Federal Court  Cour fédérale

Date: 20160713

Docket: IMM-5537-15

Citation: 2016 FC 800

Ottawa, Ontario, July 13, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

DANILO ORDONIO CORTEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [the Act] of a decision by the Immigration Appeal Division [the IAD] of the Immigration and Refugee Board [the IRB] dismissing the Applicant's appeal of a removal order. I find the IAD's decision to be reasonable for the reasons explained below.

[1] The Applicant is a 46-year old citizen of the Philippines. On January 15, 2000, he applied for permanent residence in Canada as a member of the federal skilled worker class. Shortly thereafter, he got married (August 25, 2000) and had a son (June 20, 2001).

[2] On February 27, 2004, the Applicant was required to submit a new visa application. He did not disclose, on that application, that he was married or that he had a child. On at least three other occasions, the Applicant repeated this misrepresentation to Canadian immigration authorities.

[3] The Applicant was granted permanent residence status and entered Canada on April 4, 2005. He has since found work as an accountant.

[4] On December 15, 2009, the Applicant applied to sponsor his wife and child for permanent residence as members of the family class. On March 17, 2011, however, that application was denied pursuant to paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], which states that:

> 117(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if
>
> …
>
> (d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

[5] The Applicant's appeal of that decision was denied on October 20, 2011.

[6] From December 2012 to August 2013, the Applicant returned to the Philippines to look for work. He says that he was unable to do so because of the poor economy and age discrimination in hiring.

[7] On February 11, 2014, the Immigration Division of the IRB held an admissibility hearing and issued an exclusion order against the applicant for misrepresentation in his permanent residence application on the basis that he had not disclosed his spouse or child.

[8] He appealed that order to the IAD, arguing either for special relief under paragraph 67(1)(c) of the Act or for a stay of removal under section 68. The Applicant admitted his misrepresentation, explaining that he did so on the advice of his immigration consultant. He further explained that he was in Canada working to support his family and that it was best for him to stay and provide as much financial assistance as possible.

II. Decision

[9] On November 19, 2015, the IAD dismissed the Applicant's appeal, finding that his misrepresentations were serious and that it was in the best interests of the Applicant's child for his father to return to the Philippines.

[10] The IAD initially noted that the Applicant had conceded that the removal order was valid in fact and law, and was appealing on the basis of special relief. As such, the Applicant bore the burden of demonstrating on a balance of probabilities that sufficient humanitarian and

compassionate [H&C] considerations existed in light of all the circumstances of the case for special relief.

[11] The IAD then stated that the basis of the exclusion order was the uncontested fact that the Applicant did not disclose that he was married and had a son. The IAD concluded that, regardless of the Applicant's stated remorse, this was a serious misrepresentation of which the Applicant was aware and that "his whole motivation was to acquire immigration to Canada quickly and then sponsor his family". Those underlying facts were not in dispute, summarized as follows by the IAD in the decision:

> 15…. [The appellant] testified that he knew the information on the form was not correct but he signed and submitted the application "with the advice of the consultant" who told him that the [sic] he should not include the marriage and birth because it would delay the application and he could sponsor his wife and son when he settled in Canada. Although he was "not comfortable with that," he explained that it "made sense" and "looked like I'm better off that way" because he did not have any relatives or friends in Canada. The appellant said that he never asked and his consultants never told him how long the delay would be, or how long a sponsorship would take.
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> 16. The appellant agreed that he signed the false permanent resident application form in many places in February 2004. He also repeated the misrepresentations when he said he never married and swore the contents were correct to the immigration officer in March 2004, but was "not comfortable doing it." He agreed that he continued his declaration to the immigration officer when he entered Canada in April 2004. He also signed a document confirming that he had no spouse or children in August 2004. The appellant's repetition of misrepresenting and not disclosing his circumstances over about four years is an aggravating circumstance that weighs against his appeal.

[12] The Applicant argued before the IAD that if he had initially disclosed his wife and child it would not have affected the success of his permanent residence application since, when he

finally did apply to sponsor them, they were not inadmissible for criminal and medical reasons. Therefore, his initial non-disclosures were less serious than they could have been. The IAD considered this but concluded that it had "little application to the present case, which involves circumventing the rules a number of times for a specific, named purpose; his non-disclosures were not inadvertent".

[13] The IAD then turned to the Applicant's evidence on his establishment in Canada and the best interests of his child. The Applicant argued that he was well-established in Canada and made a good income as an accountant. He stated that he sent money back to ensure that his son could continue to attend a prestigious school – while the school is publicly funded, transportation and board are not. He argued that his wife's income alone would not allow them to continue to send their son to boarding school and that he was unlikely to find work in the Philippines should he return. The Applicant submitted that it was in his son's best interests that he stay in Canada for two reasons: first, to continue to send money to support him and his education; and second, to maintain the opportunity for his son to one day move to Canada.

[14] The IAD concluded otherwise, determining "that the [Applicant's] presence with his son would be in the son's best interests and that the [Applicant's] removal would not be a hardship to his child (or to the rest of the family)". The IAD noted the Applicant's submissions on this point but found that he "overemphasized the hardship he might face in removal": the Applicant has no family in Canada and would, even if allowed to stay, remain unable to sponsor his wife or child anyway. As such, the Applicant's appeal was dismissed.

III. Issues

[15] The Applicant raises two issues in this judicial review:

A. Did the IAD err in unreasonably discounting the Applicant's own assessment of his son's best interests?

B. Did the IAD err in not discounting the severity of the misrepresentation since the Applicant's wife and child are not otherwise inadmissible?

IV. Analysis

[16] The standard of review that applies to a determination by the IAD of whether special relief from an exclusion order is warranted is reasonableness (*Duquitan v Canada (Citizenship and Immigration)*, 2015 FC 769 at para 11; *Uddin v Canada (Citizenship and Immigration)*, 2016 FC 314 at para 19). As such, so long as the decision is justified, transparent, intelligible and falls within a range of possible, acceptable outcomes, this Court should not intervene (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

A. *Did the IAD err in unreasonably discounting the Applicant's own assessment of his son's best interests?*

[17] Paragraph 67(1)(c) of the Act is explicit that the best interests of any child directly affected by the decision under appeal at the IAD must be taken into account:

> 67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of…
>
> > (c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

[18] When assessing the best interest of the child [BIOC], the case law is clear that decision-makers must be "alert, alive, and sensitive" to the needs of the affected child (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75; see also *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61).

[19] The Applicant argues that he provided his own assessment of his son's interests – that it was best for his child if he were to remain in Canada and to contribute financially from abroad, permitting him to continue his prestigious and competitive schooling – and that the IAD erred in ignoring this assessment and concluding that it would be best for the Applicant to return to the Philippines. According to the Applicant, "the [IAD]'s claim to know better than the child's own parents what is best for him is indefensible and unreasonable, as it flies in the face of the established principle that fit parents are presumed to know what is best for their own child, and to act accordingly".

[20] The Applicant argues, in this vein, that the default assumption, in any BIOC analysis, should always be that the parents will and do act in their child's best interests and thus their assessment should guide the decision-maker towards a proper outcome. The Applicant cites several cases for the principle that fit and competent parents will act in their child's best interests, including:

- Young v Young, [1993] 4 SCR 3 at 42, L'Heureux-Dubé J, dissenting [Young]: "Once a court has determined who is the appropriate custodial parent, it must, indeed it can do no more than, presume that that parent will act in the best interests of the child";
- *DLC v GES*, 2006 SKCA 79 at paras 61-62 [*GES*]: "a fit parent's assessment of a child's best interests should not be lightly interfered with… a court should be slow to take issue with a fit and capable custodial parent's view that access is not appropriate";

- *Troxel v Granville*, 530 US 57 at 68 (2000) [*Troxel*]: "there is a presumption that fit parents act in the best interests of their children… Accordingly, so long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the State to inject itself into the private realm of the family"; and
- *Chapman v Chapman*, (2001) 201 DLR (4th) 443 at 449 (Ont CA) [*Chapman*]:"In the absence of any evidence that the parents are behaving in a way which demonstrates an inability to act in accordance with the best interests of their children, their right to make decisions and judgments on their children's behalf should be respected, including decisions about whom they see, how often, and under what circumstances they see them".

[21] The Applicant argues that this jurisprudence demonstrates that Courts "should presume, absent compelling evidence to the contrary, that the actions of parents are indicative of the children's best interests". His position, in essence, is that, in conducting a BIOC assessment, one must always start from the assumption that the parents' actions are reflective of the child's best interests. Only in the presence of compelling evidence should this assumption be rebutted. Since the IAD acted contrary to this principle and rejected the Applicant's own choice about what was best for his son, the IAD reached an unreasonable conclusion.

[22] The Applicant offered no jurisprudence specific to the fields of immigration or refugee law that stood for this principle. Indeed, the sources offered – *Young*, *GES*, *Troxel*, and *Chapman* – all come from the much different field of family law and all arise either from disputes between parents (*Young* and *GES*) or between parents and grandparents (*Troxel* and *Chapman*) over issues of access to the child or children in question. They all speak to a general reticence, in that field of law, to intervene unnecessarily in the private sphere of the family.

[23] As noted by the Federal Court of Appeal, however, "[t]he consideration of a child's best interests in an immigration context does not readily lend itself to a family law analysis where the

true issues are those of custody and access to children" (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 37 [*Kisana*]). Granted, the Federal Court of Appeal in *Kisana* was addressing a different proposition (that the best interests of an affected child would *always* trump any other considerations in a given decision) than the one at issue here, but courts should always be cautious to import interpretive principles from dissimilar fields of law without a compelling justification.

[24] One needs to be doubly cautious when the evidentiary record before the Court consists only of information submitted by the Applicant. While in the private law context of a family law dispute, all parties have an incentive to adduce evidence favourable to their side and thus provide the decision-maker a full and complete record, here, there is only the Applicant and what he insists is best for his child. Certainly where the parent, as in this case, has a history of misrepresentation, it is fair to question whether they might not conflate what they assert are their child's best interests with the outcome they prefer. The Applicant wants to stay in Canada. If he did not, he would return to the Philippines. As such, his suggestion that it is in his son's best interests that he stay should be evaluated carefully.

[25] Therefore, without some stronger expression in law than those offered by the Applicant, I cannot agree that the default position in a BIOC analysis is that whatever the parents "do in practice" for (or with) that child is in his or her best interest. As such, I find the IAD did not err in its analysis of the Applicant's preferred BIOC outcome.

B. *Did the IAD err in not discounting the severity of the misrepresentation since the Applicant's wife and child are not otherwise inadmissible?*

[26] The Applicant argues that, when assessing the inadmissibility of an individual due to the non-disclosure of a family member, one must consider whether that family member would have been admissible, had they actually been disclosed at the appropriate time. If the family member was admissible, then the non-disclosure had no effect on the success of the individual's application and therefore should not ultimately result in an inadmissibility finding.

[27] This Court has, the Applicant submits, noted as much in *Sultana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 533 [*Sultana*], an analogous case involving an application for exemption from the bar in paragraph 117(9)(d) of the Regulations on H&C grounds. There, Justice de Montigny, then of this Court, found a decision unreasonable in part because "it is not explained why the policy considerations underlying paragraph 117(9)(d) of the Regulations should outweigh the hardships faced by these children when there is no indication that they would have been inadmissible if listed" (*Sultana* at para 34; emphasis added).

[28] The Applicant also notes the following from Section 5.12 of Citizenship and Immigration Canada's Operational Manual OP2, "Processing Members of the Family Class":

> The exclusion found in R117(9)(d) exists to encourage honesty and prevent applicants from circumventing immigration rules. Specifically, it exists to prevent applicants from later being able to sponsor otherwise inadmissible family members under the generous family class sponsorship rules when these family members would have prevented the applicant's initial immigration to Canada for admissibility reasons (i.e., excessive demand).

[29] According to the Applicant, where an undisclosed family member is not inadmissible, then the policy concerns underpinning paragraph 117(9)(d) are not in play and thus a positive exercise of H&C relief is warranted.

[30] The IAD, however, declined to follow this jurisprudence, concluding that "it has little application to the present case, which involves circumventing the rules a number of times for a specific, named purpose; his disclosures were not inadvertent". The Applicant argues that this analysis confuses the *motives* of the misrepresentation with the *effect* – the case law is concerned with whether the misrepresentation would have affected the outcome of the application, not with why the Applicant made the misrepresentation. As a result, the IAD erred in not considering this principle as a factor that leaned determinatively towards the granting of relief.

[31] The Respondent argues that the case law shows that "a failure to disclose information that could be material to the inadmissibility of a visa application is sufficient to support of a finding of misrepresentation" (*Aoun v Canada (Citizenship and Immigration)*, 2015 FC 296 at para 9; emphasis in original). In other words, it doesn't matter if the misrepresentation had an effect on the outcome or not; what matters is whether it deprived the decision-maker of an opportunity to make a relevant inquiry.

[32] This may be true for a finding of misrepresentation, but the Respondent fails to note that this is a debate over a finding that special relief is warranted: the misrepresentation has already been demonstrated, and so other factors, including the effect of the Applicant's decision not to disclose his wife and son, can and should be raised in considering whether special relief should be granted.

[33] That said, I do not find that the IAD erred unreasonably in declining to give, as the Applicant demands, heavy weight to the fact that the initial misrepresentation would not have affected his admissibility at that point anyway.

[34] First, I would note that the case law on paragraph 117(9)(d) focuses almost exclusively on the *motive* of the misrepresentation when considering whether to grant special relief (see, for example, *Krauchanka v Canada (Citizenship and Immigration)*, 2010 FC 209 at para 22 [*Krauchanka*]; *Pascual v Canada (MCI)*, 2008 FC 993 at para 19; *Aggrey v Canada (Citizenship and Immigration)*, 2012 FC 1425 at para 9), which explains why the IAD explicitly noted the Applicant's purpose in concealing his family's existence. The only suggestion that the *effect* of the misrepresentation is an important factor weighing in favour of granting special relief after the fact comes from Justice de Montigny's brief comment in *Sultana*.

[35] The Applicant takes the position that *Krauchanka* also endorsed the principle that the effect of a misrepresentation is a key consideration in any paragraph 117(9)(d) analysis, citing the following:

> [24] The public policy of upholding compliance with Canada's immigration laws is a legitimate concern in this application. The sponsor would have been ineligible to immigrate to Canada as a dependent child had he declared the applicants before his landing. He failed to do so and the evidence on the record points toward a deliberate misrepresentation. This was an important, although not determinative, consideration which the visa officer was entitled to factor into the analysis: *Legault v. Canada (MCI)*, [2002] 4 FC 435 (C.A.), per Justice Décary at paragraph 29.

[36] I do not agree with the Applicant's interpretation of this paragraph: rather, *Krauchanka* simply reiterates the principle that the deliberateness of the misrepresentation is a relevant consideration, not whether or not it would have made a material difference at the time it was made.

[37] As for *Sultana*, in that case, Justice de Montigny determined that the officer erred in considering a "failure to disclose" as the "paramount factor precluding any possibility that the H&C factors could overcome the exclusion mandated by s. 117(9)(d)" and that "[t]his fixation on the failure of the sponsor to declare his family members prevented the Immigration officer from genuinely assessing the H&C considerations submitted by the applicants" (paras 29-30; emphasis added). To Justice de Montigny, the officer was unreasonably focused on one factor to the exclusion of all others, and it was this unreasonable focus that merited review, rather than a failure to consider the effect of the non-disclosure at issue. I find the circumstances to be different here, in that that IAD considered the various requisite H&C factors in a thorough manner.

[38] Indeed, in another case which raised the issue of failure to disclose, *Zingano v Canada (Citizenship and Immigration)*, 2011 FC 1243) [*Zingano*], this Court declined to explicitly endorse the principle that the effect of the misrepresentation is a significant, quasi-determinative factor in assessing whether to grant relief. There, as in this matter, the applicant was found inadmissible because his sponsor did not disclose him on an application for permanent residence. Before this Court, he raised the question of the material effect of the original misrepresentation:

> [48] The Applicant also says that the refusal of an H&C application is unreasonable where the non-disclosed child is not otherwise inadmissible to Canada. Where a non-disclosed child is not inadmissible, the non-disclosure is immaterial to the non-disclosing parent's application. In these cases, the policy rationale behind paragraph 117(9)(*d*) – ensuring that applicants do not later sponsor inadmissible family members – does not hold. An H&C exemption in this type of case is normally warranted and a denial of the application will normally be unreasonable.

[39] Justice Russell, however, concluded that "the fact of the Applicant's admissibility does not determine the reasonableness of the IAD's assessment of H&C factors" (*Zingano* at para 74).

[40] In other words, it is certainly open to the IAD to consider the ultimate effect of the misrepresentation on the admissibility of the individuals involved, but that factor alone is not determinative nor must it always be weighted heavily. After all, in a case like this, one cannot truly know the results of a hypothetical medical, criminal, or financial admissibility examination administered at some point in the past. It would be difficult, if not impossible, to prove admissibility retroactively, without an examination and assessment having taken place at the relevant time.

[41] Here, the IAD considered the Applicant's submissions on this point (i.e. that his son and wife would not have changed the outcome of his application had they been disclosed) and weighed the necessary H&C factors. However, it found that the seriousness of the misrepresentations involved outweighed the effect of the misrepresentation. Since the weighing of evidence is not something this Court can intrude upon in judicial review, the IAD's conclusion on this point is therefore reasonable.

V. Conclusion

[42] The IAD conducted a thorough review of the evidence offered by the Applicant in support of granting special relief and weighed it against the "integrity of Canada's control over its borders" in light of the Applicant's deliberate misrepresentation. It is not this Court's role to conduct a microscopic review of the IAD's analysis, but rather to determine whether its decision, as a whole, is reasonable in light of the facts and the law, even if that was not the outcome that

others might have rendered had they made the decision. The Applicant, despite the very concerted and able efforts of counsel, has not persuaded me that the IAD's decision is unreasonable. His application for judicial review is accordingly dismissed. No questions are certified and no costs are ordered.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no award as to costs.

3. There are no questions for certification.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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