Federal Court  Cour fédérale

Date: 20171205

Docket: IMM-2706-17

Citation: 2017 FC 1088

Toronto, Ontario, December 5, 2017

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

NUO YU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] By the present Application the Applicant challenges a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board dated May 29, 2017 in which, following a *de novo* hearing, the Applicant's appeal from an exclusion order of the Immigration Division was dismissed. The exclusion order was made pursuant to s. 40(1)(a) of the *Immigration and Refugee Protection Act* (*IRPA*) on a finding that the Applicant had misrepresented material facts by entering into a marriage of convenience.

[2] As found by the IAD Member, the factual scenario underlying the Applicant's request for humanitarian and compassionate relief is as follows:

> The appellant is a 33-year-old citizen of China. She has been in Canada since March 14, 2003 when she came as a foreign student. She studied Early Childhood Education in English at Seneca College. She graduated in 2007 and started to work as a child teacher the same year. The appellant was married to Ronald Dupuis on October 24, 2004 and a spousal sponsorship was filed in 2005. After the appropriate application was signed and submitted to the immigration authorities by both the appellant and her husband, the appellant sent a letter dated May 18, 2007 asking to withdraw the sponsorship. Citizenship and Immigration Canada (CIC) acknowledge in a letter dated August 11, 2008 as having been received a letter dated May 18, 2007 from the · appellant that she wished to withdraw her appeal. The processing of this In-Canada spousal sponsorship was not finalized and the appellant did not gain her residency status under this process. She was subsequently landed as a permanent resident under the Canadian Experience Class (CEC) on July 20, 2010. She filed an application for Canadian Citizenship in 2013 and passed the English language testing and received a letter from the Canada Border Services Agency (CBSA) with regards to this matter.
>
> The appellant and her former husband filed an application for divorce at some point in 2009.
>
> […]
>
> The appellant started dating Qing Wang in 2008. She is currently in a common-law relationship with him. Her common-law husband is a Canadian citizen. There are two minor children from this relationship. Both were born in a Canada, a daughter born in 2009 and a son born in 2013.
>
> (Decision, paras. 7 to 9)

[3] Before the IAD, the Applicant did not contest the legal validity of the exclusion order and requested the IAD to exercise its equitable jurisdiction to provide relief from the exclusion order. The IAD Member (Member) who heard the Applicant's appeal rejected the Applicant's request

on findings that the Applicant's misrepresentation was "egregious and at the severe end of the scale" (Decision, para. 60). As a result the IAD found that:

> In this case the appellant's intentional misrepresentation is serious; her expressions of remorse are questionable at best and both weigh heavily against me exercising my discretionary jurisdiction in her favour.
>
> [Emphasis added]
>
> (Decision, para. 62)

[4] For the reasons that follow, I find that the decision under review is unreasonable because the dominant focus throughout the decision on the Applicant's marriage of convenience conduct caused the Member to be blind to the evidence produced on the request for humanitarian and compassionate relief.

[5] A key feature of the Applicant's request for humanitarian and compassionate consideration was that she withdrew her application of permanent residence in relation to her non-genuine marriage prior to being landed as a permanent resident (Decision, para. 17). The Member did not agree with the Applicant's argument that the seriousness of the misrepresentation is greatly mitigated by the withdrawal (Decision, para. 37). A principal reason for arriving at this position was a finding that the Applicant was not credible.

[6] An important feature of arriving at the negative credibility conclusion was the Applicant's rendition of details arising after the marriage compared to the rendition provided by Mr. Dupuis, the person she married. The evidence compared by the Member was that provided by the Applicant at the hearing before the Member which took place on February 16 and May 15,

2017, and that provided by Mr. Dupuis, described in a written report, in response to questioning by the CBSA which took place on July 17, 2007. As a result, the Member made the following findings: "I do not find the appellant credible"; "I find on a balance of probability the evidence of Mr. Dupuis is credible"; and "I do not find [the Applicant] credible and believe she is lying to maintain a story that benefits her for this appeal" (Decision, paras. 28 and 29).

[7] In my opinion the process engaged by the Member of arriving at the credibility findings was in breach of a duty of fairness owed to the Applicant. This is so because there was no way for the Applicant, or the Member for that matter, to test the accuracy and reliability of the statements made by Mr. Dupuis, by questioning. I find that the Member's engagement of the process constitutes a reviewable error.

[8] The Member transported the negative findings with respect to the Applicant directly into the evaluation of the request for humanitarian and compassionate relief without a moment of concern. I find that to do so was remarkably unfair to the Applicant. The decision in *Dowers v Canada (Minister of Immigration, Refugees and Citizenship*, 2017 FC 593 at paragraphs 2 to 6, stresses the point that concern about the past must be separated from concern about the future :

> A situation such as the Applicant's, where a person comes to Canada and stays without adhering to the immigration laws, but, nevertheless, succeeds to be a positive, productive, and valuable member of society must be given careful attention. Section 25 has no purpose if that person is easily condemned for her or his immigration history. <u>The history must be viewed as a fact which is to be taken into consideration, but within a serious holistic and empathetic exploration of the totality of the evidence, to discover whether good reason exists to be compassionate and humanitarian</u>. The discovery requires full engagement:

> Applying compassion requires an empathetic approach. This approach is achieved by a decision-maker stepping into the shoes of an applicant and asking the question: how would I feel if I were her or him? In coming to the answer, the decision-maker's heart, as well as analytical mind, must be engaged (*Tigist Damte v Canada (Citizenship and Immigration)*, 2011 FC 1212, para. 34).

[Emphasis added]

[9] As recounted above, the Applicant is in a common-law relationship, and has two Canadian born children. The Applicant admitted that she was wrong in what she had done, but asked for compassion to be applied in deciding her fate, and the fate of the members of her family who are completely innocent.

[10] The Applicant, and the Applicant's family, should not be condemned for the Applicant's mistake without the most careful attention. I find that Member's decision-making completely fails to adhere to this expectation. In the course of examining the evidence, the Member made it clear that the established negative perspective of the Applicant's conduct would have an impact on the humanitarian and compassionate evaluation. Not only did the Member commit to this critical approach, but the opening to the evaluation itself clearly shows that the Member was blind to the real life impact that the approach would have. These are the opening words to the evaluation:

> There will be some impact on the appellant's family. What degree of impact will depend on what she and her common-law husband decide to do when [she is] removed from Canada. She will have to make a decision for her family in relation to this.
>
> Spousal relationships as well as those with children are important. I acknowledge one of the objectives in IRPA, which is to reunite families in Canada. By virtue of this appeal not being allowed, the

> potential separation of family members exists. Also, it is clear that the appellant's removal from Canada can cause a financial strain on her common-law husband and children. However, the family has assets and they can decide how they would use such assets to cope financially in Canada if the appellant's common-law husband and children do not plan to travel to China. The family impact, in my view, does not override the mitigating factors in this appeal.
>
> [Emphasis added]
>
> (Decision, paras. 47-48)

[11] The last comment in the quotation is evidence of a closed mind. There is no question that the lives in the hands of the Member did not receive a shred of compassion. For this reason, I find the decision under review is unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision under review is set aside and the matter is referred back for redetermination by a different decision-maker.

There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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