Federal Court  Cour fédérale

Date: 20200402

Docket: IMM-1270-19

Citation: 2020 FC 477

Ottawa, Ontario, April 2, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

XIAOCHEN SUN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of the Immigration Appeal Division ("IAD") that upheld the exclusion order against the Applicant. The IAD concluded there were insufficient humanitarian and compassionate ("H&C") considerations to overcome the Applicant's misrepresentation.

[2] The Applicant is a citizen of China who entered Canada in 2002 on a study permit. Subsequently, the Applicant applied for permanent residence. On the application for permanent residence, the Applicant failed to list his girlfriend (who is now the Applicant's wife) as a common-law partner, although they had been living together in a common-law relationship. The Applicant's wife, who was without legal status in Canada, is believed not to have been mentioned in the application for purposes of being sheltered from immigration authorities. This misrepresentation was discovered when the Applicant later applied to sponsor his wife under the Family Class.

[3] Although the Applicant had testified that he was unaware of the common-law concept as it is not present in his culture, the IAD did not find the Applicant's testimony to be credible given the fact that the Applicant had lived 16 years in Canada. Overall, the IAD did not find sufficient H&C considerations to grant special relief.

[4] For the reasons that follow, this application for judicial review is dismissed.

II. **Facts**

A. *The Applicant*

[5] Mr. Xiaochen Sun (the "Applicant") is a citizen of China. In 2002, the Applicant came to Canada on a student visa, and stayed on various visas as he completed his university degree and began working in Canada. The Applicant's current profession entails providing immigration advice to clients regarding Chinese visas and providing assistance with the necessary forms.

[6] In 2002, the Applicant met his current wife, Ms. Xing Wan, who is a citizen of China. At the time, Ms. Wan was also in Canada on a student visa. However, after Ms. Wan's study permit expired in 2004, she continued to reside in Canada without status.

[7] In 2004, the Applicant and Ms. Wan began living together. According to a witness testimony, they did not share a bedroom during the entire period. However, in 2012, the Applicant and Ms. Wan began living alone.

[8] On June 19, 2013, the Applicant applied for permanent residence under the Canadian Experience Class and declared that he was single and had no dependants. The Applicant did not declare his common-law relationship with Ms. Wan in the application or during his landing interview. On April 2, 2014, the Applicant obtained his permanent residency.

[9] On April 7, 2014—five days after the Applicant became a permanent resident—the Applicant and Ms. Wan became married. Soon thereafter, in June 2014, the Applicant applied to sponsor his wife for permanent residence as a member of the Family Class.

[10] However, on April 20, 2016, the Applicant was found ineligible to sponsor his wife, pursuant to subsection 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227("*IRPR*").

[11] On October 27, 2016, the Applicant was found to have committed misrepresentation by failing to declare his common-law relationship with his wife. As a result, a report was written

against the Applicant pursuant to section 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). This report was referred to the Immigration Division ("ID") for an admissibility hearing.

[12] On December 1, 2017, the Applicant appeared before the ID for a hearing and conceded that he had committed misrepresentation by failing to disclose his common-law relationship at the time of application and landing as a permanent resident. The ID found that the Applicant was inadmissible for misrepresentation, and issued an exclusion order against him pursuant to section 40(1)(a) of the *IRPA*.

[13] The Applicant appealed the ID decision to the IAD. The IAD hearing took place on January 17, 2019.

B. *IAD Decision*

[14] By decision dated February 14, 2019, the IAD determined that there were insufficient H&C considerations to warrant relief in light of the circumstances of the case, and found that the Applicant's exclusion order was valid.

[15] Regarding the Applicant's failure to disclose his common-law relationship, the IAD found that the magnitude of the seriousness of the misrepresentation was high. The IAD did not accept that someone with the Applicant's level of education and professional background would not have been aware of the need to accurately complete his permanent residence application.

[16] While the IAD acknowledged the Applicant's remorse and claim that he did not understand the concept of a "common-law relationship" due to a lack of similar concept in Chinese culture, the IAD found that the Applicant did not provide any objective evidence to support his allegations. Especially in light of the fact that the Applicant resided in Canada for 16 years, the IAD did not find the Applicant's testimony to be credible, and held that the testimony was "disingenuous" and "lacked cogency". The IAD also noted that the Applicant would have had the ability to conduct the necessary research into the term "common-law" and determine if the term applied to his relationship with Ms. Wan.

[17] The IAD further noted that Ms. Wan lacked legal status, which provided a reason for not disclosing her on tax forms, insurance documents, or bank accounts. The IAD held that it was not credible that the Applicant would have been unaware of Ms. Wan's lack of status in Canada until 2014, as they had been together for over a decade. The IAD found it unreasonable that a partner's immigration status would not be discussed in a genuine relationship. The IAD concluded that the Applicant's remorse was diminished by the lack of credibility, which constituted "a significant negative factor".

[18] The IAD recognized that the Applicant had a high degree of establishment in Canada, and placed "considerable positive weight" on this factor.

[19] The IAD noted that the Applicant had family, friends, and pets in Canada, but found that the hardship of resettlement would likely not go beyond the normal difficulties associated with

removal. The IAD also noted that Ms. Wan was a Chinese citizen who could reside with him in China, and that the Applicant was familiar with Chinese culture.

[20] In considering the evidence with respect to the Applicant's health status, the IAD noted that the Applicant underwent surgery for melanoma (skin cancer) in July 2017, after being diagnosed in June 2017. Although the Applicant and his wife's aunt testified about their concerns on the Applicant's ability to obtain health insurance in China and the level of care he would receive in China, the IAD found that there was little documentary evidence to support these allegations. The IAD also noted that the Applicant is currently cancer free and not receiving treatment apart from follow-up appointments. Furthermore, the IAD found little evidence to show any sustained risk to the Applicant's health once the Applicant established his medical support in China. The IAD found the Applicant's health status to be a neutral factor.

[21] Finally, the IAD noted that there was little evidence of any child that would be directly impacted by the Applicant's exclusion order. Ultimately, the IAD dismissed the appeal, as it found that the negative factors—the seriousness of the misrepresentation and the lack of any credible remorse—outweighed the Applicant's establishment in Canada.

III. **Relevant Provisions**

[22] Section 40(1)(a) of the *IRPA* reads as follows:

Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants:
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	**a)** directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

[23] Section 67(1)(c) of the *IRPA* reads as follows:

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.

IV. **Issues and Standard of Review**

[24] The following issues arise on this application for judicial review:

A. Did the IAD breach its duty of procedural fairness?

B. Did the IAD err in its credibility findings?

C. Did the IAD unreasonably diminish the Applicant's remorse?

D. Did the IAD err in its analysis of the *Ribic* and *Chieu* test?

[25] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], issues of procedural fairness were reviewable on a correctness standard *(Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 72). In *Vavilov* at paragraph 23, the Supreme Court writes:

> Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[26] A reading of paragraphs 76 and 77 in *Vavilov* reveals the Supreme Court's acknowledgement that the "requirements of the duty of procedural fairness in a given case…will impact how a court conducts reasonableness review." In my view, this is instructive for a reviewing court to first determine whether a duty of procedural fairness exists, and in light of the procedural fairness requirements (if applicable), apply the presumption of the reasonableness standard on the overall decision. In *Vavilov*, the duty of procedural fairness concerned whether reasons for the administrative decision was required and provided (*Vavilov* at para 78). Having found that reasons for both required and provided in this case, the Supreme Court moves onto its discussion on whether the decision is substantively reasonable. The following excerpt is also

helpful, where the duty of procedural fairness is distinguished from the reasonableness analysis (*Vavilov* at para 81):

> […] The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

[27] The correctness standard continues to apply to the issue of procedural fairness in the case at bar.

[28] Prior to *Vavilov*, the reasonableness standard applied to the review of an IAD decision not to grant relief on H&C grounds: *Liu v Canada (Citizenship and Immigration)*, 2019 FC 184 (CanLII) at para 19; *Gao v Canada (Citizenship and Immigration)*, 2019 FC 939 (CanLII) at para 20; *Li v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1235 (CanLII) at para 14. There is no need to depart from the standard of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[29] As noted by the majority in *Vavilov*, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker," (*Vavilov* at para 85). Furthermore, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it

cannot be said to exhibit the requisite degree of justification, intelligibility and transparency," (*Vavilov* at para 100).

V. **Analysis**

A. *Procedural Fairness*

[30] The Applicant submits that the IAD breached procedural fairness by not providing the Applicant with an opportunity to respond to credibility concerns. The Applicant relies on *Toki v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 606 (CanLII) at para 17, where the Court held that the duty of fairness is "heightened when a potential consequence that will flow from the refusal is a finding of misrepresentation".

[31] The Respondent submits that the IAD was not required to provide a further opportunity for the Applicant to respond to credibility concerns because the Applicant had an opportunity to address credibility concerns at the hearing. The Respondent submits that although credibility issues were raised in the written submissions and during the hearing, the Applicant's representative chose not to lead evidence addressing the concerns during the hearing.

[32] In my view, the IAD did not breach its duty of procedural fairness. During the hearing, the IAD raised its concerns around the Applicant's claim that he was unaware of his wife's lack of status in Canada. The IAD had also put forth its credibility concerns regarding the Applicant's alleged lack of knowledge on the concept of a "common-law" relationship during

the hearing. Therefore, the Applicant was clearly afforded an opportunity during the hearing to address the IAD's concerns regarding his credibility.

B. *Credibility Findings*

[33] The Applicant submits that the IAD erred in its credibility findings and that the IAD's implausibility determination was not based on clear evidence. The Applicant submits that the IAD erred by finding it implausible that an individual who had lived 16 years in Canada would be unaware of the concept of a "common-law" relationship. The Applicant relies on *Maldonado v Canada (Minister of Employment and Immigration)* (1979), [1980] 2 FC 302, [1979] FCJ No 248 (CA) [*Maldonado*] at para 5 for the proposition that sworn statements are presumed to be true unless there is a reason to doubt their truthfulness. The Applicant also relies on *Ansar v Canada (Citizenship and Immigration)*, 2011 FC 1152 at para 17, citing *Santos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937 at para 15, where the Court held that "implausibility determinations must be based on clear evidence, as well as a clear rationalization process supporting the Board's inferences, and should refer to relevant evidence which could potentially refute such conclusions".

[34] The Applicant submits that it was unnecessary for his testimony to have been supported by objective evidence and claims that "something so inherent and personal as one's culture should be within the range of evidence that can be believed without the need for further objective documentation". The Applicant submits that his testimony was corroborated by a letter submitted by his wife's aunt, and by his wife's testimony during the hearing.

[35] Moreover, the Applicant contends that it was unreasonable for the IAD to conclude that the Applicant would have gained knowledge of the common-law concept simply by residing and being educated in Canada. The Applicant cites *Bains v Canada (Minister of Employment and Immigration)* (1993), 63 FTR 312 (FCTD), where the Court noted that the Board must exercise caution in imposing western or Canadian paradigms on non-western culture. Furthermore, the Applicant submits that the IAD should have referred to a document published by the Immigration and Refugee Board ("IRB"), which states that a common-law marriage is culturally unacceptable and illegal in China.

[36] The Respondent submits that the IAD—in making plausibility findings—reasonably considered the Applicant's explanations within the totality of the evidence, and did not reject the Applicant's testimony simply on the basis that there was a lack of objective evidence. The Respondent argues that based on the evidence that the Applicant completed high school and university in Canada, resided 16 years in Canada, and provided professional advice to clients regarding Chinese visa requirements, the IAD provided cogent reasons on why the Applicant's explanations were not credible.

[37] Moreover, the Respondent submits that the onus was on the Applicant to establish the burden of proof. The Respondent argues that the IAD was not required to go beyond the Applicant's evidence and submissions to look for documentary evidence on common-law relationships in China *(Jean-Baptiste v Canada (Citizenship and Immigration),* 2018 FC 285 (CanLII) at para 19; *Mahmood v Canada (Public Safety and Emergency Preparedness),* 2016 FC 1332 (CanLII) at para 20).

[38] I find that the IAD did not err in its credibility findings. Despite the presumption of truthfulness in *Maldonado*, the jurisprudence also establishes that "the existence of contradictions or inconsistencies in the evidence can be a valid basis for a finding of a lack of credibility," *(Canada (Minister of Employment and Immigration) v Dan-Ash* (1988), 93 NR 33 (FCA)). Given that the Applicant was well-established in Canada for 16 years and had completed his high school and undergraduate education in Canada, it was implausible that the Applicant would not have encountered the concept of "common-law" during school, at work, or in his community. The IAD reasonably considered the Applicant's explanations in consideration of the totality of the evidence, did not err in its plausibility findings, or err in making adverse credibility findings against the Applicant.

[39] Moreover, I agree with the Respondent that the IAD was not required to go beyond the Applicant's evidence and submissions to look for documentary evidence on common-law relationships in China. Furthermore, although the Applicant had argued that common-law relationships are culturally unacceptable and illegal in China, I find no clear logical link between the lack of knowledge of a certain concept and its illegality: the illegality of a common-law relationship in China does not necessarily equate to the Applicant's lack of knowledge.

[40] During the hearing, the Court brought to the attention of the Applicant's counsel that the document checklist specifically states the phrase "spouse or common-law partner". Given the Applicant's level of education in Canada and the length of period he has spent in Canada from a young age, it was certainly reasonable that the Applicant would have known what the term meant, or at least had the capability to find out what the term meant, since he was completing an

application wherein the term was explicitly stated on the document checklist for the Applicant to go through. Moreover, the Applicant had the assistance of his immigration consultant, who he could have asked, if there were uncertainties on the application. However, as the Respondent noted, the evidence before the IAD showed that the Applicant had not inquired into this matter. On the basis of the record, it was reasonable for the IAD to have made adverse credibility findings against the Applicant.

C. *Remorse*

[41] The Applicant submits that the IAD unreasonably "coloured its perception" of the Applicant's remorse based on the adverse credibility findings. The Applicant submits that the adverse credibility findings do not necessitate the finding that his remorse is not genuine.

[42] The Respondent submits that the Applicant's argument is without merit because it was open to the IAD to discount the expression of remorse as not credible, where an applicant's expression of remorse is premised on a discredited explanation. The Respondent cites *Abiobun v Canada (Citizenship and Immigration)*, 2019 FC 299 (CanLII) at paras 17-19. The Respondent also submits that the lack of genuine remorse is a relevant aggravating factor for the IAD's consideration *(Chung v Canada (Citizenship and Immigration)*, 2017 FCA 68 (CanLII) at para 22). The Respondent submits that the IAD established negative credibility concerns before doubting the Applicant's remorse *(Li v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 451 (CanLII) at para 32).

[43] I am not convinced that *Abiobun* is helpful to the case at bar. In *Abiobun*, the Court found the IAD's assessment of the applicant's lack of remorse to be reasonable because although the applicant had initially expressed remorse, he ultimately did not admit any errors on his part. In contrast, the Applicant in the case at bar recognizes that he made a mistake.

[44] Nevertheless, it was reasonable for the IAD to discount the Applicant's expressions of remorse because the IAD found that the Applicant's explanations for his mistake lacked credibility.

[45] The IAD did not err in its assessment of remorse. In the case at bar, as the remorse was directly linked to the Applicant's explanations for his misrepresentation, the IAD did not err in considering credibility concerns in assessing the genuineness of the remorse. It is clear that the adverse credibility findings formed the basis for the IAD's conclusion on the Applicant's lack of genuine remorse.

D. *Seriousness of the Misrepresentation*

[46] The Applicant submits that the IAD's findings on the misrepresentation is unreasonable, as its characterization of the nature of the misrepresentation is incorrect. The Applicant asserts that the IAD unreasonably held that his misrepresentation was serious because it was an innocent misrepresentation and he obtained no benefit from it. The Applicant contends that the misrepresentation should have been assessed at the lower end of the spectrum, as the misrepresentation was based on the Applicant's lack of knowledge on the concept of a

"common-law" relationship. The Applicant also submits that he was required to show fewer H&C factors.

[47] The Respondent submits that the Applicant's assertion that his misrepresentation was innocent is entirely premised on accepting his explanation for not declaring his common-law partner. The Respondent notes that the IAD found this explanation to lack credibility. Moreover, the Respondent submits that the Applicant did derive a benefit from the misrepresentation, because the Applicant sheltered his wife from immigration authorities by not disclosing his relationship on the permanent residence application.

[48] Furthermore, the Respondent argues that the misrepresentation is material and serious if it forecloses further inquiry into an applicant *(Thavarasa v Canada (Citizenship and Immigration)*, 2015 FC 625 (CanLII) at paras 18-22; *Canada (Citizenship and Immigration) v Li*, 2017 FC 805 (CanLII) at paras 31-32). The Respondent submits that immigration officials may have had further questions for the Applicant at the time that he became a permanent resident, had he properly disclosed his common-law relationship with a foreign national living in Canada without status.

[49] In my view, the IAD did not err in its assessment of the seriousness of the misrepresentation. As the Respondent correctly notes, the IAD reasonably found the Applicant's explanation—that he lacked knowledge of the "common-law" concept—to lack credibility. As noted above, the IAD reasonably found that it was not credible that the Applicant was unaware of his wife's immigration status during their lengthy relationship of 10 years. Therefore, the

Applicant would have gained a benefit from shielding Ms. Wan from immigration authorities through his misrepresentation.

VI. **Certified Question**

[50] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VII. **Conclusion**

[51] The IAD did not breach procedural fairness, and the IAD decision is reasonable.

[52] This application for judicial review is dismissed.

JUDGMENT IN IMM-1270-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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