Federal Court  Cour fédérale

Date: 20111011

Docket: IMM-39-11

Citation: 2011 FC 1148

Ottawa, Ontario, October 11, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

XUE YAN TIAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (IAD), dated 19 November 2010 (Decision), dismissing the Applicant's appeal of an exclusion order made pursuant to section 45 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) due to its finding that the Applicant misrepresented material facts relating to a relevant matter that induced or could have induced an error in the administration of the Act.

BACKGROUND

[2] The Applicant is a permanent resident of Canada, currently residing in Ontario. On 23 February 2004, she married Chan Yin Kin, a Canadian citizen, in Guangdong Province, China. She was sponsored by her husband and was successful in obtaining a permanent resident visa which allowed her to come to Canada. The Applicant arrived in Canada on 8 December 2005. The following day her daughter, who had been removed from the application for spousal sponsorship because her biological father would not permit her to leave China, arrived in Canada and was granted a visitor's visa.

[3] According to the evidence, more than four months previous to these events, the Applicant's husband, who had been suffering from cancer, passed away. The Applicant claims that, in the three months prior to her arrival in Canada, she had lost contact with her husband. She did not know that he had had cancer and had passed away until she went to see his landlady in Toronto's Chinatown. At no time did she report the loss of contact or the death to Canadian immigration officials. They learned of the death by chance when the Applicant filed an inland sponsorship application for her daughter.

[4] Immigration officials commenced a misrepresentation process against her. The Immigration Division found that she had violated paragraph 40(1)(*a*) of the Act, having entered Canada with full knowledge that she should have informed immigration officials that her husband was deceased. In consequence, the Immigration Division issued an exclusion order on 17 November 2008. The Applicant's appeal of the exclusion order was heard by the IAD in three sittings (14 January, 17

March and 23 September of 2010). The Applicant was represented by counsel, as was the Minister, and an interpreter was present. Applicant's counsel conceded that the exclusion order was valid. However, he argued that the misrepresentation was an innocent misrepresentation, and he urged the IAD to consider this, as well as the best interests of the child, in its determination of the Applicant's humanitarian and compassionate (H&C) application pursuant to paragraph 67(1)(*c*).

[5] The IAD found, on a balance of probabilities, that there were insufficient H&C reasons to exercise its discretion to grant the requested relief. This is the Decision under review.

DECISION UNDER REVIEW

[6] In considering the Applicant's appeal of the exclusion order on H&C grounds, the IAD relied on the factors set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) at paragraph 14, which include: the seriousness of the misrepresentation leading to the exclusion order; the length of time spent in Canada and the degree to which the Applicant is established in Canada; family in Canada and the dislocation that the exclusion order would cause them; family and community support available to the Applicant; potential foreign hardship that the Applicant would face in her country of removal, namely China; and the best interests of any child directly affected by the decision.

[7] The IAD found that the Applicant's story was so riddled with "mysteries," difficulties and implausibilities that it was "simply not credible." It suggested to the IAD that the marriage was not

bona fide but was entered into "primarily for the purpose of allowing the [Applicant] to gain status" under the Act.

[8] The IAD identified several aspects of the Applicant's evidence as not credible and as casting doubt on the *bona fides* of the marriage. The Applicant did not know the name of her husband's employer and knew nothing about the living arrangements of her husband's children, who were born of a previous marriage but who were living in Canada. She stated that, although she was unable to contact her husband for the three months before her arrival in Canada, she "never considered" inquiring at local hospitals or at the police department to discover his whereabouts. For his part, the husband never asked anyone to contact the Applicant after he was hospitalized. The Applicant had no records of her husband's hospital stay and made no effort to obtain them, despite the IAD's request for such documentation. She testified that her husband had concealed his terminal illness from her because he did not want to worry her and that she, like her husband's siblings in China, had no idea that he had passed away. The Applicant was not involved in the probate of her husband's estate. She claimed that she wanted none of his possessions and did not provide a copy of her husband's will so that the IAD could see if she was named in it.

[9] The husband's ex-wife, on the other hand, seemed much better informed about the husband's affairs and the administration of his estate. Originally, she had been named as the next of kin on the death certificate until the Applicant requested an amendment. The IAD found it inconceivable that the Applicant and the husband's siblings could have remained ignorant of his death when his ex-wife clearly knew of it. The IAD was not persuaded by the Applicant's claim that her husband lived in Chinatown in Toronto, given that the death certificate stated his address as

Markham and he was admitted to a hospital in Markham, near his ex-wife's residence. Based on this and other evidence noted in the Decision, the IAD concluded that the husband's divorce from his first wife may have been a divorce in name only and that the Applicant's marriage was not *bona fide.*

[10] The IAD then turned to a consideration of the *Ribic* factors. First, it concluded that the misrepresentation was of the most serious kind. The Applicant's marriage was not genuine, and she knew when she arrived in Canada that her husband was already deceased. If she had informed immigration officials of the death, they would have refused her entry to the country. Second, the IAD acknowledged that the Applicant had, at that time, been in Canada for six years and is as well established as anyone could be in that time. Third, the Applicant has no family, except for her daughter, but her numerous friends would be affected by her removal. Fourth, the IAD acknowledged the Applicant's concerns that, as a single mother with an illegitimate child in China, she may be alienated. However, as the Applicant had already returned to China with her daughter on a six-month visit and apparently suffered no serious repercussions, the IAD found that there was little evidence of potential foreign hardship. The member found that, as an urbanite and successful businessperson whose life had flourished in China, the Applicant would have no trouble beginning anew.

[11] Finally, the IAD considered the best interests of the Applicant's daughter, who is directly affected by the Decision. It noted that the Applicant's daughter was then nine years old and had come to Canada when she was three. She has no status in Canada; if the Applicant leaves Canada the child will have to accompany her. The child has adjusted well to Canadian society and is a good

student who is involved in extracurricular activities. She speaks Chinese and English. Although the Applicant expressed concerns that living in China would aggravate her daughter's asthma, the IAD noted that this had not been a sufficiently serious concern to prevent the Applicant from returning to China with her daughter for a six-month visit. The child has a good life in Canada and, although adjustment will be necessary, there is no reason to believe that she could not have a good life in China and that she is not resilient enough to adapt. The Applicant offered no documentary evidence that she would be stigmatized as the child of a single mother. Moreover, although the best interests of the child are an "important factor," this should not be interpreted to mean that they outweigh other factors relevant to the appeal. The IAD found that "returning to China is certainly not so traumatic … that the best interests of the child can only be satisfied by her remaining in Canada."

[12] The IAD concluded:

> [T]he fact that [the Applicant] is well established in Canada and … has a child in Canada who has integrated well in Canadian society is in the panel's opinion not sufficient for the panel to exercise its discretionary jurisdiction in this case. In the panel's opinion to do so would be to seriously undermine the integrity of the immigration system as it would allow someone to knowingly flaunt the system and therefore gain permanent residency in Canada.

ISSUES

[13] The following issues arise on this application:

i. Whether the appropriate standard of review is reasonableness or correctness; and

ii. Whether the IAD erred in assessing the best interests of the Applicant's child.

STATUTORY PROVISIONS

[14] The following provisions of the Act are applicable in these proceedings:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant 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.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il 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.
[…]	[…]
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;

[…]	[…]
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.

STANDARD OF REVIEW

[15] In the Applicant’s view the appropriate standard of review is correctness. This matter concerns not a finding of fact but rather the failure of the Respondent to consider properly the best interests of the child under paragraph 67(1)(*c*). This, the Applicant submits, is a question of natural justice, procedural fairness and law.

[16] The Respondent’s written submissions do not address the standard of review.

[17] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[18] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 58, addressed the appropriate standard of review for matters arising pursuant to paragraph 67(1)(*c*) of the Act. It stated:

> … [The respondent] accepted that the removal order had been validly made against him pursuant to s. 36(1) of the IRPA. His attack was simply a frontal challenge to the IAD's refusal to grant him a "discretionary privilege". The IAD decision to withhold relief was based on an assessment of the facts of the file. The IAD had the advantage of conducting the hearings and assessing the evidence presented, including the evidence of the respondent himself. IAD members have considerable expertise in determining appeals under the IRPA. Those factors, considered altogether, clearly point to the application of a reasonableness standard of review. There are no considerations that might lead to a different result. Nor is there anything in s. 18.1(4) that would conflict with the adoption of a "reasonableness" standard of review in s. 67(1)(*c*) cases. I conclude, accordingly, that "reasonableness" is the appropriate standard of review.

Further, Justice Michel Shore in the recent case of *Tai v Canada (Minister of Citizenship and Immigration)*, 2011 FC 248 at paragraph 48, applied the reasonableness standard where the best interests of the child were at issue.

[19] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47; and *Khosa*, above, at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[20] Notwithstanding the above, the narrow issue raised by the Applicant in this case, in my view, centers on the IAD's interpretation of paragraph 67(1)(*c*) of the Act. The Applicant says that the IAD has misread Parliament's intent which was to separate the best interests of an affected child from any other relevant considerations and to indicate that greater weight should be given to the best interests of an affected child. She says that, in this case, the IAD failed to appreciate the intent of this section and so failed the best interests of her child the greater weight that Parliament intended. She says that this involves a mistake of law which requires the Court to apply a standard of correctness.

[21] In my view, the issue raised by the Applicant requires a standard of reasonableness. In *Smith v Alliance Pipeline Ltd.* 2011 SCC 7, [2011] 1 SCR 160 at paragraphs 26 - 28, the majority of the Supreme Court of Canada held that, where an administrative tribunal is interpreting its home statute, that interpretation should be reviewed on the standard of reasonableness. The standard of correctness now only applies in the following cases:

(1) constitutional issues;

(2) questions of general law of central importance to the legal system as a whole and outside the tribunal's expertise;

(3) drawing of jurisdictional lines between competing tribunals; and

(4) true questions of jurisdiction or *vires*

The question at issue in the present case is one of interpretation of 67(1)(*c*) of IRPA so, after *Smith*, it is my view that it attracts the reasonableness standard on judicial review.

[22] The majority in *Smith* also held that characterizing an issue as a "question of law" does not automatically mean the correctness standard applies. What matters is that the tribunal is interpreting its home statute. The Supreme Court of Canada made a similar finding in *Celgene Corp. v Canada (Attorney General)* 2011 SCC 1, [2011] 1 SCR 3 at paragraph 34.

ARGUMENTS

The Applicant

[23] The Applicant's submissions are brief. She acknowledges that the Supreme Court of Canada in *Khosa*, above, at paragraph 7, confirmed that in cases similar to the instant case it is proper for the IAD to consider the factors identified in *Ribic*, above, and *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3. The Applicant acknowledges that this is precisely what the IAD did.

[24] However, in the Applicant's view, both the IAD and the Supreme Court of Canada erred in failing to consider that the *Ribic* test emerged from the previous statutory regime – namely, the

Immigration Act, R.S.C., 1985, c. I-2, ss. 114(2) and 70(3) – which made no specific mention of the rights of the child. In contrast, under the current legislative scheme the direction to examine the best interests of the child is expressly stated in paragraph 67(1)(*c*) of the Act. The Applicant submits that this express direction in the legislation signifies Parliament's intention that the best interests of the child should no longer be weighed equally with the other relevant factors but should be weighed more heavily than the others. This does not mean that it will always outweigh the other factors but that it must have greater weight. In failing to afford the best interests of the Applicant's child greater weight that the other factors, the IAD committed a reviewable error.

[25] The Applicant also argues that the IAD's reliance on *Merion-Borrego v Canada (Minister of Citizenship and Immigration)*, 2010 FC 631 is misguided. The misrepresentation in that case was related to the existence of the children themselves, which distinguishes it from the instant matter.

The Respondent

[26] The Respondent challenges the Applicant's submission that the IAD should have weighed her daughter's interests more heavily than any of the other factors relevant to her appeal. The principles and authorities that the Applicant asks this Court to disregard were upheld by the Federal Court of Appeal in *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189. *Kisana* post-dates the enactment of the current Act and deals with section 25 which, like paragraph 67(1)(*c*), expressly mentions the best interests of the child.

[27] In that case, Justice Marc Nadon, at paragraphs 23-24, addressed the issue of the weight to be afforded the best interests of a child directly affected by the outcome of an H&C application. He held that an immigration officer must examine the best interests of the child with a great deal of attention and determine the appropriate weight to be afforded this factor in the circumstances. He further stated that Parliament has not yet decided that the presence of children in Canada constitutes an impediment to the *refoulement* of a parent illegally residing in Canada. An applicant is not entitled to an affirmative result on an H&C application simply because the best interests of a child favour that result.

[28] The Respondent argues that the IAD weighed the relevant factors as required and, therefore, its determination accords with the accepted jurisprudence.

The Applicant's Reply

[29] The Applicant submits that the jurisprudence relied on by the Respondent is of little relevance. It deals with section 25 of the Act and with a foreign national applying for permanent residence in Canada. It does not deal with paragraph 67(1)(*c*) of the Act, with a permanent resident under an exclusion order or with the *Ribic* factors.

[30] The Appeal Division's jurisdiction is established in paragraph 67(1)(*c*), not section 25. Moreover, the instant case concerns not an applicant applying for status but one who is being divested of her permanent residence status; the latter has more rights than the former. The cases cited by the Respondent are not sufficiently on point.

ANALYSIS

[31] The Applicant raises a narrow point of law for which she offers no authority and very little in the way of contextual justification.

[32] What authority we have suggests that, when the best interests of a child must be taken into account, the decision-maker must be alert, alive and sensitive to those interests but, once they are identified and defined, it is up to the decision-maker to determine what weight should be given to those interests in the circumstances of the case. See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 (QL) and *Kinsana*, above.

[33] The Applicant says that the case law which sets out these rules does not apply to paragraph 67(1)(*c*) of the Act. I note, however, that my colleague, Justice Shore, thinks otherwise. In *Tai*, above, Justice Shore was considering whether the IAD's refusal to allow an appeal on H&C grounds under paragraph 67(1)(*c*) was reasonable. He had the following to say at paragraph 88:

> The Federal Court of Appeal has held that when an immigration officer assesses an application for an H&C exemption from the law, the best interests of the child are just one factor to be considered. The Federal Court of Appeal further held that it may be assumed that child is better off living in Canada: what the officer must assess is the likely degree of hardship to children on removal and to assess that hardship against the other factors in the case. That is what the IAD did in the case of the Tai family. The IAD's decision is reasonable (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555 (CA), at paras 4-6).

[34] In the end, the Applicant has raised a matter of statutory interpretation. Her argument is, essentially, that in enacting paragraph 67(1)(*c*) Parliament intended to change the law and to elevate

the best interests of an affected child in some way. She says that the wording of paragraph 67(1)(*c*) reveals that Parliament intended that the best interests of the child would not, in effect, become a sixth factor to add to the five factors set out in *Ribic*. The intent was that, following a *Ribic* analysis, the IAD should then weigh the best interests of the child against whatever conclusions it may have come to by applying *Ribic* and place more weight on the interest of the child.

[35] Applying the usual rules of statutory interpretation (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] SCJ No 2 (QL) at paragraph 21, to paragraph 67(1)(*c*) it is obvious that Parliament wanted to make it clear that the best interests of an affected child had to be taken into account whenever the subsection was applied. However, there is nothing in the plain and ordinary meaning of the wording of the subsection, when examined in the full context of the Act, to indicate that Parliament wanted to elevate the child's interests in the way suggested by the Applicant. I think that had Parliament wished to elevate those interests, it would have said so and clarified its intent. In *Rizzo*, above, at paragraph 21, the Supreme Court of Canada adopted the following approach formulated by Elmer Driedger in *Construction of Statutes* (2nd ed, 1983):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[36] Also, *Canada Trustco Mortgage Co v Canada* 2005 SCC 54, [2005] 2 SCR 601 at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made

> according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[37] When I apply these principles to the case in hand, I can find no support for the Applicant's interpretation.

[38] In my view, the Applicant has provided no authority or convincing contextual argument to support her bald assertion that "in directing the examination of the rights of the children right in the legislation, … the rights of the child is no longer ONE of the factors, but a factor over and above the others." In my view, in accordance with *Smith*, above, the IAD reasonably interpreted and applied paragraph 67(1)(*c*) of the Act to the facts of this case and came to a reasonable conclusion.

[39] The Applicant has suggested the following question for certification:

> What is the appropriate weight and the appropriate level of analysis of the "best interests of the child" as against the other factors that the IAD must take into account in exercising its discretionary jurisdiction under subsection 67(1)(*c*) of IRPA, given that the subsection makes special mention of "the best interests of a child directly affected" but does not mention the other factors set out in *Ribic*?

[40] In *Canada (Minister of Citizenship and Immigration) v Liyanagamage* (1994), 176 NR 4, at paragraph 4, the Federal Court of Appeal set out the criteria for certification. A certified question must be one which, in the Court's opinion, contemplates issues of broad significance and general

application, transcends the interests of the immediate parties to the litigation, and is determinative of the appeal.

[41] More recently in *Zazai v Canada (Minister of Citizenship and Immigration)* 2004 FCA 89, [2004] FCJ No 368 at paragraph 11, Justice Pelletier held that "the threshold for certifying a question remains the same. Is there a serious question of general importance which would be dispositive of an appeal?

[42] The question to be certified must be on issue which is raised on the facts of the case before the judge certifying it and must not be a mere reference to the Court of Appeal.

[43] This test has been applied in several decisions of this Court. See *Garcia v Canada (Minister of Citizenship and Immigration)* 2006 FC 645, [2006] FCJ No 834; *Khaliqi v Canada (Minister of Citizenship and Immigration)* 2009 FC 202, [2009] FCJ No 287; and *Rabeya v Canada (Minister of Citizenship and Immigration)* 2011 FC 370, [2011] FCJ No 479.

[44] In my view, the jurisprudence on how to assess the best interests of the child is well settled and the question proposed by the Applicant has been answered by this Court. She has provided no convincing argument that the Decision is incorrect or unreasonable. The Applicant is seeking to invent a novel point of law but she has provided nothing to suggest that the IAD's interpretation of its home statute was incorrect or unreasonable in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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