Federal Court  Cour fédérale

Date: 20191218

Docket: IMM-3122-19

Citation: 2019 FC 1634

Toronto, Ontario, December 18, 2019

PRESENT: Mr. Justice Diner

BETWEEN:

LHENARD ALDAY VILLANUEVA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Mr. Villanueva was an accompanying dependent when his family immigrated to Canada from the Philippines in 2013. He was 21 at the time and failed to declare his son, both after his birth in August 2012 and at the time of his landing in Canada in March 2013. The Immigration Division [ID] determined Mr. Villanueva was inadmissible due to this misrepresentation, and issued an exclusion order against him in 2017. Mr. Villanueva appealed the exclusion order to the Immigration Appeal Division [IAD or tribunal], which refused to interfere with the order.

That IAD refusal is the subject of this judicial review. I find the IAD's analysis to be flawed for the reasons that follow, rendering the Decision unreasonable.

I. Background

[2] Mr. Villanueva's sister immigrated to Canada in October 2009, and applied to sponsor her parents. Mr. Villanueva was included in the application as an accompanying dependent. In August 2012, Mr. Villanueva and his future wife had a son. Their families were unhappy about the news, as the couple was young and unmarried at the time.

[3] As noted above, when Mr. Villanueva landed in Canada in March 2013, he failed to disclose his son's birth to Canadian immigration authorities. In March 2014, Mr. Villanueva wrote a letter notifying immigration authorities of what he believed to be his common-law relationship and of the birth of his son. In the letter, he explained his failure to disclose this information previously. Mr. Villanueva returned to the Philippines in December 2014 to get married. He submitted an application to sponsor his spouse and son to Canada near the end of 2015.

II. Decision under Review

[4] In its decision dated April 23, 2019 [Decision], the IAD dismissed Mr. Villanueva's appeal brought purely on humanitarian and compassionate [H&C] grounds. After affirming the exclusion order to be valid in law, the IAD assessed his circumstances under the factors outlined in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (Immigration

Appeal Board), namely (1) seriousness of the misrepresentation and the circumstances surrounding it; (2) remorsefulness of the applicant; (3) applicant's length of time and establishment in Canada; (4) applicant's family in Canada and the impact his removal would cause on them; (5) support available to the applicant from his family and community; (6) degree of hardship that would be caused to the applicant by his removal; and (7) best interests of any child directly affected by the decision.

[5] The IAD found the misrepresentation to be serious. Although young, Mr. Villanueva was not a minor at the time of landing and misrepresentation, and he made a conscious choice not to declare his son in a timely manner. In support of this finding, the IAD pointed to Mr. Villanueva's admission in cross-examination that his family had discussed whether or not he should disclose his son, and that he feared doing so would negatively impact the visa officer's decision to issue visas to Canada.

[6] Turning to remorse, the IAD acknowledged that Mr. Villanueva felt regret for his actions, but found that this did not amount to a genuine expression of remorse in that he failed to acknowledge their wider repercussions on Canada's immigration system and on his family. As will be explained below, this flawed analysis undermines the tribunal's H&C assessment.

[7] The IAD then found that Mr. Villanueva is established in Canada, garnering positive weight, resulting from his residency of six years, steady employment since landing, part ownership of a condominium, and presence of several family members. However, the IAD noted that Mr. Villanueva would not suffer hardship by returning to the Philippines, in that he would be

able to find work there given his language skills and education, and his parents could continue to visit the country.

[8] As for the best interests of the child [BIOC], the IAD held that having Mr. Villanueva retain Canadian permanent resident status would be a positive for the child. Similarly, returning to the Philippines could mean the child would no longer be able to attend private school. However, the weight accorded to this factor was reduced by the fact that reuniting with his father abroad would also have a positive impact. Further, while Mr. Villanueva may no longer be able to send his son to private school, the tribunal noted that public education is a viable substitute in the Philippines.

[9] Ultimately, the IAD concluded that the positive H&C factors were insufficient to overcome the exclusion order.

III. Analysis

[10] IAD decisions regarding whether to grant special relief under paragraph 67(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, are reviewable on the standard of reasonableness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 58; *Canada (Public Safety and Emergency Preparedness) v Wu*, 2019 FC 1491 at para 14).
Mr. Villaneuva argues the tribunal member lacked reasonability in her assessment of (a) his remorse and (b) the seriousness of the misrepresentation.

A. *Remorse*

[11] Regarding remorse, the IAD held that Mr. Villaneuva

> … stated that he understands the seriousness and that he lied to Immigration officials because he was scared they would send him back home. He failed to acknowledge the damage to the integrity of Canada's immigration system or the hurt and frustration he has caused to his wife and child. The appellant's response indicates that he cares little about or appreciate Canada's immigration system and how honesty is an integral part of our system.

[12] Mr. Villaneuva relies on *Li v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 451 [*Li*], to support his position. There, Justice Shore observed at paragraph 10 that "[i]n examining the seriousness of the misrepresentation, as well as the Applicant's remorse, the IAD found that the scheme orchestrated by the Applicant was serious, material, advertent and deliberate." Justice Shore noted that the IAD doubted the genuineness of the Applicant's remorse by making a plausibility finding "solely based on the panel member's personal point of view of human behavior" (at paragraph 28), when the panel found thus:

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

[13] Despite the IAD pointing out that the Applicant expressed remorse, the Board found that Mr. Li was "not prepared to take full responsibility for his action by admitting his

misrepresentation to all concerned" (at para 10). Justice Shore found this conclusion to be unreasonable, making the following observations at paragraphs 32-33:

> Firstly, it was unreasonable for the IAD to doubt the Applicant's remorse without making any negative credibility findings against the Applicant. While it is relevant for the IAD to consider that the Applicant did in fact misrepresent by entering into a marriage of convenience, the IAD's finding that the Applicant is not honest and genuine in his remorse because of his previous misrepresentation is not supported by the evidence before the IAD. The officer's report demonstrates the opposite: the Applicant expresses remorse for his action, readily admitted his involvement in a marriage of convenience; and, fully participated in the investigation when asked and has volunteered during the span of years tens of hours each month to benefit Canadian society.
>
> Secondly, the IAD unreasonably held that an applicant can only demonstrate remorse if she or he tells his/her employer and his/her relatives of previous wrongdoing. While this might be one of several factors to consider, it is unreasonable to doubt the Applicant's remorsefulness, simply because he did not tell his employer and all of his close relatives that he committed a misrepresentation in the past.
>
> [Emphasis in original.]

[14] Mr. Villanueva points out that, unlike Mr. Li, he voluntarily notified immigration authorities of his mistake, which demonstrates his remorse: he did not wait until he was caught. However, Mr. Villaneuva argues that similar to *Li*, the IAD unreasonably minimized his remorse. Here, the tribunal found that Mr. Villaneuva expressed "regret" but not "remorse." In his view, the IAD essentially penalized him for saying "sorry" the wrong way.

[15] I agree that this finding is unreasonable in light of both Mr. Villaneuva's actions, in terms of him writing the disclosure letter, and his words, in terms of his testimony at the IAD hearing. Mr. Villaneuva's voluntary admission one year after landing and apologetic testimony both

acknowledge that he should have declared his son before landing, but was afraid he "would be deported" if he did. His disclosure letter explained that his application was submitted when he was "still a student and single," and that "when I fathered the child out of wedlock our parents were so disappointed because of their plans for me."

[16] At the 2017 IAD appeal, Mr. Villaneuva testified as follows:

> Q: So you weren't honest with that immigration officer. You didn't tell the truth.
>
> A: Yes, sir.
>
> Q: Yes, sir? Yes, you didn't tell the truth?
>
> A: Yes, I didn't tell the truth.
>
> Q: And was the reason you didn't tell the truth the same as the reason you didn't put the child in the application?
>
> A: I'm just scared that time. I don't know what to do. I'm really sorry for that. Just give a second chance to stay in here.

[17] Then, in cross-examinations, Mr. Villanueva testified as follows:

> Q: So is it fair to say your parents knew about the baby, they told you not to declare, your sister, who was sponsoring, told you not to declare, you chose not to declare, and then again you didn't declare at the port of entry?
>
> A: Yeah, I just followed them.
>
> Q: But you were 21 years old, you were an adult, and you knowingly did not declare your son.
>
> A: Yeah. Yes, ma'am. I am really sorry about that not to declare my son.

[18] Clearly, in his inarticulate way – as might well be expected of someone testifying in his situation with high stakes and in a second language – Mr. Villaneuva admitted his mistakes, explained the reason for his original misrepresentation, and apologized for his actions.

[19] In short, remorse can be more complex than a formulaic, specific combination of words. There are other factors that must be considered, including the actions of the individual. While, as the tribunal said, he might have "failed to acknowledge the damage to the integrity of Canada's immigration system" or the "hurt and frustration he has caused to his wife and child," he displayed his sorrow for his actions and their ramifications both in his actions (voluntary disclosure), and words (both orally and in writing). I therefore do not find it reasonable to conclude that Mr. Villaneuva's "response indicates that he cares little about or appreciate Canada's immigration system and how honesty is an integral part of our system." Actions, like pictures, are worth a thousand words. Of course, the other adage would say that actions speak louder than words.

[20] Together, actions and words are powerful and can speak volumes. A tribunal must be mindful that other human barriers can impact the articulation of the words used to express remorse, including a second language, lack of sophistication, or the pressures and stakes brought to bear on an applicant at legal proceedings before a tribunal. These frailties could have applied to Mr. Villaneuva, given the situation he put himself into upon entry, and then voluntarily disclosed after consulting an immigration consultant (and it should be noted that Mr. Villaneuva and his family were unrepresented during the course of their immigration application and landing in Canada).

[21] As has already been alluded to above, and like in *Li*, many misrepresentation cases involve applicants who express regret only after being caught in their immigration scheme or lies, rather than voluntarily disclosing their mistake. In those situations, it is easy to understand why tribunal members might not believe the genuineness of their purported remorse. Indeed, those scenarios come before the Federal Court with some frequency, such as one that I heard about 18 months ago in *Pu v Canada (Citizenship and Immigration)*, 2018 FC 600 at paras 18-20:

> 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.
>
> 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.
>
> 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.]

[22] Justice O'Reilly wrote about another example of this *ex post facto*, or retrospective, remorse in *Thavarasa v Canada (Citizenship and Immigration)*, 2015 FC 625 at para 23:

> Further, the IAD reasonably found that the applicants lacked remorse. Mr Ratnasingam admitted to misrepresentation only after he was confronted by the officer with contradictory evidence. Similarly, Ms Thavarasa stated that she decided to wait to see if the false information in her husband's application was going to be a problem. In my view, this evidence supported the IAD's conclusion that the applicants were not remorseful about their misrepresentations.

[23] For all the reasons listed above, I do not find the IAD's conclusion on remorse to have been reasonable.

B. *Seriousness of the Misrepresentation*

[24] Mr. Villaneuva also submits that the IAD's assessment of the seriousness of the misrepresentation was unreasonable because it failed to consider his personal circumstances. These included his young age, the family's non-acceptance of his son's birth, his fear of disclosure hurting the broader application for permanent residence, and family pressure not to disclose, along with his subsequent voluntarily disclosure and admission of his mistake to the Respondent.

[25] Since the first error (regarding the assessment of remorse) is significant, in that it could have potentially changed the outcome, I will not rule on the reasonability of the second issue raised, but will instead briefly comment on two related points.

[26] First, there is no indication (medical or otherwise) that Mr. Villaneuva's son would have had any impact on the outcome of the application. As I have noted previously, "[i]t is certainly open to the IAD to consider the ultimate effect of the misrepresentation on the admissibility of the individuals involved" (*Cortez v Canada (Citizenship and Immigration)*, 2016 FC 800 at para 41), and more recently, "[t]he case law establishes that the seriousness of the misrepresentation and whether it had any bearing on the acquisition of status is a relevant H&C factor" (*Canada (Citizenship and Immigration) v Yu*, 2019 FC 1088 at para 11).

[27] Second, the assessment of the seriousness of the misrepresentation may – or may not – be impacted by the Respondent's recently implemented policy regarding non-disclosure of dependents, and the ability to sponsor under paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. This new policy, as implemented through a two-year September 2019 pilot program, alleviates the complete bar on sponsorship resulting from non-disclosure of dependents in certain circumstances and for certain classes.

[28] Given that this policy and pilot program had not been announced at the time of Mr. Villanueva's hearing, it was not considered by the tribunal, and accordingly has no bearing on this judicial review. That said, it may be material to the rehearing of this matter, in that it may impact the analysis of the seriousness of the misrepresentation, and/or BIOC.

IV. Conclusion

[29] The IAD erred in its assessment of remorse, which was a key factor in this Decision because of the number of other positive factors. In other words, had the assessment of remorse not been flawed, the outcome of the H&C analysis might have tipped in favour of granting the application. The judicial review is accordingly granted, and will be returned for reassessment.

JUDGMENT in IMM-3122-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

2. The matter is returned to the IAD for redetermination by a different board.

3. No questions for certification were argued, and I agree none arise.

4. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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