Date: 20190212

Docket: IMM-932-18

Citation: 2019 FC 184

Ottawa, Ontario, February 12, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

XIADONG LIU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Xiadong Liu, seeks judicial review of a decision (Decision) of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada. The IAD refused the Applicant's appeal of an exclusion order issued against him by the Immigration Division. The exclusion order was issued following the Immigration Division's finding that the Applicant was inadmissible to Canada for misrepresentation pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The Applicant did not

contest the validity of the exclusion order. The sole issue before the IAD was whether the Applicant's appeal should be allowed on humanitarian and compassionate (H&C) grounds, taking into account the best interests of the Applicant's children.

[2] For the reasons that follow, I have found that the IAD did not err in its assessment of the best interests of the Applicant's two children and that the Decision was reasonable. Therefore, the application will be dismissed.

I. Background

[3] The Applicant arrived in Canada from China in 2000 on a student visa.

[4] In July 2005, the Applicant submitted an application for permanent residence in Canada as a sponsored spouse. In his application, he claimed to have married a Canadian citizen in October 2004. The Applicant became a permanent resident on August 2, 2006. The Canada Border Services Agency subsequently discovered that the Applicant's marriage was a paid marriage of convenience entered into to permit the Applicant to obtain permanent residence. The couple divorced in 2008.

[5] The Immigration Division (ID) found the Applicant inadmissible to Canada pursuant to paragraph 40(1)(a) of the IRPA due to misrepresentation and issued an exclusion order on April 28, 2016. As a result of the exclusion order, the Applicant is subject to a five-year exclusionary period following removal pursuant to paragraph 40(2)(a) of the IRPA. The

Applicant concedes the misrepresentation and does not dispute the validity of the ID's decision. As stated above, his appeal of the exclusion order was based on H&C grounds.

[6] The Applicant is now married to a Canadian citizen and has two children who were born in Canada. The children are now 6 and 8 years old.

II. Decision under Review

[7] The Decision is dated February 8, 2018. The IAD noted that the legal validity of the exclusion order against the Applicant was not in question and framed the issue before it as whether, taking into account the best interests of a child (BIOC) directly affected by the decision, sufficient H&C grounds existed to warrant the granting of special relief to the Applicant. The IAD found that there were insufficient H&C considerations to warrant such relief and dismissed the Applicant's appeal.

[8] The IAD structured its review of the H&C considerations in the Applicant's case in accordance with the factors endorsed by this Court in *Wang v Canada (Citizenship and Immigration)*, 2005 FC 1059 at paragraph 11 (*Wang*):

- The seriousness of the misrepresentation leading to the removal order and the circumstances surrounding it;
- The remorsefulness of the applicant;
- The length of time spent in Canada and the degree to which the applicant is established in Canada;
- The applicant's family in Canada;
- The impact on the family in Canada that removal would cause;

- The best interests of a child directly affected by the decision;
- The support available to the applicant and the family in the community; and
- The degree of hardship that would be caused by the applicant's removal from Canada, including the conditions in the likely country of removal.

[9] The IAD stated that the Applicant's misrepresentation undermined the integrity of the Canadian immigration system. His actions were deliberate and intentional, constituting a fraud against the system. The Applicant's misrepresentation fell at the most serious end of the spectrum of misrepresentations and weighed heavily against him in the IAD's H&C assessment.

[10] The IAD found that the Applicant showed no remorse for his deliberate misrepresentation until he received a letter from Canadian immigration authorities in 2013. The evidence indicated that the Applicant was hopeful his actions would not be uncovered by the authorities. The Applicant's actions demonstrated no remorse, only regret after being caught.

[11] The IAD acknowledged that the Applicant had been in Canada for 17 years, had a full-time job and was hard-working. He had consistently paid his taxes and owned a house jointly with his current wife. The Applicant's establishment in Canada was a positive factor in the panel's assessment.

[12] The focus of the IAD's decision was on the consequences to the Applicant's family in Canada should he be removed and the best interests of his Canadian children. The panel set out the Applicant's testimony regarding his significant role in the lives of his wife and two minor children, noting that he takes the children to school each day and cares for them in the evenings

while his wife pursues real estate and insurance courses. The IAD questioned certain aspects of this testimony as the Applicant also testified that he worked from 9:00 a.m. to 9:00 p.m. on weekdays and 9:00 a.m. to 6:00 p.m. on Saturdays. The panel reviewed the role of his wife's parents in the children's lives, including the fact that they pick the children up from school each day, and were likely available to provide additional support. The panel found that, while removal of the Applicant would negatively affect the family's income and the loss of his day-to-day support would impact his wife and children, it could not conclude that his wife would lack the support she requires to care for the children financially and physically. The IAD also found that there would be emotional hardship to the Applicant's wife due to separation from her husband which was a positive factor in its assessment.

[13] The IAD began its BIOC analysis by acknowledging that the removal of the Applicant would likely negatively impact the children and that it is always advantageous for children to be with both parents. The panel noted that the Applicant's wife and children had the option of moving to China and that, if they remained in Canada, they would be able to visit the Applicant in China. There was no evidence before the IAD that the Applicant's wife, who lived in China prior to coming to Canada, could not enter, live or work in China. There was also no evidence to suggest that the children could not enter China or that they would not be adequately cared for and educated in China if the family were to move. The panel concluded that, while the BIOC was a favourable factor in its assessment, it was not determinative. In reaching this conclusion, the panel considered a psychologist's report (Psychologist's Report) dated October 29, 2017 in which the family's psychologist opined that a move to China would cause the children hardship in adjusting to life in another country.

[14] Finally, the panel considered hardship to the Applicant, noting that he had lived and was educated in China, spoke Mandarin and Cantonese fluently, and that there was no evidence to suggest he could not live or work in China during the five-year exclusionary period.

[15] In its conclusion, the IAD stated that, due to the serious nature of the Applicant's misrepresentation, he was required to establish a very strong H&C case in order to be granted special relief. The panel took into account the IRPA's objective of reuniting families but stated that this objective could not be considered in isolation. The IAD weighed its findings regarding each of the *Wang* factors cumulatively and concluded that the Applicant had not established sufficient H&C grounds to warrant the granting of special relief, given the very high bar he was required to meet.

III. Legislative Framework

[16] As stated above, the ID found the Applicant inadmissible to Canada pursuant to paragraph 40(1)(a) of the IRPA due to misrepresentation and issued an exclusion order. The Applicant appealed the exclusion order to the IAD pursuant to subsection 63(3). The IAD considered the Applicant's appeal on H&C grounds pursuant to the following provisions of the IRPA:

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.
[…]	[…]
Removal order stayed	**Sursis**
68(1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	68(1) Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[17] The two provisions create a mechanism for the IAD to deal with exceptional circumstances. An H&C determination by the IAD is highly discretionary and requires the panel to consider and weigh the circumstances of the specific case before it within the framework of the *Wang* factors.

IV. Issue

[18] The issue in this application is whether the Decision was reasonable. The Applicant's submissions contesting the reasonableness of the Decision focus primarily on the IAD's application and analysis of the BIOC test.

V. Standard of Review

[19] It is well established that the standard of review of an IAD decision not to grant relief on H&C grounds is reasonableness and that such a decision is to be reviewed with considerable deference by this Court (*Islam v Canada (Citizenship and Immigration)*, 2018 FC 80 at paras 7-8; *Gill v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1158 at para 27; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57-59; see, more generally, *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61 at para 44 (*Kanthasamy*)). As a result, the IAD's Decision will only be set aside if it lacks justification, transparency, or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the particular facts of the Applicant's case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VI. Analysis

[20] The Applicant submits that the IAD misapplied the BIOC test in its Decision. He states that the panel engaged in backward reasoning by first deciding that the Applicant would be removed from Canada and then determining that his family had the option of moving to China

with him. The Applicant argues that the IAD failed to ask the right question: whether it was in the children’s best interests to remove their father from Canada?

[21] The Respondent submits that the IAD reasonably considered the best interests of the Applicant’s children. The IAD found that removal of the Applicant would have a negative impact on his children and gave the best interests of the children substantial weight in support of special H&C relief. The panel then properly weighed this factor against the other *Wang* factors and concluded that the BIOC analysis was not determinative of the Applicant’s case.

[22] I agree with the Respondent and find that the IAD reasonably considered the best interests of the children within the *Wang* framework. The IAD began its analysis by stating, “I am mindful of the fact that a removal of the appellant will likely have a negative impact on [the children]”. This statement forms the crux of the Applicant’s argument regarding the backward nature of the panel’s analysis. However, the remainder of the IAD’s BIOC analysis must be considered. Further, the BIOC analysis must be reviewed in conjunction with the panel’s assessment of the impact of any removal of the Applicant on the family generally as the children’s interests were also addressed by the panel in the course of that assessment.

[23] The context of the IAD’s Decision is that of an exclusion order pending against the parent of two children. The children themselves are not subject to removal. The IAD’s BIOC analysis on the appeal of a parent’s exclusion order pursuant to paragraph 67(1)(c) of the IRPA differs from that undertaken on review of a subsection 25(1) H&C application in which the removal in question is the removal of the child. The principles set out by the Supreme Court of

Canada in *Kanthasamy* apply to the IAD's BIOC assessment but the structure of the assessment flows from the parent's possible removal.

[24] Almost invariably, the removal of a parent negatively impacts his or her children. However, the fact that an individual has children in Canada does not mean the individual cannot be removed. Rather, within the context of the possible removal of a parent, the IAD is required to assess the children's best interests. In this sense, the IAD's opening sentence in the Decision states the obvious, that the removal of the Applicant, should it happen, will negatively impact his children.

[25] The Applicant relies on the analysis of my colleague Justice Gleeson in *Ondras v Canada (Citizenship and Immigration)*, 2017 FC 303 at paragraph 11:

> [11] The Officer's BIOC analysis was unquestionably impeded by the paucity of evidence. However, within the framework of the evidence provided, the Officer was required to identify and define the child's best interests and examine those interests "with a great deal of attention" in light of all the evidence (*Kanthasamy SCC* at para 39). That did not occur here. Instead, the analysis minimalized the child's best interests by starting from the position that the mother would be removed. The presumption of removal was exacerbated by a failure to fully address the evidence that was relevant to the child's interests.

[26] In *Ondras*, the applicants were a family from the Czech Republic who had made an application for permanent residence on H&C grounds pursuant to subsection 25(1) of the IRPA. One of the applicants was the mother of the child in question. The child's father was a Canadian citizen and was not subject to removal. Justice Gleeson found that the officer assessing the application had failed to consider the BIOC evidence (*Ondras* at para 10), including the

respective roles of the two parents as caregivers, the nature of the father's job in Canada, and whether his employment would permit him to provide adequate care to his son should he remain in Canada following the removal of the mother.

[27] The IAD's analysis in the present case is distinguishable from that of the officer in *Ondras*. First, the IAD did not presume the Applicant's removal. The panel assessed the consequences of a possible removal as required pursuant to paragraph 67(1)(c) of the IRPA. Second, the IAD considered all of the evidence regarding the family's circumstances in two sections of the Decision: the impact on the Applicant's family should he be removed and the BIOC analysis. As part of its consideration of the impact of a removal of the Applicant on his family, the fifth *Wang* factor, the IAD accepted his wife's testimony that the Applicant plays a significant role in the lives of his children. The panel also discussed the respective roles of the Applicant and his wife in caring for the children, as the children are young; the parents' jobs and how their working hours affected care for the children; the role of the maternal grandparents in assisting in child care; and, the family's financial situation. This analysis was not undertaken in *Ondras*.

[28] Returning to the BIOC analysis, following its impugned statement regarding the negative impact of the Applicant's removal on his children, the IAD stated that it had seriously considered the best interests of the children and acknowledged that it is always advantageous for children to live with both of their parents. The IAD then assessed the circumstances of the children should the Applicant be removed and they were to remain in Canada with their mother, and their circumstances should the family move to China as a consequence of their father's removal. The

panel considered whether the children would be able to visit their father in China during the exclusionary period and the circumstances of the children's lives in China if the family decided to move to China for that period. Finally, the IAD reviewed the observations in the Psychologist's Report regarding the children's adjustment to life in China should they move and the implications for the children should they remain in Canada and their father be removed. It is clear that the focus of the IAD's BIOC analysis was on the consequences to the children if their father were removed. In my view, this is the analysis required of the panel and does not mean that removal was presumed.

[29] The Applicant argues strenuously that the IAD should not have presumed to consider the children's circumstances should they and their mother voluntarily accompany him upon removal. He states that the panel's commentary in this regard was speculative. The Applicant also states that the analysis is tinged with racism and discrimination contrary to section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (*Charter*).

[30] In my view, the IAD did not err in considering the possibility that the Applicant's children would move to China. First, this analysis is a necessary part of the IAD's obligation to consider all of an applicant's H&C circumstances pursuant to paragraph 67(1)(c) of the IRPA. The possibility of the Applicant's wife and children accompanying him to China was raised in the Psychologist's Report:

> As Canadian citizens who have become accustomed to the routine of their lives in this country, it will cause [the children] hardship to have to adjust to life in another country such as China. According to [the applicant's wife] if the family is all forced to go to China,

> they would apply to return to this country after the 5-year term of restriction, another disruption for the children. On the other hand should Mr. Liu be removed alone, there is ample evidence that when fathers are missing, absent or non-resident in a home, it causes emotional distress for both sons and daughters. Accordingly it is recommended that the interests of the two children in this case, William and Vanessa, are best served by permitting their father to remain in Canada, thus to avoid the uncertainty and disruption that a move to China would cause.

[31] The Applicant argues that there was no evidence before the IAD to support its assumption that his wife and children could accompany him to China. In fact, he argues that his wife and children are precluded by Chinese law from entering the country and that the children would have no right to education in China. However, this submission contradicts the indication in the Psychologist's Report of the family's intention to move with the Applicant if he is removed. In addition, the Applicant has provided no proof of Chinese law in support of his argument. The Applicant bore the burden of establishing sufficient H&C considerations to warrant special relief. Having raised the possibility of his family moving to China, it was incumbent on him to provide evidence of impediments to such a move and of any specific, negative consequences to the children beyond that of disruption (*Fouda v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1176 at para 40 (*Fouda*)).

[32] Second, a consideration of whether or not an individual's children may accompany him or her upon removal is not inherently discriminatory. In the present case, the IAD noted that the Applicant's spouse was of Chinese origin and previously lived in China. The panel then considered the possibility that the family would move to China. The Applicant's claim that "the IAD member engaged in a blatant discriminatory analysis, based on race" in analyzing the possibility that the Applicant's family would join him in China is not reflected in the Decision.

[33] The Applicant's submission that the IAD failed to ask the right question, that of whether the removal of the Applicant was in the best interests of the children, captures only the starting point of the required analysis. The IAD answered the question at the outset of its BIOC analysis, stating that "a removal of the appellant will likely have a negative impact" on the children. This answer does not end the BIOC analysis as the panel was required to consider the nature and effect of that negative impact in order to be able to weigh the BIOC against the other *Wang* factors. The IAD did so in assessing the negative impact of any removal should the children remain in Canada and should they accompany the Applicant and their mother to China.

[34] The BIOC factor was one of the *Wang* factors the IAD was required to take into account in assessing the Applicant's H&C appeal. Despite concluding that the Applicant and his family had options should he be removed, the panel nevertheless found that the best interests of the children were a strong consideration favouring the Applicant's appeal. The panel considered each factor individually and assessed the cumulative effect of the factors:

> In my view the appellant has not established that sufficient H&C grounds exist to warrant the granting of special relief in this case, given the very high bar that he is required to meet. The strongest positive factors in his case are the best interests of his children which I have found not to be determinative, the emotional hardship to him and his family resulting from the separation for five years and the appellant's degree of establishment and length of time in Canada. When weighed against the seriousness of the misrepresentation and his lack of remorse, I find that, taking into account the best interests of the children directly affected by the decision, there are insufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case.

[35] The Applicant argues that the IAD failed to consider the *Wang* factors cumulatively but it is clear from the concluding section of the Decision that the panel engaged in a cumulative

assessment and weighing of the factors. It is not the role of this Court to reweigh the evidence before the IAD.

[36] In conclusion, I find that the Decision was reasonable and that the IAD made no reviewable error in its assessment of either the best interests of the Applicant's children or the remaining *Wang* factors. The Decision reflects a conclusion that was within the possible outcomes for the Applicant's case based on the evidence in the record. As a result, the application will be dismissed.

VII. Certified Question

[37] The Respondent posed no question for certification. The Applicant submitted two questions for certification:

> 1. In a BIOC analysis, where a Canadian-born child is involved, does the decision-maker have the jurisdiction to embark on an analysis that contemplates the Canadian-born children being effectively removed with the parent(s) by accompanying the parent(s)? (Question 1)
>
> 2. Does the BIOC analysis differ as between children with no status in Canada, and Canadian-born children, whose parent(s) is/are being removed? (Question 2)

[38] In *Lunyamila v Canada (Public Safety and Emergency Preparedness*), 2018 FCA 22 at paragraph 46, the Federal Court of Appeal summarized the criteria for certification of a question pursuant to subsection 74(d) of the IRPA:

> [46] This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness),* 2017 FCA 130 at para. 36, the criteria for certification. The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general

> importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness),* 2015 FCA 21, 29 Imm. L.R. (4th) 211 at para.10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration),* 2016 FCA 178, 485 N.R. 186 at paras. 15, 35).

[39] The Applicant submits that, as the IRPA does not apply to Canadian citizens, the IAD has no jurisdiction to consider a removal on the basis that Canadian-born family members would accompany the removed individual from Canada. The Applicant states:

> [I]t is submitted that the IAD is without jurisdiction, and in excess of jurisdiction, to do anything but assume that the Canadian-born children will remain in Canada while the parent(s) is removed, and analyse the impact of that removal, on the Canadian-born child, who remains in Canada after the removal.

Question 1: *In a BIOC analysis, where a Canadian-born child is involved, does the decision-maker have the jurisdiction to embark on an analysis that contemplates the Canadian-born children being effectively removed with the parent(s) by accompanying the parent(s)?*

[40] Subsection 162(1) of the IRPA provides that the IAD has sole jurisdiction to determine all questions of law and fact in respect of proceedings brought before it, including questions of jurisdiction. The Applicant raised no issues of jurisdiction before the IAD despite the fact that the possibility of his children accompanying him to China upon removal was raised in the Psychologist's Report. Further, it is settled law that the IAD must take into consideration all of the circumstances of the case before it in making an assessment pursuant to paragraph 67(1)(c) of the IRPA (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 4; *Fouda* at paras 41-42), and may consider the possibility of a Canadian child

accompanying his or her removed parent. As a result, I find that Question 1 does not raise a serious issue of broad significance or general importance and will not be certified.

> *Question 2: Does the BIOC analysis differ as between children with no status in Canada, and Canadian-born children, whose parent(s) is/are being removed?*

[41] The Respondent argues that the second question proposed for certification by the Applicant does not arise from the underlying facts of this case. The Applicant submits that the question does arise on the facts of the case as the children in question are Canadian children and he is arguing that, as a result, the harm to his Canadian-born children should be weighed more heavily than that of non-Canadian-born children.

[42] In *Torre v Canada (Citizenship and Immigration)*, 2016 FCA 48, Justice de Montigny stated at paragraph 3:

> [3] In other words, a certified question is not to be a reference of a question to this Court, and a certified question must have been raised and decided by the court below and have an impact on the result of the litigation: *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at paragraphs 11–12, [2004] FCJ No. 368; *Lai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FCA 21 at paragraph 4, [2015] FCJ No. 125.

[43] I am of the view that Question 2 falls within the parameters described by Justice de Montigny and is in the nature of a reference question. The issue of whether the IAD was required to consider the impact of the Applicant’s removal on his Canadian-born children more closely than if they had been born outside of Canada was not argued before me and was not dispositive of the Applicant’s case. Therefore, Question 2 will not be certified.

JUDGMENT in IMM-932-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Elizabeth Walker"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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