Federal Court  Cour fédérale

**Date: 20181127**

**Docket: IMM-461-18**

**Citation: 2018 FC 1186**

**Ottawa, Ontario, November 27, 2018**

**PRESENT: The Honourable Madam Justice Walker**

**BETWEEN:**

**RONG HU**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] Ms Rong Hu, the Applicant, is a citizen of China. She obtained permanent resident status in Canada in 2013. The Applicant seeks judicial review of a decision (Decision) of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada dismissing her appeal of a removal order dated January 27, 2016. The application for judicial review is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] The Applicant does not contest the validity of the removal order. The sole issue before the IAD was whether the Applicant's appeal against the removal order should be allowed on humanitarian and compassionate (H&C) grounds, taking into account the best interests of the Applicant's children.

[3] For the reasons that follow, this application will be dismissed.

## I. Background

[4] The Applicant obtained permanent residence in Canada in March 2013 based on sponsorship by her husband as a member of the family class. The Applicant has two young children, both of whom were born in Canada.

[5] The Applicant's husband, Mr. Ren, is also a citizen of China. Mr. Ren obtained his permanent resident status in Canada through sponsorship by his first wife in 2005. He and his first wife divorced, following which the Applicant and Mr. Ren married. Subsequently, Canadian immigration authorities investigated Mr. Ren's immigration status. He was found to be inadmissible to Canada pursuant to paragraph 40(1)(a) of the IRPA due to misrepresentation by virtue of a marriage of convenience to his first wife. A removal order was issued against Mr. Ren and he appealed the removal order to the IAD. Mr. Ren's appeal was dismissed by the IAD on May 30, 2016 (IAD Ren Decision) and this Court refused leave to apply for judicial review of the IAD's decision on September 12, 2016. Mr. Ren suffers from documented mental health issues that were comprehensively considered by the IAD in the IAD Ren Decision.

[6] The Applicant was required to attend an admissibility hearing and was herself found to be inadmissible to Canada pursuant to paragraph 40(1)(b) of the IRPA because she had obtained permanent residence in Canada on the basis of her husband's sponsorship. Paragraph 40(1)(b) provides that a permanent resident is inadmissible for misrepresentation for having been sponsored by a person who themself is determined to be inadmissible for misrepresentation.

[7] On January 20, 2016, a removal order was issued against the Applicant. She appealed the removal order on H&C grounds pursuant to subsection 63(3) and paragraph 67(1)(c) of the IRPA. The IAD heard the appeal on September 28, 2017 and January 9, 2018.

## II. Decision under Review

[8] The Decision is dated January 18, 2018. The IAD found that the removal order was valid in law and that there were insufficient H&C considerations to warrant granting special relief. As a result, the IAD dismissed the Applicant's appeal of the removal order.

[9] The IAD structured its review of the H&C considerations in the Applicant's case in accordance with the seven factors endorsed by this Court in *Wang v Canada (Citizenship and Immigration)*, 2005 FC 1059 at paragraph 11 (*Wang*):

- The seriousness of the misrepresentation leading to the removal order and the circumstances surrounding it;
- The remorsefulness of the applicant;
- The length of time spent in Canada and the degree to which the applicant is established in Canada;
- The applicant's family in Canada;

- The impact on the family in Canada that removal would cause;
- The best interests of a child directly affected by the decision;
- The support available to the applicant and the family in the community; and
- The degree of hardship that would be caused by the applicant's removal from Canada, including the conditions in the likely country of removal.

[10] The IAD made findings in respect of each factor. The panel acknowledged that the Applicant's misrepresentation was indirect as her inadmissibility was based on her husband's misrepresentation. However, the IAD found that the Applicant bore some responsibility for her situation as she made no inquiry into her husband's background or past relationship before marrying him. The IAD also found that the Applicant exhibited no remorse for the situation except as it resulted in her own possible removal from Canada.

[11] The IAD considered the fact that the Applicant had been in Canada as a permanent resident for five years and had worked steadily during that period. The panel also considered the purchase of two properties by the Applicant and her husband. The IAD concluded that the importance of the Applicant's length of time and establishment in Canada was diminished by the fact that both were predicated on misrepresentation. With respect to support from the local community, the panel referred to letters the Applicant had filed from friends and coworkers. Although the individuals writing the letters did not know of the Applicant's immigration issues, the IAD found that the Applicant's garnering of support in the short period she had been in Canada was a mitigating factor in her favour.

[12] The Applicant had only her immediate family in Canada (her husband and two children) which was a neutral element for the IAD. The impact of any removal of the Applicant on her children was assessed by the IAD in its consideration of the best interests of the children on the assumption that they would accompany her to China. The IAD had no evidence before it dealing with the impact of the Applicant's removal on her husband if he remained in Canada.

[13] The IAD's analysis of the impact of Mr. Ren's mental health issues on the Applicant and her two children if the family were reunited in China is the focus of this application for judicial review. The IAD Ren Decision was before the IAD when it considered the Applicant's appeal and a copy was contained in the Certified Tribunal Record.

[14] The Applicant's testimony before the IAD concerning the hardship that would be caused by her removal to China centred on the conditions in China for people suffering from mental health illnesses and the impact of those conditions on her should her husband also be removed to China. She expressed concern for his safety, her own safety and that of her children. She stated that she values the progressive approach taken to mental health issues in Canada and thought that her husband would most likely be confined involuntarily if he were to experience a mental health episode in China. The IAD stated:

> While I appreciate the appellant's position, the removal of her husband is currently under review by the Minister. The hardship arising to him from return to China was also directly addressed in his own IAD hearing. It will be again in the course of his pending PRRA application. I find it is not my place to re-examine the husband's issues at length in the context of the present appeal.

[15] In assessing hardship, the IAD referred to the Applicant's testimony regarding the issues each member of the family would face due to Mr. Ren's mental health illness should the family be forced to live in China. More broadly, the IAD noted that the Applicant had worked for a technology company in Shanghai and had continued to work in information technology in Canada. The IAD was satisfied that she could find employment in China if required to do so. The Applicant would also have her parents nearby to help with the care of her children, whether or not her husband was present. The IAD concluded this section of its analysis stating that there would be hardship to the Applicant if Mr. Ren were removed to China or if he stayed in Canada due to a successful Pre-removal risk assessment (PRRA) application. This factor was a mitigating element in the panel's evaluation.

[16] The IAD then considered the best interests of the Applicant's two children. The panel cited the decision of the Supreme Court of Canada (SCC) in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCR 61 (*Kanthasamy*), and took into account the factors described by Justice Abella in its consideration of the best interests of the children (BIOC). The IAD stated that both children were very young (three years old and seven months old) and fully dependent on the Applicant as a caregiver. Neither child had visited China, nor were they of school age. No evidence was placed before the IAD regarding the impact of emigration to China on the children in general or in relation to education or gender issues. The IAD found "it reasonable to conclude that the children's best interest involved remaining together with their mother, whether that be in Canada or China." As a result, the best interests of the children were a neutral element in the IAD's consideration of the appeal.

[17] The IAD concluded the Decision by stating that the Applicant's status in Canada derived from a person found inadmissible to Canada for misrepresentation, a factor that goes to the integrity of Canada's immigration program. Taking into account the best interest of the Applicant's two children, the IAD was not satisfied on a balance of probabilities that sufficient H&C considerations existed to warrant granting the special relief sought by the Applicant.

## III. Issues

[18] The Applicant raises the following issues in this application:

1. Was the IAD's assessment of the best interests of the Applicant's children unreasonable?

2. Did the IAD fail to reasonably articulate the basis on which it concluded that there were insufficient H&C considerations in the Applicant's case to justify granting special relief?

## IV. Standard of review

[19] It is well-established that the standard of review of an IAD decision not to grant relief on H&C grounds is reasonableness and that such a decision is to be reviewed with considerable deference by this Court (*Islam v Canada (Citizenship and Immigration)*, 2018 FC 80 at paras 7-8; *Tang v Canada (Citizenship and Immigration)*, 2017 FC 107 at paras 10-11; *Gill v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1158 at paras 25-28; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57-59). The parties are agreed in this respect.

[20] Consequently, the IAD's Decision is owed deference and will only be set aside if it lacks justification, transparency, or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the particular facts of the Applicant's case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

## V. Analysis

### 1. *Was the IAD's assessment of the best interests of the Applicant's children unreasonable?*

[21] The Applicant's appeal to the IAD was made pursuant to subsection 63(3) of the IRPA. Subsection 67(1) of the IRPA sets out the circumstances in which the IAD may allow the appeal of a removal order brought pursuant to subsection 63(3). The relevant provisions of subsection 67(1) in this case are 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. |

[22] The Applicant submits that the IAD conducted an unreasonable assessment of the best interests of the Applicant's two children in failing to consider, within its BIOC analysis, the impact on them of their father's mental health illness if the family were reunited in China following removal of both the Applicant and Mr. Ren. The Applicant characterized her fear of the adverse repercussions of Mr. Ren's mental illness on her and the children as her principal fear on removal. The Applicant testified at length before the IAD regarding her husband's mental health illness and her ability to manage his condition in Canada with the frequent support of doctors, hospitals, social workers and police officers. She stated that she would be unable to rely on similar resources in China. The Applicant also testified that she would be unable to work and support the children in China should Mr. Ren fall ill as she would be required to take time off work to manage his condition.

[23] The Respondent submits that the IAD considered Mr. Ren's mental health condition and its potential effects on the best interests of the children but properly found that these issues had been previously dealt with in the IAD Ren Decision. The Respondent acknowledges that the IAD must carry out its own analysis of the Applicant's circumstances but argues that it may rely on the previous findings of another IAD panel "in order to uphold the integrity of the immigration system as a whole". The Respondent cites the finding in the IAD Ren Decision that Mr. Ren's bipolar condition could be and was controlled by medication that was adequately available in Shanghai and submits that the Applicant was seeking to re-litigate the issue of Mr. Ren's condition. Mr. Ren did not testify in the Applicant's hearing and, therefore, the IAD was left with the unchallenged findings made by the previous panel in the IAD Ren Decision.

[24] The IAD considered the mental health issues suffered by Mr. Ren in the Decision. More importantly, the IAD considered those issues both as they affected Mr. Ren if he were to be removed to China and as they affected the Applicant and the two children if they too were removed to China. The Applicant notes that these issues were not addressed by the IAD in its BIOC analysis. In my opinion, the heading under which the IAD reviewed the issues is not determinative and I find that the Decision was reasonable in this regard. The IAD justified its conclusions and the Decision was intelligible and defensible on the particular facts of the Applicant's case and the circumstances of her family as a whole.

[25] The IAD first referred to the documentary evidence disclosed by the Applicant regarding the conditions in China for individuals dealing with mental health issues. The panel considered the Applicant's worries concerning the hardship Mr. Ren would face were he to be removed to China and stated that any hardship Mr. Ren may suffer was addressed in his own IAD hearing. The IAD then referred to the Applicant's concerns for herself and the children, stating that she pointed "to the issues her husband as a person having mental health issues, and vicariously she and her children would face, upon removal to China". The panel stated that the Applicant and the children would face hardship whether or not Mr. Ren were removed, either due to separation or due to hardship in China.

[26] The Applicant argues that the IAD failed to conduct its own analysis of the impact of Mr. Ren's removal to China on her and the children. I agree with the Applicant that the panel did not set out a detailed discussion of the likely treatment of Mr. Ren in China or of its impact on the children were they also removed to China with the Applicant. However, these concerns were

directly addressed by the IAD in the IAD Ren Decision. In Mr. Ren's appeal, the IAD panel first considered the effect of removal on Mr. Ren himself. With regards to Mr. Ren's medical issues, the IAD found (IAD Ren Decision at paras 50-51):

> [50] The appellant's evidence was that his bipolar condition can be, and is, controlled by drugs. There does not appear to be an issue that he may be confined in an institution, involuntary or otherwise, due to his condition. There are psychiatrists in China, although not as many as in Canada. The appellant appears to be of some financial means, thus, if payment is an issue for psychiatrist care, and drugs, then this would not appear to be a significant challenge for him. He did, and will live in Shanghai, a major city, with presumably some hospitals, doctors and psychiatrists. It was not suggested that drugs would not be available.
>
> [51] As such, the Panel recognizes that it would be uncomfortable for the appellant to have to change his medical care regimen and providers. However, the evidence appears to be that this would be possibly somewhat more difficult in China than in Canada. However, in a major city, for a man of some means, who does not require institutionalization, the Panel finds that the appellant will, upon return, be able to establish an acceptable regimen of mental health care in China.

[27] In her testimony at Mr. Ren's hearing, the Applicant indicated that she would return to China with him upon removal and would be able to find work in China. The IAD panel then considered the impact on the children (then only one child) of Mr. Ren's mental health issues (IAD Ren Decision at paras 54-56):

> [54] The key problem cited in regard to the child was that the child would be negatively impacted if the appellant had difficulties in China. That is, if her father, the appellant, had health issues not adequately addressed, then she would, by extension, suffer.
>
> [55] The Panel does not accept this argument as persuasive. She has two professional parents, with some financial assets, who likely would be able to provide for her in China as they could in Canada. As indicated above, the Panel does not find that the appellant would suffer significant hardship in China, including for medical reasons, which was cited by the appellant as his principal concern in China, at least in relation to his daughter, thus the child

> would not suffer hardship merely as a result of this. The Panel does not find any particular problem for this young child to be raised in China by two Chinese parents, with the presence of extended family there.
>
> [56] Thus, there would not appear to be any children that could be significantly negatively affected if the appellant returned to China. Thus, this is a neutral factor in terms of the H&C analysis.

[28] The issues before the IAD in Mr. Ren's appeal were the same as those now relied on by the Applicant to argue that the IAD panel considering her appeal erred in failing to analyze the repercussions of Mr. Ren's mental health condition on his children in China. In her testimony in this case, the Applicant attempted to establish concerns that had been considered and discounted by the IAD in the IAD Ren Decision. I find that it was reasonable and necessary for the IAD in the present case to refer to Mr. Ren's IAD hearing and to conclude that it should not re-examine those issues. The Applicant testified in Mr. Ren's appeal that she would accompany him to China. Therefore, the impact in China of Mr. Ren's mental health condition on the Applicant and their child was before the IAD in that proceeding. Paragraphs 54 to 56 of the IAD Ren Decision set out the IAD's conclusions in this regard. Any conclusion by the IAD in this case which contradicted the findings of the prior panel, on the same facts, would impugn the integrity of the immigration system.

[29] Both parties rely on the decision of this Court in *Nawfal v Canada (Citizenship and Immigration)*, 2011 FC 464 (*Nawfal*), for the principle that the IAD could rely on the findings of another panel in the IAD Ren Decision but could not avoid its own analysis of the Applicant's case. In *Nawfal*, Justice Boivin stated (at para 23):

> [23] In *Badal v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 311, [2003] FCJ No 440, at para 25, this Court concluded that the Board can rely on the fact finding of another

> panel provided its reliance is limited, careful and justified. In the case at bar, the IAD referred to previous Board's finding of facts for the sole purpose of comparing it to the applicant's current position regarding the seriousness of his son's handicap. The Court finds that the IAD did not blindly defer to the Board's previous finding but conducted its own independent analysis based on the evidence before it. In the Court's view, in these circumstances, such a reliance on previous findings is justified in order to uphold the integrity of the immigration system as a whole.

[30] In paragraph 15 of the Decision, the IAD conducted an independent analysis of the Applicant's evidence regarding her fears for Mr. Ren and the lack of treatment he may face in China and concluded that the hardship arising for Mr. Ren was properly addressed in the IAD Ren Decision. In paragraphs 15 and 16 of the Decision, the IAD recognized the Applicant's concerns for herself and the children in having to deal with Mr. Ren's condition in China. The panel also considered other aspects of any hardship the Applicant may face in China. In light of the specific findings of the IAD in the IAD Ren Decision, I find no reviewable error in this regard. I note also that, having considered the effect of Mr. Ren's mental health issues, the IAD reviewed each factor set out by Justice Abella in *Kanthasamy* in considering the best interests of the Applicant's children. As stated above, the fact that this part of the IAD's analysis of the children's interests is contained under a separate heading does not render the Decision unreasonable.

2. *Did the IAD fail to reasonably articulate the basis on which it concluded that there were insufficient H&C considerations in the Applicant's case to justify granting special relief?*

[31] In the alternative, the Applicant submits that the IAD failed to articulate the basis for its conclusion that H&C relief was not warranted in her case. She states that the IAD divided its

analysis and conclusions into seven discrete sections that reflected the factors it weighed in assessing the Applicant's appeal, only considering each factor separately. She argues that the IAD provided no cumulative summary or conclusion for its ultimate finding that the Applicant had not established sufficient H&C considerations to grant the appeal. Therefore, the IAD's Decision lacked transparency.

[32] The Applicant provided a chart of the IAD's conclusions on each of the individual *Wang* factors in support of her argument that it is not possible to discern the basis on which the IAD dismissed her appeal. She also argues that certain of the IAD's findings are not supported by the evidence, particularly its conclusion that the Applicant bore some responsibility for her precarious immigration situation.

[33] I have reviewed the Decision in light of the Applicant's arguments, her chart and the evidence cited in her submissions. When read as a whole, it is clear from the Decision that the IAD found little basis or justification for the special relief sought by the Applicant pursuant to paragraph 67(1)(c) of the IRPA. The IAD analysed each element of the Applicant's claim for H&C relief and found only two elements in some mitigation of the indirect misrepresentation that was the basis of her status in Canada. One such element was the hardship to the Applicant of any removal of her husband to China, her central argument in this application. The majority of the factors considered by the IAD were found to be neutral considerations. In summary, the Applicant failed to establish sufficient H&C considerations, whether individually or as a whole.

## VI. Conclusion

[34] I find that the Decision was reasonable. The IAD properly relied on the findings of another IAD panel in assessing the effects of Mr. Ren's mental health issues on the Applicant and her children if the family were reunited in China following removal of both parents. The IAD's BIOC analysis reflected the principles established by the SCC in *Kanthasamy*. The Decision clearly sets out the IAD's analysis of the Applicant's H&C arguments and its conclusion that there was insufficient evidence to grant special H&C relief on appeal of the Applicant's removal order. The Decision is intelligible and justified.

[35] No question for certification was proposed by the parties and none arises in this case.

**JUDGMENT in IMM-461-18**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-461-18 |
| **STYLE OF CAUSE:** | RONG HU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | AUGUST 15, 2018 |
| **JUDGMENT AND REASONS:** | WALKER J. |
| **DATED:** | NOVEMBER 27, 2018 |

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