr. Korczak's example in "The Children's Republic" that Dr. Korczak had created, Dr. Korczak's life, itself, and work exemplify the need to consider the best interests of a child. As a result, Janusz Korczak is considered by the United Nations as the symbolic father of the *United Nations Convention on the Rights of the Child*. Therefore, to understand and adequately consider the *Convention on the Rights of the Child* to which Canada is a signatory, the *Convention* must be considered in interpreting all Canadian legislation in respect of the rights of a child. It is important to recall the name of Dr. Janusz Korczak and his work to recognize, acknowledge and understand the specific human condition of a child whose life and upbringing are the very source of who that child can become as an adult; and, to do all to ensure the child is able to grow into adulthood.

II. Introduction

[5] The Applicant seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision by the Immigration Appeal

Division [IAD] of the Immigration and Refugee Board of Canada, wherein the IAD rejected the Applicant's appeal of a removal order made against him by the Immigration Division. The Applicant did not contest the removal order; rather, he sought special relief from the removal order based on humanitarian and compassionate grounds and the best interests of the child, pursuant to paragraph 67(1)(*c*) of the IRPA.

III. Background

[6] The Applicant, Fangyun Li (age 32), is a citizen of China. He arrived in Canada on or around, April 13, 2002, with a valid student permit. On November 7, 2003, the Applicant, fraudulently, married a Canadian citizen for the sole purpose of being sponsored as a permanent resident to Canada; he became a permanent resident of Canada on August 8, 2007; and, divorced on December 8, 2008. On January 21, 2012, he entered into a genuine marriage. His current wife from a *bona fide* marriage is a Canadian citizen, named Ka Kei Tang.

[7] Subsequent to an investigation by the Canada Border Services Agency in respect of a marriage of convenience, a subsection 44(1) of the IRPA report was prepared with regard to the Applicant; and, on June 2012, the Immigration Division held that the Applicant is inadmissible to Canada for misrepresentation; and, thus, a removal order was made against the Applicant.

IV. Impugned Decision

[8] Before the IAD, the Applicant conceded that he is inadmissible to Canada pursuant to paragraph 40(1)(*a*) of the IRPA; but, submitted that he should, nonetheless, be allowed to remain

in Canada on humanitarian and compassionate grounds.

[9] The IAD, in order to determine whether it should exercise its discretion, relied on the factors set out in *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 [*Wang*]. In essence, the *Wang* criteria are the *Ribic* factors adapted in the context of misrepresentation (see *Ribic v Canada (Minister of Citizenship and Immigration)*, [1985] IABD No 4 [*Ribic*]).

[10] In examining the seriousness of the misrepresentation, as well as the Applicant's remorse, the IAD found that the scheme orchestrated by the Applicant was serious, material, advertent and deliberate. Regarding the Applicant's remorse, the IAD found that although he expressed remorse, he was "not prepared to take full responsibility for his action by admitting his misrepresentation to all concerned" (Decision at para 31, Applicant's Record at p 12).

[11] Regarding the establishment of the Applicant and his family in Canada, the IAD held that the evidence confirms that the Applicant and his wife are well-established in Canada (Decision at para 46, Applicant's Record at p 15). Turning to the hardship that the Applicant and his family may face if he was deported from Canada; the IAD held that the evidence supports a conclusion that both the Applicant and his wife would suffer hardship if he was removed from Canada.

[12] The IAD then proceeded to the analysis of the best interests of the, then, unborn child. The IAD accepted post-hearing evidence, submitted on February 14, 2014, that the Applicant's wife was pregnant and expecting their first child on October 15, 2014 (see section 175 of the

IRPA). Nonetheless, the IAD held that it could not give much weight to the pregnancy: "the fact of the pregnancy is just that and the panel cannot give it much weight given that until there is a live birth there are *per se* no best interests to take into consideration such that the best interests of this yet to be born child would be determinative of the appeal" (Decision at para 57, Applicant's Record at p 18).

[13] In the balancing of the factors, the IAD mentioned that it had to take into consideration the maintenance of the integrity of the immigration system (see paragraph 3(1)(*h*) of the IRPA); and, there should be consequences to one who commits misrepresentation. Consequently, the IAD was of the opinion that even if there were a number of positive considerations, such as the Applicant's establishment in Canada, that "to offer a relief under these circumstances would send a message that rolling the dice was preferable to candour" (Decision at para 74, Applicant's Record at p 23). Thus, the IAD held that the removal order was valid in law and that there were insufficient humanitarian and compassionate considerations to merit special relief in light of all the circumstances of the matter.

V. Issues

[14] The Court considers the two following issues to be central to this application for judicial review:

1) Did the IAD give adequate considerations to the best interests of the, then, unborn child?
2) Did the IAD err in concluding that there were insufficient humanitarian and compassionate grounds to justify allowing the Applicant to remain in Canada?

VI. Legislation

[15] The following are the relevant legislative provisions from the IRPA:

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 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 :
(*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.

VII. Position of the Parties

A. *Applicant's submissions*

[16] The Applicant submits that the IAD erred in considering the best interests of the, then, unborn child. Firstly, it applied the wrong legal test by stating that the best interests of the child analysis does not apply equally to an unborn child as it does to a born child (*Hamzai v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1108 at para 33 [*Hamzai*]; paragraph 67(1)(*c*) of the IRPA). Secondly, the IAD unreasonably considered the best interests of the, then, unborn child by simply stating that the child's interests had been taken into consideration; that is not sufficient; the IAD had the obligation to identify, define and examine, "with a great deal of attention", in light of the evidence the unborn child's interests (*Kanthasamy*, above at para 39). The analysis of the IAD in its decisions does not demonstrate that the IAD was "alive, alert and sensitive" to the, then, unborn child's interests.

[17] The Applicant further submits that the IAD exercised its discretion in a capricious manner and ignored evidence; specifically in respect of the Applicant's remorse and, thus, intensive volunteer work. The IAD held that the Applicant was not sufficiently remorseful as the Applicant had not admitted his misrepresentation to all concerned. The Applicant submits that this is an error in law (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, (1998) 157 FTR 35 at paras 15-17; *Ultima v Canada (Minister of Citizenship and Immigration)*, 2013 FC 81 at para 35; *Do v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 432 at paras 56-58).

[18] Lastly, the IAD erred by concluding that there are insufficient humanitarian and compassionate grounds to allow the Applicant to remain in Canada. The IAD unreasonably considered the *Ribic* factors; and, the IAD gave too much weight to the misrepresentation, to the

point of ignoring other relevant factors (*Duong v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 192, [2001] FCJ No 362 at paras 15-16; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 380 at paras 15-16).

B. *Respondent's submissions*

[19] Conversely, the Respondent submits that the IAD properly considered the best interests of the, then, unborn child, as the IAD did, in fact, perform a complete "best interests of the child" analysis; moreover, the best interests of the child constitute only one of several factors to be balanced amongst other factors. Secondly, significant deference is owed to findings of fact of the IAD, consideration of the evidence pertaining to the Applicant's remorse and the weight attributed to it by the IAD (*Shah v Canada (Minister of Citizenship and Immigration)*, 2008 FC 708 at paras 17, 19 and 20 [*Shah*]). In essence, the Applicant is asking this Court to reweigh the evidence before the IAD and to substitute its own conclusion to that of the IAD. This is not within the power of this Court to do; the IAD, according to the Respondent, did properly consider the *Ribic* factors (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]; *Shah*, above at paras 19-20).

VIII. Standard of Review

[20] Undoubtedly, the Court must apply the reasonableness standard in reviewing the IAD's decision, that, in respect of not granting special relief to a valid removal order based on the best interests of the child and on humanitarian and compassionate grounds (*Khosa*, above at para 59;

Uddin v Canada (Minister of Citizenship and Immigration), 2016 FC 314 at paras 18-20 [*Uddin*]).

IX. Analysis

A. *Unreasonable consideration of the best interests of the, then, unborn child*

[21] Both parties, in arguing whether the IAD erred in considering the best interests of the unborn child relied on the decision *Hamzai*, above, specifically at para 33, wherein the Court mentioned:

> [33] In this case, there was no specific information given as to the hardship that would be faced specifically by the unborn child. The officer has no duty to consider those specific interests. In any event, the clear and reasonable best interests of the child analysis above apply equally to any unborn child. There are no distinguishing factors that would make the case of an unborn or newborn child any different. [Emphasis added.]

[22] In *Hamzai*, above, the Court was judicially reviewing a decision by an officer of an application for an exemption on humanitarian and compassionate grounds pursuant to subsection 25(1) of the IRPA. In the present case, the Court is judicially reviewing a decision of the IAD in respect of paragraph 67(1)(*c*) of the IRPA.

[23] This Court has previously held that when assessing the best interests of an unborn child, an enforcement officer does not have to undertake a full humanitarian and compassionate grounds analysis involving the best interests of an unborn child as the enforcement officer needs only to consider short-term interests (*Ren v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1345 at para 41). In fact, an enforcement officer lacks the jurisdiction to

conduct a full humanitarian and compassionate analysis (*Ahmedov v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 730 at para 49). That is not the case for the IAD as paragraph 67(1)(*c*) of the IRPA specifically grants the IAD the power to conduct a humanitarian and compassionate analysis involving the best interests of a child (*Uddin*, above at para 47). As mentioned in *Hamzai*, above, the same test is applicable to an unborn child.

[24] In assessing the best interests of the, then, unborn child, the IAD stated:

> [57] While a positive consideration, the fact of the pregnancy is just that and the panel cannot give it much weight given that until there is a live birth there are *per se* not interests to take into consideration such as the interests of this yet to be born child would be determinative of the appeal.
>
> (Decision at para 57, Applicant's Record at p 18)

[25] In *Kanthasamy*, above, the Supreme Court instructed that under subsection 25(1) of the IRPA analysis, a decision-maker must do more than to simply state that the decision-maker took into consideration the best interests of the child; the decision-maker must well identify, define, and examine – with significant attention – in light of the evidence, the interests of the child (*Kanthasamy*, above at para 39). In the present case, the IAD did not even proceed to specify that it took into consideration the best interests of the child; the IAD simply mentioned that the child is as yet unborn; and, does have *per se* no interests. At the very least, the IAD should have considered the child's best interests of being united in Canada with his/her family (see paragraph 3(1)(*d*) of the IRPA). Consequently, the IAD's best interests of the child analysis, in and of itself, is unreasonable (*Hamzai*, above at para 33; *Kim*, above at para 58).

B. *Unreasonable consideration of the humanitarian and compassionate grounds to warrant special relief*

[26] The granting of special relief in regard to a removal order, pursuant to paragraph 67(1)(*c*) of the IRPA is an exceptional and discretionary relief; hence, considerable deference is owed to the factual findings of the IAD (*Khosa*, above at paras 60 and 62; *McCurvie v Canada (Minister of Citizenship and Immigration)*, 2013 FC 681 at para 68 citing *Charabi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1184 at para 21). In considering whether there are sufficient humanitarian and compassionate grounds warranting a special relief, the IAD must guide itself by the factors laid out in *Ribic* (*Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84 [*Chieu*]; *Khosa*, above) – as adapted in the context of misrepresentation (see *Uddin*, above). The IAD has extensive discretion to consider and weigh the factors in accordance with the particular circumstances of the case (*Chieu*, above at para 40; *Khosa*, above at para 65).

[27] Most of the Applicant's submissions treat the assessment of his remorse by the IAD. As such, the Applicant submits that he was remorseful; and, had been as such throughout the entire process, volunteering is time with many hours each week to community service. This was confirmed by the reporting officer who specified in his report that the Applicant did express remorse for his action, readily having admitted his involvement in a marriage of convenience and having fully participated in the investigation when requested (Applicant's Record, Affidavit of the Applicant, Exhibit B, p 44).

[28] In its decision, the IAD acknowledged that the Applicant did not deny the allegations that he had engaged in misrepresentation, he did express remorse and cooperated with the immigration authorities investigating his case. Nonetheless, the IAD held that the Applicant "is not prepared to take full responsibility for his actions by admitting his misrepresentation to all concerned. This is a negative consideration" (Decision, para 31). By "all concerned", the IAD was referring to the Applicant's employer, his parents and his parents-in-law. Furthermore, the IAD doubted the genuineness of the Applicant's remorse by making the following plausibility finding, which is solely based on the panel member's personal point of view of human behavior:

> [35] Remorse is difficult to assess as people will admit to almost anything when their backs are up against a wall, and the remorse that they express is often their expression of regret for their misfortune at being caught. Based on what the panel has heard, it is satisfied that if he had not been caught up in his own malfeasances the appellant had no intention of ever repenting, and his cooperation with immigration authorities is primarily the result of his being caught and not out of an innate desire to finally do the right thing.
>
> (Decision at para 35)

[29] Ultimately, in the balancing of factors, the IAD stated that even though there were numerous positive considerations – such as an expression of remorse, the cooperation with the immigration authorities, the Applicant's establishment in Canada, the hardship caused to the Applicant and his family if he was to leave Canada – that the IAD had to draw a line:

> [74] […] Parliament expects that there be a consequence for misrepresentation. What message does the panel send if in the face of serious multiple misrepresentations it allows an appeal simply because the appellant has been here for a few years, has worked to establish himself and has married with a child on the way. These are factors, in a whole or in part, that the panel would expect to see manifest by any immigrant to Canada but they do not by themselves or in their totality rise to the level of special relief when weighted against the seriousness of the misrepresentation. To offer

> special relief under these circumstances would send a message to others that rolling the dice was preferable to candour. However, candour is what is expected of persons who seek entry to Canada which is a privilege and not a right.
>
> (Decision at para 74)

[30] The balancing of the *Ribic* factors is not a quantitative exercise, rather, it is a qualificative assessment (*Dhaliwal v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 157 at para 106; *Ambat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 292 at para 32). In essence, the role of the IAD is to determine whether the Applicant's remorse, alone or in combination with other factors – such as his establishment in Canada, the hardship to himself and his family, the best interests of the unborn child and the seriousness of the misrepresentation – warrant special relief from a valid removal order.

[31] In the present case, the IAD was of the opinion that notwithstanding numerous positive considerations, the Applicant's decision to enter into a marriage of convenience in 2003 had to be punished. For the reasons below, the Court finds that the IAD unreasonably considered the *Ribic* factors; and, thus, its decision is unreasonable.

[32] Firstly, it was unreasonable for the IAD to doubt the Applicant's remorse without making any negative credibility findings against the Applicant. While it is relevant for the IAD to consider that the Applicant did in fact misrepresent by entering into a marriage of convenience, the IAD's finding that the Applicant is not honest and genuine in his remorse because of his previous misrepresentation is not supported by the evidence before the IAD. The officer's report demonstrates the opposite: the Applicant expresses remorse for his action, readily admitted his

involvement in a marriage of convenience; and, fully participated in the investigation when asked and has volunteered during the span of years tens of hours each month to benefit Canadian society.

[33] Secondly, the IAD unreasonably held that an applicant can only demonstrate remorse if she or he tells his/her employer and his/her relatives of previous wrongdoing. While this might be one of several factors to consider, it is unreasonable to doubt the Applicant's remorsefulness, simply because he did not tell his employer and all of his close relatives that he committed a misrepresentation in the past.

[34] Thirdly, and most importantly, the legislator specifically provides at paragraph 67(1)(*c*) of the IRPA that removal orders, issued as a result of misrepresentation may be excused in light of sufficient humanitarian and compassionate considerations. Thus, even though Parliament did intend that there be consequences for misrepresentation, it also recognized that there may be circumstances where a removal order issued due to misrepresentation may be cured by special relief.

[35] The majority in *Khosa*, above, stated that the weight to be given to the *Ribic* factors, such as an applicant's remorse, is within the discretion of the IAD; hence, as long as the IAD's decision falls within a range of possible and acceptable outcomes, which are defensible in respect of the facts and law, the IAD's decision must stand (see *Khosa*, above at paras 66-67). In the present case, the IAD was of the opinion that to "offer special relief under these circumstances would send a message to others that rolling the dice was preferable to candour".

Instead of asking whether there were sufficient positive considerations, in light of the *Ribic* factors, to warrant a special relief, the IAD seemed to believe that it is its role to punish the Applicant for his initial misrepresentation. From a reading of the IAD's reasons, one cannot conclude that the IAD entered into a reasonable attempt to decide whether there were sufficient positive considerations warranting a special relief.

[36] The Court agrees with the IAD that misrepresentation is a serious offence to the integrity of the Canadian immigration system. Nonetheless, one has to consider how would Canadian society benefit by refusing the appeal. Based on the evidence before this Court, it appears that the Applicant, with his wife and now born child, brings a positive contribution to Canada. More importantly, further to establish genuine remorse, the Applicant entered into a genuine marriage with a Canadian citizen; and, his wife testified, in her affidavit, that she would sponsor the Applicant if he was forced to leave Canada. Hence, the result would be that a family would be separated for, at best, more than several years (possibly seven according to current figures due to the nature of the case) with the eventual prospect of later being reunited by means of a sponsorship application which would in likelihood be accepted.

X. Conclusion

[37] Consequently, due to the absence of reasonableness in the IAD's decision, the application for judicial review is hereby granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be granted; and, the file be remitted to the IAD for assessment anew by a different panel. There is no question of general importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5217-14
STYLE OF CAUSE:	FANGYUN LI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 20, 2016
JUDGMENT AND REASONS:	SHORE J.
DATED:	APRIL 21, 2016

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