Federal Court  Cour fédérale

Date: 20170613

Docket: IMM-1836-16

Citation: 2017 FC 578

Ottawa, Ontario, June 13, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

BO HUA YUAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, a citizen of China with permanent residency status in Canada, challenges a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada, dated April 14, 2016, dismissing his appeal of an exclusion order issued in June 2015 by the Board's Immigration Division on the basis of inadmissibility for misrepresentation pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The Immigration Division found that the Applicant has misrepresented his true date of birth when he applied for – and received – a student visa for Canada in 2002 so as to create the impression that he was five years younger than his actual age. Before the IAD, the Applicant did not challenge the legal validity of the Immigration Division's exclusion order. He rather sought special relief on humanitarian and compassionate [H&C] grounds as permitted by paragraph 67(1)(c) of the Act.

[3] Before this Court, the Applicant claims that the IAD decision dismissing his request for special relief is unreasonable and should, as a result, be set aside.

II. Background

[4] The relevant facts can be summarized as follows. The Applicant is in his early 40's. He has a wife, Si Hui Wang ["Kathy"], and three young children, all born in China. Kathy immigrated to Canada from China in 1997 and was granted Canadian citizenship in 2002. The Applicant met her that year while studying in Canada. After completing his studies in 2004, he returned to China where he took over a business, which he still owns. That business is engaged primarily in imports and exports of clothing to the United States. Kathy returned to China in 2005 and the couple got married there in March 2008. They had their first child the same year.

[5] In 2009, Kathy sponsored the Applicant for permanent residency status in Canada. In his application, the Applicant did provide his true date of birth but on the advice of an immigration agent, he did not disclose the history of his previous student visa application. The Applicant became a permanent resident upon landing in Toronto on January 26, 2010. However, he

immediately returned to China to care for his father whose health had deteriorated. The Applicant's father passed away shortly thereafter and then his mother became ill and was eventually diagnosed with cancer. The Applicant says that he and his wife became his mother's primary caregivers.

[6] In May 2014, the Applicant was informed by Citizenship and Immigration Canada [CIC] that there were some issues with his previous immigration applications. Shortly thereafter, he was advised that the matter would be referred to the Immigration Division for an admissibility hearing pursuant to paragraph 44(2) of the Act. That hearing was held on June 4, 2015 and on the same day, the Applicant was found inadmissible for misrepresentations resulting in the exclusion order being issued.

[7] The Applicant appeared before the IAD on February 26, 2016. He had arrived in Canada, with his family, two months prior. Before the IAD, the Applicant admitted having knowingly provided a false birth date when he applied for his student visa in 2002 and explained that he had been told by the study-abroad agency that was assisting him at the time that putting a younger age on his application would enhance his chances to get the visa. He also explained that he received advice from the immigration agent who assisted him with his permanent residency application to not report his previous studies in Canada. As a result, he did not challenge the legal validity of the exclusion order. As indicated previously, he sought special relief on H&C grounds pursuant to paragraph 67(1)(c) of the Act.

[8] That provision of the Act reads as follows:

Appeal allowed 67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of, […] (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.	**Fondement de l'appel** 67 (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé : […] 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.

[9] The Applicant told the IAD that because of his parents' situation, he was only able to spend one to two months in Canada each year since he had obtained permanent residency status. He also testified that he and his wife had discussed returning to Canada because their children were reaching the age where they would attend school and they wanted them to receive their education in Canada. He said that he and his family were living in the most polluted city in China and that food safety and education in China were problematic and not as good as in Canada. The Applicant also said that because they have Canadian citizenship, his children did not have household registration in China which meant that in order to send them to school, he and his wife would have to use their connections and pay bribes. The Applicant also indicated that he was planning to transfer his business to Canada and that losing his permanent residency would be a "big issue" for his family as they would probably all have to return to China with him since for his wife to stay here in Canada with the children was not really an option because she

would not be able to care for all of them given their young age. Finally, he told the IAD he was paying Canadian income tax.

[10] The IAD dismissed the appeal as it was not satisfied that there were sufficient H&C considerations to warrant the granting of special relief in all of the circumstances of the case. Applying the factors endorsed in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 [*Chieu*] and known as the "Ribic factors", the IAD made the following findings.

[11] First, with respect to the Applicant's degree of establishment in Canada, the IAD concluded that this factor was a negative one. It found in that regard that the Applicant:

a) Had returned to Canada only for about a month per year after landing;

b) Still owned a four bedroom apartment in China;

c) Still operated his business in China which had no clients in Canada;

d) Had been staying with friends since coming to Canada in December 2015; and

e) Had provided no evidence of community involvement in Canada and no documentary evidence of any plans to move his business to Canada.

[12] The IAD then examined the seriousness of the misrepresentations leading to the exclusion order and the circumstances surrounding them and again found this factor to weigh against the granting of special relief. It held that the Applicant's misrepresentations were numerous and made with the intent to mislead the immigration authorities. For the IAD, this was a serious attack on the integrity of the immigration laws of Canada. Third, on remorsefulness, the IAD held that the impact on his family going forward was likely the most compelling factor

causing the Applicant remorse but that blaming the immigration agent for the misrepresentation was not an indication of remorsefulness and impacted negatively his appeal.

[13] Fourth, the IAD examined how the Applicant's removal would impact his family in Canada. It found that the Applicant had no direct family in Canada but that his wife had her two parents and an estranged sister in Canada. It afforded neutral weight to this factor. Then, the IAD considered the hardship removal would have on the Applicant. It reiterated in that regard that the Applicant had spent a very short period of time in Canada since being granted permanent residency status, still owned a house and operated a successful business in China and had failed to provide documentary evidence of a plan to become established in Canada or of the payment of Canadian income tax. It concluded that the Applicant would continue to live the life he has always lived in China following his removal and, as a result, afforded negative weight to this factor.

[14] Finally, as mandated by paragraph 67(1)(c) of the Act, the IAD examined the impact removal would have on the Applicant's children. It first noted that the children were born in China and except for the six weeks preceding the hearing, had lived all their lives in that country. It further noted that since the children were still very young and close to their parents, the Applicant and his wife were "the best parents, living together, to provide for their needs in a responsible and effective manner" (IAD Decision, at para 31).

[15] The IAD then summarized as follows the Applicant's evidence regarding the hardship the children would suffer if he would be forced to leave Canada:

> [32] […] The appellant and his wife testified that his [sic] children, since taking out Canadian citizenship, are no longer considered citizens of China. As such, they must pay for insurance and are "discriminated" against in their schooling options. Moreover, the appellant testified that the smog is so bad in China that the children must wear mask when playing outside, that there is too much traffic which makes it dangerous for them to cross the street, and that the safety of the food supply is questionable, with the appellant's wife detailing how yogurt in China is made from used leather. The appellant and his wife testified that the children, one of whom was, according to testimony, registered at North Vancouver elementary school last month, will suffer greatly if their father is excluded because it is now time for them to return to Canada to learn English.

[16] The IAD found that evidence to be "largely not credible". It reiterated that the Applicant had provided no documentary evidence of attempts to move his business to Canada or look for Canadian clients. It also stressed the fact that the Applicant had made no efforts either to move his children to Canada until he received the exclusion order. The IAD concluded as follows:

> [32] […] All the negative factors that the appellant and his wife claimed are not credible based on the simple fact that they choose to live with their children in China until the appellant received a removal order. The appellant and his wife found it was in the best interests of the children to live in China until December 2015 despite the children's Canadian citizenship and the children's right to enter and live in Canada. I find their testimony in this regard to be lacking in credibility. I find that the best interests of the children are to remain with both their parents. Their parents have seen fit to raise their children since birth in China and the Panel affords no weight to this consideration in this appeal.

[17] The Applicant claims that the IAD decision should be overturned as the IAD failed to apply the correct test in considering the best interests of the three children, misapprehended the evidence relating to his remorsefulness, did not give due consideration to his establishment given

that his wife and children are Canadian citizens and imposed an incorrect standard in determining his credibility and that of his witnesses.

III. Issue and Standard of Review

[18] The issue raised by this judicial review application is whether the IAD decision denying the Applicant's request for special relief can be successfully challenged on the basis of the grounds advanced by the Applicant.

[19] It is trite law that the relief contemplated by paragraph 67(1)(c) of the Act is "exceptional and discretionary", especially where, as here, the validity of the exclusion order is not contested *(Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339, at para 62 [*Khosa*] and that the making of such a discretionary decision is subject to the reasonableness standard of review (*Khosa*, at paras 58-59; *Aisikaer v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 708, at para10 [*Aisikaer*]).

[20] As such, the Court must defer to the IAD findings. However, it must be satisfied that the impugned IAD decision falls within a range of possible and acceptable outcomes and fit with the principles of justification, transparency and intelligibility. In making that determination, the Court must refrain from reweighing the evidence and substituting its own appreciation of the appropriate outcome because this is not its role when it is exercising its judicial review function (Khosa, at para 59).

[21] Here, I am of the view that the IAD decision is problematic in two respects: the best interests of the children and remorsefulness. As such, given the importance of the best interests of the children factor, this, in my opinion, contaminates the IAD decision to a point where I cannot find that it falls within a range of possible and acceptable outcomes.

IV. Analysis

A. *The Best Interests of the Children*

[22] The Applicant claims that the best interests of his three children would be a positive factor rather than a neutral factor if the IAD had considered all relevant information, including the best option for them which was to remain with both parents in a singular family. In particular, he contends that the IAD minimized the children's interests by focussing on their parents' past actions, by failing to take into account the fact that they are considered foreign nationals in China because of their Canadian citizenship, and by not considering all possibilities affecting them.

[23] As acknowledged by the IAD, it is trite law that the children's best interests is an important factor which is to be accorded substantial weight and to which the IAD needs to be alert, alive and sensitive (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 74-75 [*Baker*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, at para 38 [*Kanthasamy*]; *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125, at para 12 [*Legault*]. It is also well settled that the presence of children does not call for a certain result and that their interests will not always outweigh other considerations

or mean that there will not be other reasons for denying an H&C claim (*Kanthasamy*, at para 38; *Legault*, at para 12).

[24] However, in order to resist judicial scrutiny, these interests need to be "well identified and defined" and must be examined "with a great deal of attention in light of all the evidence" in what is otherwise a "highly contextual analysis" (*Kanthasamy*, at para 35 and 39; *Baker*, at para 75; *Richard v Canada (Citizenship and Immigration)*, 2016 FC 1420, at para 16). This is so because of the "multitude of factors that may impinge on the child's best interests" such as his or her age, capacity, needs and maturity (*Kanthasamy*, at paras 35).

[25] Although these guidelines were established mainly in the context of H&C applications brought under paragraph 25(1) of the Act, I see no principled reason why they should not apply to the IAD in the context of a request for special relief made under paragraph 67(1)(c) of the Act as in both instances, the decision-maker is under the statutory duty to take into account, in the exercise of its discretionary power, the best interests of the child directly affected by its decision.

[26] Here, I am mindful of the fact that to compare a better life in Canada, where it may very well be that there is less pollution, better education and safer food supply than in most countries in the world, to life in the home country cannot be determinative of a child's best interests as the outcome would almost always favour Canada. However, I am not satisfied that the children's interests were "well identified and defined" by the IAD and examined "with a great deal of attention in light of all the evidence".

[27] There are, in my view, two problematic aspects to the IAD's decision in this regard. First, I agree with the Applicant that the IAD dispensed with any consideration of the best interests of the three children on the basis of the parents' choice of not moving them to Canada at an earlier time. This led the IAD to assert little, if no, credibility to the evidence of the hardship the children would suffer from a decision denying special relief. In doing so, the IAD failed, in my view, to be alert, alive and sensitive to the children's best interests as its primary focus was on the parents, not the children. It is not enough to simply list these interests, as the IAD has done. They need to be assessed in their full context and, as we have seen, from a variety of standpoints like age, level of dependency, medical issues and education.

[28] No such analysis was conducted in this case despite evidence that the children face institutional and personal discrimination due to their lack of identity and are at risk, from a health standpoint, due to poor environment. These concerns required some form of analysis but, for all intents and purposes, were disregarded as the IAD felt they lacked credibility because of the parents'conduct, namely the lack of effort to move to Canada earlier than they did. This was an error especially in light of the Applicant's explanation that he did not move his family to Canada earlier in order to care for his ailing father and mother.

[29] Second, despite being satisfied that the Applicant's family was a close family unit and that, as a result, it was in the best interests of the children to stay with their parents, the IAD failed to give any consideration to the possibility that this be in Canada as the Applicant testified he intended to do if his appeal was granted. In other words, the IAD recognized that separation of the parents was to be avoided but it did not adequately address all the options that would have

allowed the children to continue to live with their parents as a close family unit. Staying in Canada, rather than returning to China, was, according to the evidence, such an option.

[30] I agree with the Applicant that although the facts differ, *Ferrer v Canada (Minister of Citizenship and Immigration)*, 2009 FC 356, provides support for the proposition that the IAD's failure to consider all probable outcomes should the Applicant's appeal be allowed constitutes also a reviewable error (*Ferrer*, at para 5).

[31] Finally, contrary to the Respondent's contention, I do not believe that *Wang v Canada (Citizenship and Immigration)*, 2014 FC 304 [*Wang*] is dispositive of the present matter. In *Wang*, it was held that the possibility for the applicant in that case of having to pay fees for her children's education and medical care in China did not amount to unusual, underserved or disproportionate hardship within the meaning of paragraph 25(1) of the Act. This possibility arose from China's one-child policy. Here, the context is different as the Applicant's children have no identity in China because they are Canadian citizens and face discrimination as a result of this. Also, they are personally affected by pollution in the city where they live. These concerns deserved to be contextually considered. This was not a simple matter of having to pay a fine in order to access public services.

B. *Remorsefulness*

[32] The IAD found the Applicant to be a straightforward and credible witness with regard to the circumstances surrounding the misrepresentations but held that blaming his agent for the misrepresentations was not an indication of remorsefulness. This, in my view, is an unreasonable

finding as I fail to see in the evidence any indication that the Applicant attempted to justify his misrepresentations by blaming his agent. As a matter of fact, he testified that there was no one else to blame than him for these actions and that he was willing to accept the consequences but was hoping that the IAD would consider his wife and children's situation and give him a merciful decision. He said the same thing in a letter he sent to CIC in June 2014 after having been advised that he would face inadmissibility proceedings. Assuming it was considered by the IAD, the impugned decision provides no explanation as to why this letter carried no weight.

[33] It is quite clear to me that the Applicant understood that he bore all responsibility for his misrepresentations and I fail to see any basis for the IAD's finding that somehow, he externalized the blame. There is a difference between blaming someone for his actions and being forthcoming in describing the circumstances surrounding these actions. With all due respect, the IAD failed to make that distinction.

[34] For all these reasons, the IAD decision will be set aside and the matter, remitted to the IAD to be reconsidered by a different member.

[35] At the hearing of this judicial review application, the parties sought some time to address the issue of the possible certification of a question for the Federal Court of Appeal. The parties are therefore given 7 days from the release of these Reasons to make submissions on this issue. These submissions shall be provided by letter to the Court's Registry in Ottawa, Ontario, and shall not exceed three (3) pages.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted;
2. The decision of Immigration Appeal Division, dated April 14, 2016, is set aside and the matter is remitted to the Immigration Appeal Division for redetermination by a differently constituted panel;
3. The parties are given 7 days from the release of these Reasons to make submissions on Certification in the manner provided for in paragraph 35 of these Reasons.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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