Federal Court Cour fédérale

**Date: 20170216**

**Docket: IMM-3232-16**

**Citation: 2017 FC 177**

**Toronto, Ontario, February 16, 2017**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**BEIDI QIU**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**<u>JUDGMENT AND REASONS</u>**

**<u>Overview</u>**

[1] This is an application for judicial review of a decision of the Immigration Appeal Division [IAD] denying an appeal from a Removal Order issued against the Applicant, Beidi Qiu, on June 17, 2014. The Removal Order was issued based on a finding that Mr. Qiu was a person described by s. 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27

[the Act], in that he is a permanent resident who is inadmissible for misrepresentation for having engaged in a marriage of convenience [MOC] on April 6, 2006, with his sponsor, Elizabeth Lenh. Mr. Qiu's appeal to the IAD sought special relief based on humanitarian and compassionate [H&C] considerations, taking into account the best interests of a child affected by the decision, under s. 67(1)(c) of the Act.

[2] As explained in greater detail below, this application is dismissed, because I have found that the IAD's decision was not based on a material misstatement or misconstruction of the evidence or an unreasonable H&C assessment.

**Background**

[3] Mr. Qiu is a 30 year old citizen of China who traveled to Canada in 2005 on a student visa when he was approximately 19 years of age. He came to Canada to study English, although he acknowledges that his main goal was to marry a Canadian woman and remain in Canada permanently.

[4] In 2006 Mr. Qiu met a classmate who introduced him to a Canadian woman named Elizabeth Lenh. He paid a total of $46,000 for his classmate to arrange a marriage between him and Ms. Lenh, he filed an In-Canada Spousal Sponsorship Application for Permanent Residence, and he became a permanent resident on August 1, 2008. He and Ms. Lenh subsequently divorced on July 13, 2010. Mr. Qiu concedes that this was an MOC.

[5] During the marriage, Ms. Lenh was in a genuine relationship with a different man from 2009 to 2013. Mr. Qiu was also in another relationship with a woman in China which spanned from 2006 to 2011. He has two daughters from this relationship, born on February 26, 2008 and September 30, 2009. In 2013 he requested and was granted custody of the children, and they have since been living with his parents in China, who look after them with the assistance of a paid caregiver.

[6] In 2014, Mr. Qiu entered into a new relationship with a woman in Canada, Jingxian Wang, and they were married on May 28, 2015. The couple live together, along with Ms. Wang's five year old son from a previous relationship. Mr. Qiu provides support to her son financially, physically, and emotionally. Ms. Wang is also pregnant with Mr. Qiu's child.

[7] In 2013, the Canada Border Services Agency [CBSA] commenced an investigation into Mr. Qiu's marriage to Ms. Lenh. Mr. Qiu provided written submissions to CBSA, in which he maintained that his marriage was genuine, and he provided a false submission from his landlord stating that he and Ms. Lenh had co-habited. On February 22, 2014, CBSA filed a request for an admissibility hearing based on a report issued under s. 44 of the Act, expressing that there were reasonable ground to believe that Mr. Qiu was inadmissible for misrepresentation under s. 40(1)(a).

[8] Mr. Qiu appeared before the Immigration Division [ID] for an admissibility hearing on June 17, 2014 and conceded the allegations made against him. The ID determined that he was a person described under s. 40(1)(a) of the Act and issued a Removal Order. Mr. Qiu appealed this

decision to the IAD. He did not challenge the legal validity of the Removal Order but sought special relief on H&C grounds. The IAD's decision, denying such relief, is the subject of this judicial review.

## Issues and Standard of Review

[9] The Applicant articulates the following issues for the Court's consideration:

A. Did the IAD misstate and/or misconstrue key evidence?

B. Did the IAD err unreasonably in its assessment of the significant H&C factors in support of the Applicant's request for equitable relief, and in so doing fail to adhere to the principles enunciated by the Supreme Court of Canada in *Kanthasamy v Canada (Minister of Citizenship and Immigration),* 2015 SCC 61 [*Kanthasamy*], and fail to conduct a proper assessment of the Applicant's current marriage and the best interests of his wife's son?

[10] The parties agree, and the Court concurs, that the applicable standard of review is reasonableness (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at paras 57-59; *Semana v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 1082, at para 18; *Wang v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 705, at para 15).

## Analysis

*Did the IAD misstate and/or misconstrue key evidence?*

[11] In making the decision to deny Mr. Qiu H&C relief on his appeal, the IAD relied on the factors prescribed in *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059, which includes the remorsefulness of the appellant. The IAD found that Mr. Qiu was not credible in his expressions of remorse and lacked genuine remorse, which was a negative consideration weighing heavily against the granting of relief. In reaching this conclusion, the IAD noted that Mr. Qiu carried forward his misrepresentations regarding the genuineness and primary purpose of his marriage from the time of submitting the immigration forms to his landing and well beyond, despite being afforded the opportunity to admit his wrongdoings. The IAD found that Mr. Qiu's failure to accept responsibility for his misrepresentation, until it was no longer a viable option to continue the deception, demonstrated that he lacked genuine remorse.

[12] Mr. Qiu argues that, in reaching this conclusion, the IAD misstated or misconstrued key evidence, as its recitation of the background to the appeal referred to Mr. Qiu having attended an interview with CBSA in December 2013, at which he continued to maintain that his marriage was genuine and not an MOC. Later in its decision, in considering the seriousness of the misrepresentation, the IAD again referred to Mr. Qiu perpetuating his deceptions at the interview with CBSA officials in 2013.

[13] Mr. Qiu is correct that this represents a factual error, as it is clear from the Certified Tribunal Record that his communications with CBSA in December 2013 were in writing, not at an interview. The CBSA Notes to File dated December 6, 2013 record that Mr. Qiu was mailed a copy of the s. 44(1) report on June 11, 2013, with an opportunity to make written submissions in response to the allegations of misrepresentation contained within the report. These submissions

were due July 3, 2013. Late submissions were received on August 6, 2013. The Notes to File record that the submissions were not being considered for the resulting recommendation but note that Mr. Qiu maintains that the marriage was genuine and had his landlord write an untruthful letter claiming that he rented an apartment to Mr. Qiu and Ms. Lenh.

[14] Mr. Qiu notes that the written submissions he made to CBSA are not included in the Certified Tribunal Record, and that the record indicates they were not taken into account by the CBSA. However, he does not dispute that he made those submissions or their content, as his affidavit filed in this application confirms that he made submissions to CBSA maintaining that the marriage was *bona fide* and providing a fraudulent letter from his landlord stating that Ms. Lenh and he cohabited, which actions he says he deeply regrets. Furthermore, the transcript of the IAD hearing records that Mr. Qiu confirmed to the IAD that in 2013 he still insisted the marriage was genuine and provided a letter from a landlord stating that he and Ms. Lenh lived together, which was not true.

[15] The Respondent notes that the transcript of the IAD hearing actually records Mr. Qiu confirming that he had an interview with, and spoke with, an immigration officer in 2013. The Respondent argues that the RAD therefor cannot be faulted for describing the December 2013 communications as an interview, when that was Mr. Qiu’s own evidence. Mr. Qiu responds that the IAD nevertheless had the obligation to capture the facts accurately, with the benefit of the record it had before it.

[16] My conclusion is that little turns on Mr. Qiu contributing to the IAD's factual error, as little turns on the error itself. The basis for the IAD's analysis was the fact that Mr. Qiu continued to perpetuate his deception even after CBSA commenced its investigation of the misrepresentation. Whether the perpetuation of the deception was done in writing or at an interview is immaterial. The IAD correctly notes that in December 2013 Mr. Qiu continued to maintain that his marriage was genuine and provided a fraudulent letter from a landlord in support of this assertion. The IAD also noted it was not until the inadmissibility hearing before the ID in 2014 that Mr. Qiu came clean and admitted that he had defrauded the Canadian immigration system. It found that he was not remorseful, but rather had attempted to perpetuate his lies.

[17] I find the IAD's analysis to be supported by the evidence, well within the range of possible, acceptable outcomes, and therefore reasonable.

*Did the IAD err unreasonably in its assessment of the significant H&C factors in support of the Applicant's request for equitable relief, and in so doing fail to adhere to the principles enunciated by the Supreme Court of Canada in Kanthasamy v Canada (Minister of Citizenship and Immigration), 2015 SCC 61, and fail to conduct a proper assessment of the Applicant's current marriage and the best interests of his wife's son?*

[18] Mr. Qiu argues that the IAD performed an unreasonable H&C assessment and in particular an unreasonable assessment of the best interests of the children. For the reasons explained below, I find no merit to his submissions.

[19] The IAD took into account the interests of Ms. Wang's son, to whom Mr. Qiu provides financial, physical and emotional support, their unborn child, and Mr. Qiu's two children who

live in China with his parents. At the conclusion of its analysis, the IAD found that none of the children's interests trump those of another and that they are therefore neutral factors in the appeal, such that the best interests of the children did not militate against Mr. Qiu's removal.

[20] Mr. Qiu's submissions place particular emphasis on an argument that the IAD erred in taking into account the best interests of his children in China. He argues that the IAD was not asked to consider those interests and should have taken into account only the interests of Ms. Wang's son and their unborn child. He relies on *Kanthasamy v Canada (Minister of Citizenship and Immigration),* 2015 SCC 61 *[Kanthasamy]* and Justice Shore's decision in *Li v Canada (Minister of Citizenship and Immigration),* 2016 FC 451 [*Li*] as support for his position that a best interests analysis must consider those of an unborn child.

[21] I agree that it is clear that the interests of an unborn child must be taken into account. However, I cannot agree with the proposition that the IAD's analysis was unreasonable because it considered the interests of Mr. Qiu's Chinese born children. He has referred the Court to no authority to support a conclusion that the IAD should have considered the interests only of Canadian born children. I appreciate that Mr. Qiu may not have asked that his two children living in China be taken into account. However, the IAD had evidence of those children and their circumstances. Given the importance of childrens' best interests in the context of an H&C analysis, as confirmed by the Supreme Court of Canada in *Kanthasamy*, I would be inclined to conclude that the IAD was not only entitled but obliged to take into account the interests of the Chinese born children. Certainly, its inclusion of those children in the analysis more than satisfies review on the standard of reasonableness.

[22] Mr. Qiu further argues that the IAD's analysis was unreasonable in that it created a sort of contest between the two sets of children. He submits that the required analysis is not about determining which child trumps the interests of another. I find nothing unreasonable in the IAD's approach, which concluded explicitly that the interests of the children in one country did not trump those of the children in another. The interests of several children were affected by the question of Mr. Qiu's removal, and the IAD considered and weighed those interests as it was required to do.

[23] I recognize that Mr. Qiu also argues that Ms. Wang's son and their unborn child would be affected significantly by his removal to China and that his children in China would be less affected because they are not accustomed to living with him. However, this argument amounts to a disagreement with the way the IAD weighed the evidence and the factors in its H&C analysis and does not represent a basis for the Court to intervene.

[24] Mr. Qiu also argues that the IAD's consideration of the best interests of his unborn child was inadequate. He submits that the analysis is limited to the observation that the child will be entitled to live in Canada and can live with Ms. Wang if the parents consider that to be in the child's best interests. I find no merit to this submission. There are obviously limits on how detailed an analysis is possible in relation to an unborn child. However, the IAD expressly states that separation from a parent is not generally desirable for a child and subsequently refers to the positive factors which support the granting of special relief as including, most notably, those which relate to the unborn child. The IAD did not perform an inadequate analysis of the unborn

child's interests. Rather it concluded that the positive factors, including those interests, were not sufficient to grant special relief.

[25] Mr. Qiu submits that the IAD failed to take into account the factor considered by Justice Shore at paragraph 36 of *Li*, i.e. the number of years of family separation that would result from removal. In *Li*, Justice Shore referred to this being possibly seven years before the family in that case could be reunited by means of a sponsorship application. Mr. Qiu notes that he will be barred from seeking return for five years, following which he may need to apply for an Authorization to Return to Canada, which will add to the period of separation. However, the IAD's decision notes Ms. Wang's testimony that, while she believes five years is too long, she and Mr. Qiu will wait for each other. While Ms. Wang's reference to five years may somewhat understate the period of separation, there is no basis for a conclusion that the IAD failed to properly consider the family separation that would result from removal.

[26] In the course of its analysis, the IAD noted that, as Ms. Wang did not meet Mr. Qiu until March 2014, she was effectively required to care for her son without the support of a father figure for 1 to 2 years. Mr. Qiu submits that this represents an error because the IAD was looking into the past rather than considering the family's current circumstances and how they would be affected by his removal. I disagree. The past experiences of the individuals comprising the family unit can clearly be relevant to how they would be affected by removal. Moreover, in the sentence of the decision following those referenced by Mr. Qiu, the IAD acknowledges that when Ms. Wang's second child is born, there will likely be a greater need for assistance with the children, which the IAD characterizes as a significant consideration in this appeal.

[27] The IAD also noted in its best interests analysis that Mr. Qiu and Ms. Wang were aware before they entered into their marriage that his removal from Canada was a distinct possibility. Mr. Qiu argues that this amounts to punishing Ms. Wang's son for the couple's decision to marry. I do not read this portion of the IAD's analysis in this manner. Rather, the IAD was considering the extent to which Ms. Wang and her son were dependent on Mr. Qiu, which is relevant to the best interests analysis.

[28] Finally, Mr. Qiu submits that the IAD's analysis failed to take into account the guidance of the Supreme Court of Canada in *Kanthasamy.* While the IAD did not reference *Kanthasamy* in its reasons, I have not found the IAD's decision to be in any way inconsistent with the principles derived from that jurisprudence.

[29] Having found no basis to conclude that the IAD's decision is unreasonable, this application for judicial review must be dismissed. The parties proposed no question for certification for appeal, and none is stated.

## JUDGMENT

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

No question is certified for appeal.

"Richard F. Southcott"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3232-16 |
| **STYLE OF CAUSE:** | BEIDI QIU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | FEBRUARY 8, 2017 |
| **JUDGMENT AND REASONS:** | SOUTHCOTT, J. |
| **DATED:** | FEBRUARY 16, 2017 |

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