Federal Court  Cour fédérale

Date: 20180221

Docket: IMM-3434-17

Citation: 2018 FC 187

Ottawa, Ontario, February 21, 2018

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

XIAO QING LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*] of a decision by the Immigration Appeal Division [the IAD] dated June 17, 2017, which dismissed the Applicant's appeal based on humanitarian and compassionate [H&C] grounds of a departure order issued by a Minister's Delegate following the Applicant's failure to meet the residency obligations for permanent

residence [PR] under section 28 of *IRPA* [the Decision]. At the IAD, the Applicant conceded her non-compliance with section 28 of *IRPA*, but sought exceptional H&C relief under paragraph 67(1)(c) of *IRPA*, which was denied.

II. Facts

[2] The 49-year-old Applicant, her husband, and her two sons, (17 and 13) are citizens of the People's Republic of China.

[3] The Applicant's husband filed a PR application under the NV5 Investor class for the Provincial Nominee Program for Quebec in or around May 2005. The Applicant and their two sons were included in that application as dependents. As a result, the Applicant together with her husband and two sons were landed as permanent residents on December 23, 2006.

[4] On January 3, 2007, approximately ten days after landing, the Applicant and her family returned to China. Over the next seven years, they only intermittently visited Canada.

[5] In 2011, approximately five years after first obtaining permanent resident status, the Applicant and her sons applied to renew their permanent residence cards [PR cards]. To do so, the mother engaged a company called New Can Consultants (Canada) Ltd. / Wellong International Investments Ltd. [New Can].

[6] New Can was run by Xun "Sunny" Wang. New Can fraudulently facilitated false employment and other documents for expired PR cards, and did so for the Applicant. While

made for her, she did not need to use the false documents New Can prepared. It is noteworthy that Mr. Wang was charged and pled guilty to a number of immigration fraud charges, involving his other clients but not the Applicant.

[7] The Applicant testified at her IAD hearing that she knew at the time she applied to renew her PR cards for an another five years in 2011, that she did not have enough days to meet the relevant residency requirements. The Applicant alleged she was absent from Canada 837 days during the relevant period which ran from 2006 to 2011. However, based on the stamps in her passport and CBSA ICES traveller history, the Applicant was absent from Canada for a total of 1,332 days in that five-year period. The PR cards were issued as requested.

[8] In 2014, the Applicant returned to Canada with her sons with the intention of residing in Canada on a long-term basis.

[9] In 2015, the Applicant's husband renounced his Canadian PR status.

[10] In April 2016, while attempting to enter Canada from the United States, the Applicant was detained and interviewed by a Border Services Officer of the CBSA. Following the interview, in May 2016, CBSA issued a report pursuant to subsection 44(1) of *IRPA* alleging the Applicant had not met her residency obligation under section 28 of *IRPA* [the Section 44 Report]. The Applicant has conceded that she was absent for more than the permitted 730 days. In fact, CBSA calculated she was absent for 1,261 days, quite substantially more than allowed in the 2011 to 2016 time frame. The Section 44 Report also concluded that the Applicant

indirectly/directly misrepresented herself in 2011 on her application to renew the PR cards, because she omitted dates of travel and did not properly calculate days absent from Canada.

[11] Notes attached to the Section 44 Report allege that the founder of New Can counselled his clients, of which the Applicant was one, to commit various misrepresentations to maintain Canadian PR status. The notes recommend that if the Applicant appealed the departure order issued to her, she be convoked to an admissibility hearing and be issued a five-year exclusion order for misrepresentation, pursuant to subsection 40(1)(a) of *IRPA*.

[12] In July 2016, after being invited to make submissions as to why a removal order should not be issued, the Applicant was convoked for an interview with a Minister's Delegate to answer questions concerning her failure to meet the residency obligations in the previous five years *i.e.*, between 2011 and 2016.

[13] At the conclusion of the interview, the Minister's Delegate concluded that the Applicant failed to meet the residency obligation. The Minister's Delegate further concluded that H&C factors did not outweigh the fact the Applicant had not maintained her residency obligation. The Minister's Delegate signed the departure order.

[14] No misrepresentation finding was initiated or made against the Applicant.

[15] The Applicant appealed to the IAD, and claimed H&C relief. After a hearing, the IAD dismissed her appeal.

III. Decision

[16] The Applicant accepted that she failed to meet the residency obligations between 2011 and 2016. Therefore the only issue at the IAD was the Applicant's claim for H&C relief. The Applicant submitted that there were significant H&C factors such that the IAD should have exercised its 'equitable jurisdiction' under paragraph 67(1)(c) of *IRPA* and granted her relief.

[17] On July 17, 2017, the IAD upheld the decision of the Minister's Delegate to issue a departure order refused to grant special H&C relief under section 67(1)(c) of *IRPA*, and dismissed her appeal.

[18] Briefly, in arriving at its conclusion, the IAD found that the credibility of the Applicant was diminished by her testimony regarding her dealings with New Can in 2011 and by her testimony before the IAD in 2016, necessitating a higher requirement of positive H&C factors. Further, the IAD found that while the Applicant has positive establishment in Canada, the weight it bore was affected negatively by the timing of its acquisition. The IAD also emphasized that the Applicant and her family continue to maintain considerable establishment in China.

[19] With respect to the best interests of the children [BIOC], the IAD stated, among other things:

> It cannot be clearly said one way or the other that it is in the best interests of the boys either for the family to be living together in China or to be separated from their parents but remain in Canada. As such, the best interests of the children becomes a neutral factor in this case.

IV. Issues

[20] The Applicant submits the following issues for determination:

(1) Did the IAD err in its analysis of the BIOC?

(2) Did the IAD err by fettering its discretion and failing to consider establishment which post-dated the removal order?

(3) Did the IAD make a veiled misrepresentation finding that tainted the entirety of the Decision, thus rendering it unreasonable?

[21] The overall issue for determination is whether the IAD's Decision is reasonable.

V. Standard of Review

[22] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The Supreme Court has determined that the standard of review under section 67(1)(c) of *IRPA* is reasonableness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57-59. Reasonableness is the standard of review.

[23] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial

> review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[24] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

[25] It bears repeating that H&C relief is an exceptional and extraordianry remedy, see *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 per Gascon J at para 15:

> [15] It has been consistently held that an H&C exemption is an exceptional and discretionary remedy (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 [*Legault*] at para 15; *Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193 [*Adams*] at para 30). This relief sits outside the normal immigration classes or refugee protection streams by which foreign nationals can come to Canada permanently, and it acts as a sort of safety valve available for exceptional cases. Such an exemption is not an "alternative immigration stream or an appeal mechanism" for failed asylum or permanent residence claimants (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 [*Kanthasamy FCA*] at para 40).

[26] In this connection, see also the decision of Chief Justice Crampton in *Santiago v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 91 at paras 27-28, that of Shore J in

Canada (MPSEP) v Nizami, 2016 FC 1177 at para 16, and my decision in *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 904 at para 24.

VI. Analysis

A. *Did the IAD err in its analysis of the best interests of the children [BIOC] in this case?*

[27] The Applicant submits the IAD erred in its assessment of the BIOC. In particular, the Applicant says the IAD failed to undertake a proper assessment and balance of the BIOC, which, the Applicant submits, was the most important factor in the Applicant's appeal. The Applicant alleges that the IAD made no conclusive determination in regards to the BIOC, and that by failing to do so, the IAD failed to properly exercise its jurisdiction pursuant to subsection 67(1) of *IRPA*. In the words of the Applicant, "the [IAD] has, effectively, shirked from its responsibility of making a clear finding with respect to the best interests of the children, as required by the jurisprudence."

[28] The Applicant also argues the IAD's conclusions demonstrate that the IAD was not alert, alive and sensitive to the BIOC. One such conclusion of the IAD that she criticizes is:

> When the relevant evidence is weighed, I find that while it is the preference of the children for the IAD to allow their mother to remain in Canada and for them to continue the comfortable life they presently enjoy in Canada, it does not necessarily follow that it is in their overall 'best interests' to do so.

[29] With respect, I am not persuaded that the IAD's assessment of BIOC was unreasonable. At the outset, the Respondent argued at the hearing, but not in its memorandum, that a "full-blown" BIOC analysis is only required in an H&C analysis conducted pursuant to section 25 of

IRPA. I agree that support for this argument is found in *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 [*Lewis*] at para 74 where Gleason JA, for the Federal Court of Appeal, stated:

> [74] In light of the foregoing, I disagree with Mr. Lewis and the intervener that *Kanthasamy* requires that a full-blown best interests of the child analysis be undertaken before a child's parent(s) may be removed from Canada or that such children's best interests must outweigh other considerations in the analysis. In my view, the holding in *Kanthasamy* applies only to H&C decisions made under section 25 of the *IRPA* and, even there, does not mandate that the affected children's best interests must necessarily be the priority consideration.

[30] I note that both subsection 25(1) and subparagraph 67(1)(c) of *IRPA* refer specifically to the best interests of a child directly affected. I also note that *Lewis* involved consideration of a removal order under section 48 of *IRPA*, whereas the present application arises under section 67:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant	Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il

the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
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 :
(a) the decision appealed is wrong in law or fact or mixed law and fact;	**(a)** la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice has not been observed; or	**(b)** il y a eu manquement à un principe de justice naturelle;
(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.
[Emphasis added.]	[Non souligné dans l'original.]

[31] I accept that a "full-blown" BIOC analysis is required under section 25 of *IRPA*. I am also mindful of the Federal Court of Appeal's ruling in *Lewis*.

[32] I have concluded that the BIOC analysis required by section 67 of *IRPA* was reasonably conducted in this case. Clearly and with respect, the IAD was alert, alive and sensitive to the best interests of the Applicant's sons. The IAD considered a host of considerations including how well the sons fit in at their Canadian schools, how they have adjusted well in Canada with their mother, and their stated preference to remain in Canada. The IAD considered the older son's assertion that the boys had "few roots" in China, and that their schooling would be disrupted if returned to China. It expressly considered but found no persuasive evidence that the youngest son's health would be significantly affected if he returned to China; while this was said to be unreasonable, I am not persuaded the IAD should be criticized for discounting an insignificant matter. The IAD also considered that both sons speak Mandarin, lived most of their respective lives in China until 2014, had family, including their grandparents and father in China, have plenty of money to support them in China, and may access "international" westernized-style schooling in China where the language of instruction is English. And in addition, the IAD considered that if removed, the sons would be with their mother and father.

[33] The Applicant argues the IAD failed to assess the option of the mother remaining in Canada with the two sons. With respect, this argument is without merit because it is contrary to the very finding the Applicant criticizes as set out in para 28 above, in which the IAD assesses the option of the mother remaining in Canada with the two sons. To repeat it here for convenience, the IAD concluded:

> When the relevant evidence is weighed, I find that while it is the preference of the children for the IAD to allow their mother to remain in Canada and for them to continue the comfortable life they presently enjoy in Canada, it does not necessarily follow that it is in their overall 'best interests' to do so.

[34] I am also unable to fault the IAD for concluding, as I reported in para 19 above, that: "[i]t cannot be clearly said one way or the other that it is in the best interest of the boys either for the family to be living together in China or to be separated from their parents but remain in Canada. As such, the best interest of the children becomes a neutral factor in this case."

[35] I make this finding for several reasons. It is not disputed that the Applicant has the onus to make her case for H&C relief. Here, the IAD was not persuaded by her arguments and therefore, the Applicant's BIOC claim was not accepted. I agree that decision-makers should state their conclusions directly, and where possible and acceptable, may reasonably come down on one side or the other. However, I am not persuaded either that a neutral finding is impermissible generally, or that the specific neutral finding was unreasonable. This is not a shirking of responsibility. In my respectful view, the IAD simply made a decision that falls within the range of possible, acceptable outcomes that are defensible on this record.

B. *Did the IAD err by fettering its discretion and failing to consider establishment which post-dated the removal order?*

[36] The Applicant argues that although the IAD found "[…] positive establishment in Canada", referring to the Applicant's significant Canadian assets including the $8M home in West Vancouver acquired in 2014 (it and other Canadian assets are worth well over $10M), and to the fact that her children started to attend school in Canada in 2014, the IAD had nonetheless fettered its discretion by discounting such establishment because of its timing. The IAD concluded that the Applicant's efforts post-2014 were, "more likely than not an effort to

diversify the family's assets out of China and to demonstrate establishment in the instant proceedings."

[37] The Applicant argues that the Applicant's efforts to establish herself in Canada could not have been undertaken to demonstrate establishment in her appeal proceedings because her establishment took place in 2014, while the appeal process did not start until the departure order in 2016. In this respect, the Applicant has identified an unreasonable finding in the IAD's reasoning: the Applicant's establishment in this case pre-dated rather than post-dated the 2016 removal order and the appeal process. While the Applicant has identified an unreasonable assessment, that of course does not make the IAD's Decision, taken as an organic whole, unreasonable particularly given its relative insignificance.

[38] To the issue raised, I am not persuaded that the IAD failed to consider the establishment that post-dated the removal order. I say this because most, if not all of the establishment in this case occurred *before* the removal order and not afterwards.

[39] Upon examination and reflection, I am unable to see how these reasons support a fettering of discretion allegation.

C. *Did the IAD make a veiled misrepresentation finding that tainted the entirety of the Decision, thus rendering it unreasonable?*

[40] In this connection, the Applicant makes several arguments. The Applicant takes issue with the IAD's statement, "[…] in my view, the [Applicant's] lack of credibility necessitates a high requirement for positive humanitarian and compassionate factors […] in order to overcome

the refusal and the resultant [departure order].” That said, the Applicant acknowledges, and it is established, that the greater the extent of a party’s non-compliance with the residency obligation, the greater the H&C considerations that must be present in the party’s case to overcome that non-compliance. The Applicant agrees and it is also established that credibility may be of relevance because it may lead the IAD to assign less weight to the explanations or considerations put forward by an applicant.

[41] The Applicant alleges that the IAD confounded the issue of non-compliance with the issue of credibility: she argues that a lack of credibility on her part cannot necessitate a higher requirement for H&C factors. The Applicant emphasizes that CBSA did not pursue an allegation of misrepresentation, and indeed as noted already, no such allegation was pursued against her. By requiring the Applicant to meet a higher H&C threshold due to her alleged lack of credibility, the Applicant alleges the IAD treated her case as though it involved a misrepresentation finding, which it did not. The Applicant submits this tainted the IAD’s finding and renders it unreasonable.

[42] An assessment of this line of argument must start with the IAD’s credibility concerns. In this case, the credibility concerns the Court considers relevant are two-fold: what transpired with the Applicant and her consultant New Can in 2011, and what transpired before the IAD itself, five years later in 2016.

[43] Regarding the 2011 application to renew her PR cards and her dealings with New Can, the fact is that the Applicant knew, as she conceded under examination before the IAD, that she lacked the required days in Canada to support her PR cards renewal application. In this

connection, the IAD found that the Applicant was melodramatic and appeared "to be willfully blind, at times, regarding the circumstances surrounding her engagement of [New Can] to assist her in maintaining her permanent resident status despite having spent so much time outside of Canada." On the record, this conclusion was justified.

[44] Turning to the 2016 IAD hearing, five years after the Applicant's dealings with New Can and her suspicious renewal application, the IAD found continuing credibility issues with the Applicant's testimony, which the IAD summarized as follows. In my respectful opinion the following IAD conclusions are supported by the record:

> While this case is not a "misrepresentation" case – and I make no findings in that regard – the [Applicant's] credibility is, in my view, diminished when she clings to the notion that she was unaware that [New Can] was a scam (at minimum) and that her "employment," as arranged by New Can, was entirely a fiction.
>
> The respondent submits that the [Applicant] would not likely have had her permanent resident card renewed if she had been honest with the immigration officials making the determination. I agree; it is simply not credible that the [Applicant] did not know what she was doing. In my view, had the [Applicant] fully admitted to the Panel that she was trying to "pull a fast one" by engaged [New Can] she would merit considerably more credibility than I am able to assign to her overall testimony. This is a highly negative factor in this case; in my view, the [Applicant's] lack of credibility necessitates a high requirement of positive humanitarian and compassionate factors (see, below) in order to overcome the refusal and the resultant [departure order].

[45] In the result this case presents credibility issues, supported by the record, concerning the Applicant's conduct in 2011. Additional credibility concerns persisted and to an extent were amplified five years later when the Applicant testified before the IAD, at that time seeking extraordinary and discretionary H&C relief.

[46] At issue is what to make of these findings, supported as they are by the record?

[47] The fact that the Respondent did not pursue misrepresentation does not change the right of the IAD to make these credibility findings. More fundamentally, in effect, I am asked to overlook or ignore the Applicant's conduct and testimony, and the resulting negative credibility findings because a misrepresentation hearing was not conducted. With respect, and notwithstanding counsel's arguments, I cannot accept this position. These issues were put to the Applicant at the IAD hearing where she was represented. The law is that all relevant factors are to be considered on an H&C application – see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 25:

> [25] What *does* warrant relief will clearly vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them: *Baker*, at paras. 74-75.
>
> [Emphasis in original.]

[48] The Applicant's 2011 conduct with New Can was a concern to the CBSA Officer who drafted the Section 44 Report. Likewise, it was of concern to the Minister's Delegate who endorsed the Section 44 Report. That it was of equal concern to the IAD is not surprising; it would have been surprising otherwise.

[49] There was no veiled misrepresentation hearing in this case; what occurred was a reasonable balanced consideration of the relevant factors. In my view, the IAD acted within its reasonableness mandate to consider the credibility issues in this case arising out of her conduct in 2011 and her testimony in that regard and otherwise in 2016.

[50] I should add that I do not accept the argument that the comments by the IAD referred to in para 40 of these reasons, made by the fact-finder in the present case, state conclusions of law that differ from those previously accepted.

VII. Conclusion

[51] At this point, the Court is required to step back and view the determination by the IAD as an organic whole, reminding itself that judicial review is not a treasure hunt for error, and that H&C is an extraordinary and discretionary remedy. Overall, I have come to the conclusion that the Decision is justifiable, transparent and intelligible. In addition, the Decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. Therefore, this application for judicial review must be dismissed.

VIII. Certified question

[52] Neither party proposed a question for certification, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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