Federal Court Cour fédérale

Date: 20180608

Docket: IMM-4434-17

Citation: 2018 FC 600

Toronto, Ontario, June 8, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ZHUO PU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of the September 25, 2017 decision [Decision] of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada, refusing her appeal from the Immigration Division [ID].

[2] I have considered the arguments raised by the Applicant in this judicial review. While I may not have reached the conclusion that the IAD did, that is not the reasonableness standard by which this Decision must be reviewed. In the circumstances, and for the reasons that follow, as I have not been persuaded that the Decision falls outside of the range of reasonable outcomes, I am dismissing this application.

II. Background

[3] The Applicant is a citizen of China. She came to Canada in 2003 on a student visa. In 2004, she entered into a marriage of convenience with a man she met in Canada [Mr. Y] through the assistance of an agent. The Applicant's mother paid $10,000 for Mr. Y to marry and sponsor her daughter. In 2005, the Applicant became a permanent resident of Canada after her sponsorship application was approved. The Applicant and Mr. Y divorced in 2007.

[4] It appears that, in 2009, an investigation was initiated by the Canada Border Services Agency [CBSA] when a driver's licence check suggested that the Applicant may not have been living with Mr. Y. In or around this time, CBSA also received a letter from an acquaintance of the Applicant, stating that the Applicant had connected her with the agent. The Applicant later denied, during her interview with CBSA, that her marriage with Mr. Y had been one of convenience.

[5] In 2012, a report was prepared under section 44(1) of IRPA, alleging that the Applicant was inadmissible under section 40(1)(a) on the basis that she had entered into a paid marriage of

convenience. Following a hearing held before the ID in 2014, the Applicant was found inadmissible under section 40(1)(a) of IRPA and an exclusion order was issued against her.

[6] On appeal to the IAD, the Applicant conceded the validity of the exclusion order. Thus, her appeal turned on whether sufficient humanitarian and compassionate [H&C] considerations existed to warrant special relief.

[7] In its Decision, the IAD considered the Applicant's case according to the factors set out in *Ribic v Canada (Minister of Employment and Immigration)* (1986), [1985] IABD No 4 (Immigration Appeal Board), as modified for misrepresentation cases (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 at para 11): (1) the seriousness of the misrepresentation and the circumstances surrounding it, (2) remorse, (3) time spent in Canada and establishment here, (4) family members in Canada, and the impact of removal on them, (5) the best interests of any child directly affected, (6) the support available to the appellant in the family and community, and (7) the degree of hardship caused by removal.

[8] In dismissing the appeal, the IAD found that the seriousness of the Applicant's offence weighed heavily against the relief sought. Further, the IAD was not persuaded that the Applicant's remorse was genuine, finding that she had not readily or truthfully answered the CBSA's questions in 2009, and had attempted to deflect responsibility for her actions at the hearing of her appeal. The IAD assigned this factor little evidentiary value.

[9] The IAD considered the Applicant's length of time in Canada and her employment and financial ties here, finding that these factors weighed in the Applicant's favour. The IAD also considered the Applicant's evidence of her participation in charitable organizations, but found that her involvement consisted "primarily" of financial donations, affording this factor moderate weight. In assessing the letters of support submitted by the Applicant's friends and colleagues, the IAD found that these letters showed the Applicant's social establishment in Canada and therefore weighed moderately in her favour. However, to the extent that the letters spoke to the Applicant's honesty and integrity, the IAD assigned them little evidentiary weight, in part because the authors were not available for questioning.

[10] The IAD did not accept the Applicant's arguments that she would face hardship in China in respect of her employment prospects or education. Likewise, the IAD was not satisfied on the evidence presented, that single mothers in China are subject to discrimination, or that the Applicant would face hardship in China as a result of air pollution. While the IAD accepted that the Applicant's son, being a Canadian citizen, weighed favourably in her H&C assessment, the IAD also considered the best interests of the child [BIOC], and concluded that the child could integrate into Chinese society, and would not face hardship there for any of the reasons offered by the Applicant.

III. **Standard of Review**

[11] The Applicant raises a number of issues in this application. She concedes, and I agree, that most of these arguments relate to the reasonableness of the Decision. I note, specifically with

respect to IAD decisions, that *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] is binding:

> [4] *Dunsmuir* teaches that judicial review should be less concerned with the formulation of different standards of review and more focussed on substance, particularly on the nature of the issue that was before the administrative tribunal under review. Here, the decision of the IAD required the application of broad policy considerations to the facts as found to be relevant, and weighed for importance, by the IAD itself. The question whether Khosa had shown "sufficient humanitarian and compassionate considerations" to warrant relief from his removal order, which all parties acknowledged to be valid, was a decision which Parliament confided to the IAD, not to the courts. I conclude that on general principles of administrative law, including our Court's recent decision in *Dunsmuir*, the applications judge was right to give a higher degree of deference to the IAD…

[12] Therefore, I am chiefly concerned with the Decision's intelligibility, transparency, and justification, and whether it falls within the range of outcomes defensible and acceptable in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[13] The Applicant also argues that the IAD used the wrong BIOC test. This issue is reviewable on a standard of correctness (*Ngyuen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 20; *Lu v Canada (Citizenship and Immigration)*, 2016 FC 175 at para 14).

IV. <u>Analysis</u>

[14] I will address each of the Applicant's arguments in turn.

i. Remorse

[15] The Applicant first argues that the IAD erred in its assessment of her remorse. She submits that the IAD ignored her affidavit, in which she explained that she was embarrassed about her misrepresentation and provided evidence as to the context surrounding it, including her difficult family circumstances in China and her mother's coercion. The Applicant argues that this evidence, as well as evidence of her good character as contained in letters submitted by friends and colleagues, lent support to the genuineness of her remorse. The Applicant further argues that it was unreasonable for the IAD to assess her remorse in 2009, as opposed to at the time of the IAD hearing, during which she expressed that she was sorry for the misrepresentation.

[16] I am not satisfied that the IAD's analysis on remorse was unreasonable. On this point, I find Justice Shore's reasoning in *Krishnan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 517 [*Krishnan*], to be of assistance:

> [25] Mr. Krishnan has not demonstrated that the Appeal Division erred in assessing Mr. Krishnan's remorse for the numerous crimes he committed. The Appeal Division gave many examples to illustrate why it did not accept that Mr. Krishnan was remorseful, including the fact that he continuously downplayed his involvement and culpability in the crimes he committed. These findings were open to the Appeal Division on the evidence. The "errors" alleged by Mr. Krishnan related not to his remorse, but rather to what he claims were the reasons as to why he participated in the criminal activity. The evidence contained in Mr. Krishnan's affidavit with respect to remorse has been considered by the Appeal Division. That it came to a conclusion unfavourable to Mr. Krishnan on this point, does not, without more substantial grounds, allow for a judicial review application.

[17] As in *Krishnan*, I find that the Applicant's contextual evidence principally spoke to her reasons for entering into the marriage and not to the genuineness of her remorse. Further, I do not agree that this evidence was ignored by the IAD. The IAD is presumed to have considered all the evidence before it in reaching its decision (*Islam v Canada (Citizenship and Immigration)*, 2018 FC 80 at para 20, citing *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (Federal Court of Canada – Appeal Division). Even in light of the evidence the Applicant highlights before this Court, the IAD was satisfied that the Applicant's misrepresentation was "deliberate and orchestrated" and therefore extremely serious.

[18] With respect to remorse, the IAD concluded that the Applicant's remorse was not genuine principally because (a) she had continued to misrepresent her position in 2009, and (b) at the IAD hearing she had attempted to deflect responsibility for her earlier actions. The IAD acknowledged the Applicant's expressions of remorse at the appeal, but found that she had had since 2009 to take responsibility for her actions, and that the Applicant was ultimately remorseful only for having been caught at the hearing — several years after her initial interview with CBSA, during which she again misrepresented the circumstances of the marriage.

[19] Although the Applicant disagrees that she deflected responsibility at the IAD appeal, I am of the view that the IAD's findings were reasonably open to it based on the evidence before it. I also note that the IAD's reasoning is consistent with other areas of law where late-stage accountability can weigh significantly against a party who seeks discretionary relief.

[20] To conclude on this issue, I will cite from the IAD's comments in *Lin v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 CanLII 26505 (CA IRB), which are on point for this case:

> 51 Remorse is defined as deep regret or guilt for a wrong committed, and a feeling of being sorry for doing something bad or wrong in the past. There are two components to remorse in the context of a misrepresentation: one involves the actions preceding the IAD appeal; and the other is the expression of remorse in testimony at the appeal itself. An expression of remorse at the IAD appeal is less meaningful, if the Appellant continued to perpetuate dishonest conduct during the section 44 investigation process and the ID hearing.
>
> [Citations omitted.]

ii. Credibility

[21] The Applicant next challenges the IAD's treatment of her credibility. She argues that the IAD erred in finding that her earlier misrepresentation affected her credibility at the hearing, because her testimony and affidavit evidence benefitted from the presumption of truthfulness.

[22] Given the seriousness of the Applicant's misrepresentation, in my view it was reasonable for the IAD to consider this factor as being relevant in the context of its overall credibility findings (see *Chow v Canada (Citizenship and Immigration)*, 2012 FC 1492 at para 16). Further, it is clear that the IAD was concerned not only with the Applicant's initial misrepresentation, but also with her subsequent conduct when interacting with immigration authorities.

[23] Reading the Decision in its entirety, I am not persuaded that the IAD placed undue emphasis on the Applicant's initial misrepresentation in its credibility assessment. Ultimately, as

the Respondent notes, the IAD indeed gave the Applicant the benefit of the doubt on certain matters on which her evidence was thin, including about the presence of her partner in their child's life.

[24] Overall, therefore, I am satisfied that the IAD made reasonable findings on the strength of the Applicant's evidence, including by requiring corroborating documentation for matters outside of the Applicant's personal knowledge, such as discrimination faced by single mothers in China.

iii. Letters of support

[25] Next, the Applicant argues that the IAD unreasonably afforded little weight to her letters of support because the authors were not presented for questioning. She submits that it was the IAD's onus to summon the authors if it wished to do so. Applicant's counsel did not rely on any specific case for this argument, but indicated that *Phara Delille v Canada (Immigration, Refugees and Citizenship*), 2017 FC 508 [*Delille*] (at paras 54-55) may have relevance.

[26] The relevant part of the Decision is as follows:

> [15] I also note the numerous letters of support from friends and associates of the appellant which demonstrate that the appellant has established herself socially in Canada. While l note that the letters of support on behalf of the appellant state that the appellant acts with "integrity," is trustworthy and honest, I find the evidence of the appellant's misrepresentation clearly indicates otherwise. The authors of the letters were not available to be questioned as witnesses or cross-examined and I give the authors' personal opinions of the appellant's character little evidentiary weight. However, I find the letters do establish the appellant's social establishment in Canada which weighs moderately in favour of the appellant in her H&C considerations.
>
> [Footnotes omitted.]

[27] First, as mentioned above, Applicant's counsel did not provide any case law establishing that it is a reviewable error for the IAD to attach lesser weight to untested opinion evidence speaking to an applicant's character. In my view, it was the Applicant's case to make, not the IAD's — and the Applicant did not call any witnesses. Justice Mactavish's comments in *Dhindsa v Canada (Citizenship and Immigration)*, 2017 FC 232 are instructive on this point:

> [17] What the IAD did find to be significant was the fact that no independent evidence had been provided to establish the existence of Gurpreet, his dance troupe or Lovely University. Ms. Dhindsa submits that it was open to the IAD to call Gurpreet as a witness, if it had any concern in this regard. That is not the role of the IAD, however. The onus is on an applicant to present her case and to adduce whatever evidence she wishes to have considered: *V.S. v. Canada (Citizenship and Immigration)*, 2017 FC 109, at para. 25, [2017] F.C.J. No. 86.

[28] Second, I note the IAD's concern that the Applicant's character was squarely at issue, given her immigration history. I agree with the Respondent's observation that the Applicant's support letters did not comment on or otherwise acknowledge the Applicant's past misrepresentation, which would be key to their evidentiary value insofar as they purported to address the Applicant's character. Therefore, it was open to the IAD to conclude that they were of limited value in addressing the character concerns arising from the Applicant's past conduct.

[29] I further find that the IAD's analysis is distinguishable from that which was criticized by Justice Roy in *Delille*. There, Justice Roy was ultimately concerned that the tribunal had "not even [attempted] to analyze the letter" (at para 54). Here, the IAD indeed analyzed the letters, and concluded that they supported the Applicant's social ties to Canada, but reasonably gave them little weight vis-à-vis their statements on the Applicant's character.

iv. Closed mind

[30] The Applicant then submits that the IAD had closed its mind to the possibility of granting her H&C relief. She points out that the IAD found that a "stay with conditions" was not appropriate, as the Applicant could not "reoffend" because she had already obtained permanent residence. The Applicant states in her written submissions that the fact that she is unlikely to reoffend is "no reason not to grant a stay".

[31] In my view, the IAD's conclusion on this point was reasonable. As explained by Justice Gleeson in *Li v Canada (Citizenship and Immigration)*, 2015 FC 998 [*Li* 2015]:

> [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. <u>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</u>. 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).
>
> [Emphasis added.]

[32] If a stay is requested and there are facts to support a stay, then an applicant is entitled to know why the stay was denied (*Li* 2015 at para 25; *Mcintyre v Canada (Citizenship and*

Immigration, 2016 FC 1351 at para 42). Here, the IAD expressly addressed the Applicant's request for a stay, and found that it was not appropriate in the circumstances.

[33] The Applicant also relies generally on *Li v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 451 [*Li* 2016], in which Justice Shore held that the IAD had been intent on punishing the applicant for his misrepresentation, and therefore had not conducted a reasonable H&C analysis (at para 35).

[34] However, *Li* 2016 is factually distinguishable. In that case, there was no reason to doubt the applicant's remorse, as he had fully participated in the investigation when asked, and had readily admitted his involvement in the misrepresentation (at para 27). Here, by contrast, the IAD found that the Applicant had misled authorities in 2009, and had not set the record straight until her hearing in 2017, where she continued to deflect responsibility for her actions.

[35] In conclusion, I do not agree that the IAD approached the Applicant's appeal with a closed mind or sought to punish her for her misrepresentation. To the contrary, it is my view that the IAD duly considered the Applicant's case, but ultimately concluded that she had not presented arguments or evidence to warrant H&C relief. Again, such an evaluation and weighing of factors is the IAD's role, and not this Court's (*Khosa* at para 4).

v. Weighing of other evidence

[36] A number of other issues raised by the Applicant are not properly within this Court's purview, as they challenge the weight assigned by the IAD to factors in its analysis (see *Khosa* at

para 61). For instance, the Applicant argues that the IAD did not appreciate the significance of her charitable or volunteering efforts or the extent of her establishment in Canada. I agree with the Respondent that these factors were considered, but ultimately that the IAD did not determine that they warranted H&C relief in the balance of its overall analysis.

vi. BIOC

[37] Finally, the Applicant argues that the IAD selected the incorrect test to be used in assessing the best interests of her child, by focusing on "hardship" to the child if the Applicant were returned to China, and failing to first consider what was in the child's best interests.

[38] I have not been persuaded that the IAD selected the incorrect test. The leading Supreme Court of Canada case, *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, faults the application of a rigid test by the decision-maker (at para 33). Here, I do not find that the IAD erred in its BIOC assessment. Indeed, there is no specific formula or rigid BIOC test (*Esahak-Sahmmas v Canada (Citizenship and Immigration)*, 2018 FC 461, at para 38; *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082, at paras 25 to 27).

[39] In this case, as the Respondent notes, the IAD took care to identify the benefits that the Applicant's child would receive from a life in Canada, yet noted that a straight comparison would ordinarily favour Canada, quoting *Yuan v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 578:

> [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…

[40] The IAD ultimately concluded that it would be in the Applicant's child's best interests to remain with his mother in China, where his entire maternal family resides. Indeed, I note that the Applicant testified before the IAD that she had not included the identity of her child's father, a temporary foreign worker, on her son's birth certificate. I also agree with the Respondent that, to the extent that the IAD's BIOC analysis focused on "hardship", that was directly in response to the framing of the Applicant's own submissions and evidence at the hearing of her appeal.

[41] Finally, the Applicant specifically takes issue with the fact that the IAD gave little weight to her testimony that her child would be unable to acquire permanent legal status in China. The IAD made this finding because, apart from her testimony, the Applicant had provided no evidence with respect to Chinese law.

[42] At the hearing of this application, Applicant's counsel submitted that it is virtually common knowledge that China does not allow dual citizenship, and that the IAD should have given the Applicant the benefit of the doubt on this point. After all, the IAD only had to conduct a Google search to find the answer.

[43] Although I have sympathy for the Applicant's arguments, the IAD rightly noted that foreign law is a question of fact, citing *Canada (Minister of Citizenship and Immigration) v Saini*, 2001 FCA 311 (at para 26). The Applicant had a number of years to prepare for her appeal and was represented by counsel before the IAD — albeit, not the same counsel she had on this

application. Appreciating that this was an important point for her case, she chose to rely solely on her own testimony at her own peril.

[44] I therefore see no reason to interfere with the Decision on the basis of the IAD’s BIOC analysis.

V. Conclusion

[45] Despite the able and compelling submissions of Applicant’s counsel in this application, I have been unable to find that the IAD’s decision was unreasonable. It is worth repeating that the question is not what I would have decided, but whether the IAD’s conclusions were reasonably open to it in light of the facts and the evidence and in my view, they were. The Applicant’s application is therefore dismissed. No questions for certification were argued and none arise.

JUDGMENT in IMM-4434-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No questions are certified.
3. No costs are awarded.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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