Federal Court  Cour fédérale

Date: 20200123

Docket: IMM-2787-19

Citation: 2020 FC 117

Ottawa, Ontario, January 23, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

HONGWU XIAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada [IAD], dated April 11, 2019 [Decision], which confirmed the removal order made against the Applicant on October 4, 2018, by the Immigration Division of the Immigration and Refugee Board of Canada [ID].

II. BACKGROUND

[2] The Applicant is a citizen of China. He has been married since 2005 and has three children. The oldest of his children, Yi Jia, is 12 years old and came to Canada at the age of one. The two younger children were born in Canada. The children currently live with their mother in Vancouver while the Applicant lives in Guangzhou, China, where he works for Jurjong Company.

[3] The Applicant was landed in 2005. In 2007, he successfully sponsored his wife and daughter to Canada in a permanent residence application. As part of this application for his family, the Applicant filed a sponsorship evaluation form where he misrepresented the fact that he worked for New Can Consultants Limited in Canada as a Marketing Manager. Even though this information was inaccurate, the application led to the issuance of the permanent resident visas for his wife and daughter in January 2008.

[4] In 2011, the Applicant lost his permanent resident status because he had breached his residency obligation. He did not appeal this decision. However, the Applicant became a permanent resident again on February 25, 2012 under the Family Immigrant Class after his wife sponsored and filed a permanent residence application for him.

[5] When the Applicant arrived at the Vancouver International Airport on January 18, 2017, a Canadian Border Services Agency [CBSA] officer proceeded to conduct a Secondary Examination. Once again, the officer determined that the Applicant had failed to maintain his

residency requirement, but waited before taking any enforcement action because the Applicant's residency was about to expire in a month.

[6] However, based on the information that the Applicant gave during this interview, a second CBSA officer wrote a s 44(1) report for misrepresentation on January 23, 2017. This report was in relation to the misrepresentation that the Applicant had filed in the sponsorship application for his wife and daughter in 2007. Subsequently, discussions between the Applicant and the CBSA officer confirmed the report. Therefore, the officer scheduled an admissibility hearing, which was held before the ID on October 4, 2018.

[7] Before the ID, the Applicant acknowledged the misrepresentation about his residency in the sponsorship application for his spouse and daughter in 2007. Therefore, the ID concluded that the Applicant is inadmissible to Canada for misrepresentation contrary to s 40(1)(a) of the *IRPA* and issued a removal order. The Applicant appealed this order before the IAD.

III. DECISION UNDER REVIEW

[8] The IAD confirmed the ID's decision and concluded that there were insufficient humanitarian and compassionate [H&C] grounds to grant special relief.

[9] Before the IAD, the Applicant challenged the legal validity of the removal order. He alleged that the misrepresentation dating back to 2007, which he had conceded, was not material to the matter before the officer, who had to determine whether the Applicant met his residency requirement during his second permanent residence period. Moreover, the Applicant alleged that

s 44(1) of the *IRPA* does not apply to prior applications when a break occurs in permanent residence status.

[10] The IAD applied the principles from *Li v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1151 [*Li* (2017)] and *Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 [*Kazzi*] and concluded that there is no time limit or statute of limitations on the consequences of misrepresentation which, in the present matter, induced an error in the administration of the IRPA and allowed his wife and daughter to secure permanent residence in Canada. Consequently, the IAD found that the ID had to consider inadmissibility based on misrepresentation rather than the violation of the residence obligation. The IAD also concluded that the fact the Applicant lost his permanent residence in 2011 and reacquired it in 2012 through his wife's sponsorship did not exempt him from the consequences of his misrepresentation in 2007.

[11] The IAD proceeded to the assessment of the best interests of the child [BIOC] in the context of H&C considerations to determine whether it could grant special relief in light of all the circumstances of the case. However, after taking into account the factors referred to in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (T84-9623) [*Ribic*], the IAD determined that there were not sufficient H&C considerations to order a stay of the execution of the removal order, or to allow the appeal.

[12] As a result of the analysis of the *Ribic* factors, the IAD found that the misrepresentation was very serious and heavily weighed against the granting of special relief. Notably, the IAD

found that the Applicant's remorse reflected more regret about the consequences to his family and less about his actions. The IAD also found that, during his two permanent residence periods, the Applicant worked and resided in China except for short visits to his family in Canada. In addition, with the exception of his immediate family, the IAD determined that the Applicant has no level of support from a community available to him in Canada.

[13] As for the impact of the removal on his family, the IAD found that the evidence showed no hardship on the family given that the Applicant and his wife had chosen to live geographically separated since 2005. In addition, the Applicant is already well established in China and, given his plan to work there until at least his retirement, the IAD found that the Applicant had demonstrated an ability to support his family while being outside of Canada. For the same reasons, the IAD concluded that his children would not face difficulties if the Applicant is denied entry to Canada for five years.

IV. ISSUES

[14] The issues raised in the present matter are the following:

1. Whether the misrepresentation that the Applicant conceded was material to his second permanent residence status, thereby rendering him inadmissible to Canada;

2. Whether the Decision was reasonable.

V. STANDARD OF REVIEW

[15] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. This Court's judgment was taken under reserve. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. However, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at para 144, this Court found that it was not necessary to ask the parties to make additional submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application and it does not change the applicable standards of review in this case nor my conclusions.

[16] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52), and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[17] The Applicant submitted that the applicable standard of review in this case was the standard of reasonableness. The Respondent submitted the same. I agree.

[18] There is nothing to rebut the presumption that the standard of reasonableness applies in this case. The application of the standard of reasonableness to these issues is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*. See *Sidhu v Canada (Citizenship and Immigration)*, 2019 FCA 169 at para 15 regarding this Court's review of the IAD's interpretation of s 40(1)(a) of the *IRPA*, and *Momi v Canada (Citizenship and Immigration)*, 2019 FCA 163 at para 21 concerning this Court's review of the IAD's finding on H&C grounds.

[19] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para 99). Reasonableness is a single standard of review that varies and "takes its colour from the context" (*Vavilov*, at para 89 citing *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). These contextual constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov*, at para 90). Put in another way, the Court should intervene only when "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). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the decision-maker's

reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it" (*Vavilov*, at para 101).

VI. STATUTORY PROVISIONS

[20] The following statutory provisions of the *IRPA* are relevant to this application for judicial review:

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;
…	…
DIVISION 5	**SECTION 5**
Loss of Status and Removal	**Perte de statut et renvoi**
Report on Inadmissibility	**Constat de l'interdiction de territoire**
Preparation of report	**Rapport d'interdiction de territoire**
44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a	44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir

report setting out the relevant facts, which report shall be transmitted to the Minister.	un rapport circonstancié, qu'il transmet au ministre.

VII. ARGUMENTS

A. *Applicant*

(1) The IAD's finding under the s 40(1)(a) of the *IRPA* is unreasonable.

[21] The Applicant submits that the IAD erred in finding that the misrepresentation was relevant to his second permanent residency status. This is because a few years after he had sponsored his wife and daughter in 2007, he lost his first permanent residence status. Consequently, citing *Kaur v Canada (Minister of Citizenship and Immigration)*, 2007 FC 268, the Applicant says that his misrepresentation does not fall under s 40(1)(a) of the *IRPA* because it was not material to the matter before the officer, who had to determine whether the Applicant met his second permanent residency requirement.

[22] In addition, the Applicant argues that *Ali v Canada (Minister of Citizenship and Immigration)*, 2008 FC 166, requires that the IAD provide a clear basis to conclude that an alleged misrepresentation is material to the matter before the Officer who conducts an examination. Moreover, the Applicant submits that nowhere in its Decision does the IAD consider that the Applicant had already lost his permanent residency status in 2011. Therefore, according to the Applicant, the Officer looked beyond the purpose of the examination by considering irrelevant facts dating back to 2007.

[23] Furthermore, the Applicant says that the IAD erred by relying upon *Li* (2017), above. In *Li* (2017), the applicant had not previously lost her permanent residency status. On the other hand, there is no indication in the present case that the Applicant made any misrepresentation in relation to the matter that is now at issue, which is the second residency that he obtained in 2012.

[24] Finally, on this issue, the Applicant alleges that the IAD cited no authority to support that s 40(1)(a) of the *IRPA* is not qualified by time; nor does the statute specify time guidelines.

(2) The IAD's assessment of H&C factors justifying relief was unreasonable

[25] The Applicant submits that the IAD's assessment of the H&C factors is deficient because it is tainted by the IAD's consideration of the Applicant's misrepresentation. In addition, the Applicant argues that *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], applies in the present matter and the BIOC factors at play. Consequently, the IAD had to consider and weigh all of the relevant facts and factors in light of the evidence. The Applicant alleges that the IAD ignored his wife's testimony about the impact on her and the children if the Applicant is denied entry to Canada.

[26] In addition, citing a second case also named *Li v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 451 [*Li* (2016)] and *Duong v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 192, the Applicant argues that, given that the IAD was influenced by the undue weight on misrepresentation, its assessment was unreasonable.

B. *Respondent*

(1) The IAD's finding under the s 40(1)(a) of the *IRPA* is reasonable

[27] The Respondent argues that the purpose of s 40(1)(a) of the I is to ensure that applicants provide complete and truthful information and to deter misrepresentation in order to maintain the integrity of the immigration process.

[28] In addition, the Respondent relies on *Aoun v Canada (Citizenship and Immigration)*, 2015 FC 296, *Li* (2017), and *Reyes v Canada (Citizenship and Immigration)*, [2013] IMM-3859-11, for the proposition that a misrepresentation applies to an individual who already holds permanent residence status, but who made a false statement on a sponsorship application. Furthermore, the wording of s 40(1)(a) of the *IRPA* suggests that Parliament did not intend to allow sponsors to avoid their obligations toward Canada. Consequently, the Respondent says that the confirmation of the removal order by the IAD was valid.

(2) The IAD's assessment of the H&C factors was reasonable

[29] The Respondent says that the IAD reasonably weighed the evidence regarding misrepresentation. The IAD was allowed to decide what factors to consider for denying special relief in order to avoid creating a precedent that would encourage illegal entry in Canada.

[30] Moreover, the Respondent argues that *Kanthasamy* says that the specifics of each case must be examined in a contextual manner. The Respondent submits that there is no *prima facie*

presumption that the children's interests should prevail and outweigh other considerations including misrepresentation.

VIII. ANALYSIS

A. *The Misrepresentation*

[31] The Applicant's arguments that the IAD's misrepresentation analysis was unreasonable are summarized cogently in written submissions as follows:

> 38. The issue in the present case is whether the Panel's interpretation that the Minister can reach back in time to find the Applicant inadmissible is unreasonable. The fact that the Applicant has already lost his permanent residency status, aims to achieve one clear goal of section 40(1)(a), that is, to maintain the integrity of the immigration process. Nowhere in the decision did the Panel consider this fact. That the Applicant provided false information in relation to a sponsorship application in 2007 was not material to the matter before the officer who conducted the examination. The matter before the Officer was whether or not he met the residency requirement. Here, the sequence of events and descriptions contained in Officer Bajwa's declaration were concerns that the Applicant did not fulfill his residency obligation. This is the entire basis that provoked the secondary examination by CBSA upon the Applicant's entry into Canada. Despite advice from the Minister's Delegate to Officer Bajwa to wait a month until the Applicant's permanent resident status expires before considering any enforcement action, a section 44 report proceeded. That report stemmed from Officer Bajwa's examination, but it is that it [*sic*] looked beyond the objective of the examination by considering facts dating back in 2007. Thus the alleged misrepresentation was not "relevant" to the matter and the Panel's interpretation of section 40(1)(a) essentially penalize[d] the Applicant which is an unfair assessment.
>
> 40. Here, the Applicant is found to have committed a misrepresentation in 2007. However this was during his first permanent residency, which he lost in January 2011. When the Minister took enforcement action to strip the Applicant of his permanent residency in 2011, it is the Minister's choice to take that action for residency obligation. The Minister is now estopped from

> taking further action against the Applicant for an act alleged that he committed during his lost first permanent residency. There is no indication that the Applicant misrepresented on the matter that is now at issue, his application to permanent residency, which he obtained in 2012.
>
> 41. The Panel further erred in finding that section 40(1)(a) is not qualified by any temporary matter and nor does the statute specify time guidelines to qualify relevance that would need to be established. The Panel offered no support for this position. Indeed it is worth [*sic*] that the Immigration Division remarked that there is no case law for the Minister's position of continuous enforcement of a misrepresentation reaching back in time. Yet the Panel appears to disregard the case law cited by the Applicant's Counsel in favour of the case of *Li* without any assessment or statutory interpretation of section 40(1)(a) and the IRPA.

[32] While the Applicant points out that *Li* (2017), above, relied on by the IAD is distinguishable on its facts, I think it is clear that the IAD does rely on *Li* (2017), but only for the general comments that dishonest sponsors should not be allowed to "avoid the legal and moral obligations that sponsorship requires of them" because that "would result in a serious threat to the integrity of the system."

[33] I don't think these general remarks are without relevance for the present case where, admittedly on very different facts from *Li* (2017), the Applicant is arguing, in effect, that a serious and dishonest misrepresentation in the past cannot now be held against him because its impact has dissipated and it cannot be connected to the permanent residence status he reacquired in 2012 through his wife's sponsorship or whether he has lost status again through a breach of residency requirements.

[34] The connection looks fairly obvious to me. The Applicant's wife was only able to sponsor him in 2012 because she became a permanent resident of Canada as a result of the Applicant's 2007 misrepresentation. In other words, the Applicant's permanent resident status in 2012 was achieved as a direct result of his own misrepresentation. The fact that the Applicant lost permanent residence in 2011 because he breached his residency obligations does not mean that the impact of his 2007 misrepresentations was spent. He has still profited personally from that misrepresentation because it allowed his wife to obtain permanent residence and then to sponsor him. On the facts of this case, the Applicant has achieved a benefit (permanent residence) as a direct result of his very serious misrepresentation in 2007.

[35] The IAD's reliance on *Kazzi*, above, is simply for that case's summary of the general principles applicable to s 40(1)(a) misrepresentations and the Court's jurisprudence that supports those principles.

[36] I see nothing in those general principles that would allow the Applicant to avoid responsibility for his very serious misrepresentations in 2007. As *Kazzi* and supporting cases make clear, "the assessment of whether a misrepresentation could induce an error in the administration of the *IRPA* is to be made at the time the false statement was made" (emphasis added). In the present case, the misrepresentation not only could have induced an error in the administration of the *IRPA*, it did induce an error because the Applicant's wife and children achieved permanent residence as a direct result of that misrepresentation and, in addition, the Applicant was able to re-acquire permanent residence through his wife as a result of his own misrepresentation.

[37] When the Applicant was re-applying for permanent residence through his wife he had a continuing duty of candour to disclose his prior misrepresentation that had allowed his wife to acquire permanent residence and sponsor him. He breached that duty of candour. This was an important misrepresentation that significantly impacted the immigration process and to allow the Applicant the immunity he now says he has acquired as a result of subsequent events would be to reward blatant dishonesty and undermine the integrity of the system by encouraging dishonest parties who are able to hide their misrepresentation over a number of years. In other words, it would clearly say that it is possible to become a permanent resident of Canada by telling lies and getting away with it for an extended period of time or because of intervening events.

[38] The Applicant did not lose his permanent residence status in 2011 because of the 2007 misrepresentation; he lost it because he had breached his residency obligations. Until the present Decision he has never been held to account for his misrepresentation and his cheating of the system.

[39] The Applicant has provided no authority to support his various assertions and arguments.

[40] The fact that the Applicant lost his permanent resident status in 2011 for other reasons does not maintain the integrity of the immigration system. At that time, his misrepresentation had not been discovered and its consequences were not understood. The fact that the Applicant quickly re-acquired permanent residency status through his wife does not assist the aims of s 40(1)(a) or nullify its impact.

[41] The Applicant places great reliance upon the words “relevant matter” in s 40(1)(a) and says that the relevant matter means the application at hand which, in this case, is the Applicant’s current permanent resident status which he gained in 2012 as a result of his wife’s sponsorship.

[42] To begin with, I think that the Applicant’s 2007 misrepresentation was both material and relevant to his reacquiring permanent residence in 2012. The Applicant gained permanent residence in 2012 because his wife, who had gained her permanent residence status and the right to sponsor the Applicant as a direct result of the Applicant’s misrepresentation, sponsored him. The only reason the Applicant’s wife was able to sponsor him in 2012 was because the Applicant directly, or indirectly through his wife, withheld a material fact that was relevant to his wife’s ability to sponsor him. And that withholding of a material fact had induced an error in the administration of the *IRPA*; namely, the Applicant was able to regain permanent resident status through his wife.

[43] Secondly, I see nothing in the legislation or the case law that says that, quite apart from any current or intervening application, the Minister, upon discovering a misrepresentation, cannot proceed to exclude the Applicant for the 2007 misrepresentation that occurred when he sponsored his wife. There are no temporal limits imposed upon s 40(1)(a) and the assessment of whether a misrepresentation could induce (or did induce) an error in the administration of the *IRPA* is to be made at the time the false statement was made (see *Kazzi*, above, at para 38). In my view, this means that the “relevant matter” was the Applicant’s sponsorship of his wife.

[44] The Applicant is of the view that, because he lost his permanent resident status in 2011 as a result of his failure to fulfill residency requirements, he is now cauterized against the consequences of his 2007 misrepresentation. I can see no authority for this position either in the legislation or the case law, and, if this position were accepted it would go a considerable way to undermining the purpose and impact of s 40(1)(a) because it would mean that the consequence of blatant and concealed misrepresentation could be rendered immune to appropriate action by subsequent steps and applications in the immigration process.

[45] The Applicant says that it is unfair that he should be punished twice. The Applicant lost his permanent resident status because he failed to comply with residency requirements. The failure to meet residency requirements was the Applicant's choice, as was the misrepresentation he committed in 2007. I see no logic or legal principle to support his argument that because he lost status in 2011 for a failure to fulfill residency requirements, he should not now have to face the consequences of his misrepresentation. Different statutory provisions are at play here and they are intended to fulfill different purposes. The Applicant's misrepresentation did not come to light earlier because he concealed it and continued to withhold information relevant to his status from the immigration authorities. The fact that he was able to do this until after he sponsored his wife and she sponsored him is not unfair. I can appreciate that there may be situations where, after a lengthy passage of time, it might be unfair for the Minister to act upon a particular misrepresentation. But this would depend upon the nature of the misrepresentation, the reasons why it was not discovered, and the consequences of acting upon it when it is discovered. But these are H&C considerations that the Applicant has availed himself of in the present case. They are not a justification for imposing a legal restriction upon the Minister's discretion to seek

recourse for a misrepresentation when that misrepresentation comes to light, either after a significant period of time, or subsequent to some other application that has intervened before the misrepresentation was discovered.

[46] The Applicant has provided no evidence of Parliamentary intent that those who experience a loss of permanent residence status for failing to maintain the residency requirements should not, thereafter, have to face the consequences of a previously undiscovered misrepresentation. Nor, in my view, does a plain and obvious reading of s 40(1)(a) in the full context of the *IRPA* suggest that immunity from consequences of misrepresentation can be gained by an intervening loss of status for reasons other than misrepresentation.

[47] I see nothing in principle or legal authority that requires me to read such a limitation into s 40(1)(a) to curtail the Minister's power in the way suggested by the Applicant.

[48] And the Applicant has not demonstrated that there is a provision of *IRPA*, or principle of law, or authority, that says the Minister is "estopped from taking further action against the Applicant for an act that he committed during his lost first permanent residency." This is no more than a bald assertion by the Applicant that he has failed to substantiate with principle or relevant authority.

B. *Humanitarian and Compassionate Assessment*

[49] The Applicant also argues that the IAD, in its H&C analysis, was unduly influenced by the misrepresentation to the exclusion of other factors.

[50] This assertion is not supported by a simple reading of the Decision which shows that the IAD gave full consideration to all other factors at play in accordance with the Supreme Court of Canada's guidance in *Kanthasamy*, above, that a decision-maker "must substantially consider and weigh all of the relevant facts and factors before them."

[51] The IAD identified, and reasonably dealt with, not only the misrepresentation, but the Applicant's remorse (or lack thereof), length and degree of his establishment in Canada, his family and community support, the impact his removal would have on his family in Canada, any hardship caused by his removal, and the best interests of the children involved.

[52] The clear evidence in this case was that, although the Applicant has family in Canada, he lives and works in China, and intends to continue this arrangement at least until he retires. In fact, all his wife could say was that "maybe he is going to be returning to Canada when he retires" (emphasis added). The Applicant did not testify himself, so the evidence is not very strong that he would return to Canada at any time, or that his loss of permanent resident status would make any significant difference to the way he leads his life.

[53] This has to be borne in mind when considering the IAD's BIOC analysis. The Applicant's wife made it quite clear that she and the children would remain in Canada. The Applicant would be barred from Canada for 5 years, but he fully intends to live and work in China in any event. So that means the only significant change will be his annual visits to Canada. The IAD was fully alive to the situation but felt that "there are ways the Applicant could

maintain contact with the children and continue to be part of their lives as they do at the present and as they have done over the last several years":

> […] The family's ability to travel to China is evident. There was little to suggest the Appellant could not continue to see and speak with the children daily via the internet. While the best interests of the children is an important and positive factor in this appeal, it does not override other factors.

[54] Given that the Applicant has chosen to live and work in China apart from his spouse and children for most of the year, and given that the family can travel to China and communicate with the Applicant on a daily basis, as they have done in the past, it cannot be said that the IAD's weighing of the BIOC was unreasonable. These children may see their father less in person for the next five years, but there is no convincing evidence that this will significantly impact their lives, given the family's current arrangements and future plans for the Applicant to go on living and working in China.

[55] At the hearing of this application, the Applicant argued that the IAD did not reasonably address the evidence of the Applicant's wife as to the significant impact the change in circumstance will have upon the children. The Applicant himself provided no evidence at the hearing and when the Applicant's wife was asked about the consequences, her answers were distinctly vague:

> **PRESIDING MEMBER**: Okay. Hold on a second.
>
> **MINISTER'S COUNSEL**: I am going to object to the question as the Appellant can't testify as to what her husband's actual thoughts are. She can testify to what they discussed.
>
> **PRESIDING MEMBER**: Listening.

COUNSEL: So if I hear my friend right, the witness cannot testify of what the husband is thinking but the witness can testify as to what she and the husband have discussed?

MINISTER'S COUNSEL: Yes.

COUNSEL: Okay. So let me rephrase that. From what your husband has told you, how does he feel about his responsibility in participating in the act leading to what happened today?

INTERPRETER: Well he's very regret about --- he's never thought about this issue would make such a big trouble to us.

COUNSEL: Okay. Now if Mr. Xiao's appeal is dismissed, if he loses the appeal today, which means he cannot come to Canada even to visit for the next five years, what kind of impact, if any, would it be for you and for the children?

INTERPRETER: I can hardly say if there is a choice how can I make this choice? I can't imagine if the children can't see their father what suffering are they going to suffer? By the end of year the children would have their father to examine their performance for whole year. They would doubt about what bad things their father has done. Well this three children's mind their father is in a very high figure in their mind.

[…]

COUNSEL: Okay. Now if I, let me ask you this, the children's father right now only comes into Canada about four times a year. And then you and the kids go over and see their father maybe twice a year. How --- if the father cannot come to Canada for five years, what's the difference?

INTERPRETER: Even though the father is not, well of course there's a big difference, you know even though he's not always in Canada with us, however most of the vacations or the school breaks we spend the time together. For example this year he cannot come in and I won't be able to take the kids to him, I alone just do not dare to take the kids with me, alone.

For the kids we can't guarantee what's happening in case there's an emergency and if the father cannot come into Canada if I get something wrong who's going to take care of the kids?

[…]

> **MINISTER'S COUNSEL**: So if you're husband's appeal is dismissed what is the plan?
>
> **INTERPRETER**: I can't imagine what's going to be happening. Like I've been here already 10 years. I am --- I feel very comfortable about the life here. All the kids grow up over here. I would try my best to take this chance to make my husband get the chance to entry. Say my oldest daughter is already grade seven if we going back to move them all back to China and when they come to the age of university, going to university they have to come back again and which is not fair to them to suffer from this double culture shock.
>
> **MINISTER'S COUNSEL**: So have you talked to your husband about the plan if his appeal is dismissed?
>
> **INTERPRETER**: Well I would say that the purpose that we immigrate to Canada 10 years ago was just because of the benefit to the kids growing.
>
> **PRESIDING MEMBER**: Ma'am. Would you answer the question that's asked. Mr. Carey would you repeat your question.
>
> **MINISTER'S COUNSEL**: Sure. Have you talked to your husband about the plan if his appeal is dismissed?
>
> **INTERPRETER**: We had a discussion but no result.

[56] Given this vague and inconclusive evidence on the impact of the Applicant's absence from Canada for five years, I cannot say that the IAD overlooked anything material in the BIOC analysis.

IX. CERTIFICATION

[57] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-2787-19

THIS COURT'S JUDGMENT is that

1. The application is dismissed;

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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