Federal Court  Cour fédérale

Date: 20131209

Docket: IMM-2709-13

Citation: 2013 FC 1224

Ottawa, Ontario, December 9, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

BHARTIBEN PATEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the Immigration Appeal Division [IAD], of the Immigration and Refugee Board [IRB], dated February 19, 2013, dismissing the Applicant's appeal of an exclusion order made against her on December 17, 2009.

I. Facts

[2] The Applicant was born in India on August 1, 1982. She became a permanent resident on October 10, 2003 after being sponsored by her first husband, Ashokkumar Pattel, whom she married on January 11, 2003.

[3] Two weeks after arriving in Canada, she gave birth to her son on October 20, 2003.

[4] A DNA test proved that the child was not the son of the Applicant's first husband, but rather the son of another man, Jiteshbhai Ramanial Patel, with whom she had a relationship before marrying her first spouse and an extra-marital affair during her marriage. The Applicant and her first spouse divorced on October 31, 2005.

[5] The Applicant presented a sponsorship application as a conjugal partner for Jiteshbhai Ramanial Patel, her child's father, who became her second spouse on May 14, 2007.

[6] During the processing of this sponsorship application, the immigration authorities got wind of the facts underlying the alleged misrepresentation. Consequently, the Applicant was interviewed by an immigration officer and a report was prepared under section 44 of the IRPA.

[7] The matter was deferred to the Immigration Division [ID], who found that the Applicant's story had major credibility problems and that, as a result, she had committed acts of misrepresentation on two counts. First, she failed to disclose that she was pregnant when she was granted permanent resident status. Second, she failed to disclose that she was in a relationship

with Jiteshbhai Ramanial Patel when she married her first spouse, as a result of which, her first marriage was considered a marriage of convenience. Along with its decision, the ID declared the Applicant inadmissible under para 40(1)(*a*) of the IRPA for misrepresentation and issued an exclusion order on December 17, 2009.

[8] The Applicant appealed this removal order to the Immigration Appeal Division.

II. Decision under review

[9] The IAD found that the removal order was founded in law and that the Applicant was inadmissible under the IRPA for misrepresentation. Ultimately, it concluded that, considering the best interest of the children, the humanitarian and compassionate [H&C] considerations brought forth by the Applicant did not outweigh the seriousness of the inadmissibility.

[10] The IAD first tackled the Applicant's submission that the report made under section 40 of the IRPA was invalid as it related only the alleged marriage of convenience and in no way indicated that the Applicant had failed to disclose her pregnancy when she arrived in Canada. The ID panel had rejected this submission and the IAD agreed with this rejection. The IAD was of the opinion that, as she was interviewed by an immigration officer, the Applicant was made aware of the allegations made against her by the immigration authorities and given the opportunity to explain her situation and give evidence in support of her claims.

[11] The IAD then examined the ID panel's decision. The ID panel had concluded that bearing her spouse's child or suspecting that she was having the child of a long-time lover was a

material fact relating to a relevant matter that could induce an error in the administration of the IRPA. It had also noted numerous contradictions and implausibilities in the Applicant's various stories and ultimately concluded that she had failed to provide reasonable explanations for her contradictions. Upon reviewing the evidence on file, the IAD found that it had no reason to doubt the ID panel's conclusions with regard to the assessment of the oral evidence and the Applicant's lack of credibility. The Applicant had the onus, before the IAD, to establish that the removal order was invalid, but she provided no evidence to show that the ID panel's conclusions related to the lack of credibility were unfounded. The Applicant did not testify during the hearing, thereby depriving the IAD of the opportunity to obtain explanations and assess the Applicant's credibility as it concerns the allegations of misrepresentation. Simply put, the Applicant did not discharge her burden of establishing that the removal order was not valid.

[12] The IAD then turned to the assessment of H&C considerations, relying on factors set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (IAB T84-9623) [*Ribic*] and confirmed by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at paras 40-41, [2002] SCJ No 1 [*Chieu*], and specified that these factors are not exhaustive and that the weight to be given to these factors varies depending on the circumstances of each case.

[13] The Applicant's testimony at the hearing was limited to the H&C considerations of her case, and her counsel asked only the broadest of questions. No evidence was submitted in this regard. The IAD had to ask the necessary question in order to make its decision. The IAD considered various elements, including the Applicant's family and their establishment in Canada.

The IAD determined that the Applicant's current spouse – the father of the children – lives in India in a town located at a very reasonable distance of a hospital and which offers education services. The Applicant claimed that she would have to send her children to a private school in the city but failed to provide evidence to support her claims.

[14] The Applicant alleged that moving to India and living under the same roof as her spouse and his family would cause a great deal of hardship, but the IAD noted that the Applicant previously lived in that house for several months at a time and never indicated having experienced any problems. According to the IAD, it was in the best interest of the children that they be reunited with both parents, a situation which is only possible in India. The Applicant failed to present evidence to support her allegation that her family would suffer undue hardship in India.

[15] In its analysis of the H&C considerations, the IAD acknowledged that the Applicant has been in Canada for a long period and that she managed to establish herself and her family in Canada, which are positive factors. However, the presence of family members in India would mitigate any hardship she could experience should she return to her home country. Finally, the IAD opined that the Applicant's misrepresentations are significant and highly negative factors in the analysis of H&C considerations, because had she disclosed the information related to her earlier relationship with her current spouse and to the advanced pregnancy, it is likely that she would not have been granted permanent resident status or that the immigration authorities would have conducted additional verifications prior to rendering their decisions.

III. Applicant's submissions

[16] The Applicant submits that the IAD's decision is unreasonable because it failed to take into account the evidence and the sworn testimony with which it had been presented regarding the issues of misrepresentation and H&C considerations.

[17] With respect to the issue of misrepresentation, the IAD misconstrued the evidence on two accounts: the genuineness of her first marriage and her pregnancy. First, she claims that her first marriage was arranged according to the Indian culture and that there was no planned collusion. Various elements support the genuineness of her marriage, including the fact that, as corroborated by the social worker responsible for the Applicant, she was willing to give up her baby in order to remain with her first spouse and save her marriage. It was her husband who ultimately refused her return to the house. She adds that although she separated from her first husband in 2003, she only contacted her current spouse three years later to inform him that they had a child together. Second, she argues that she did not know she was pregnant and that she had submitted evidence in this regard. She adds that surely immigrants entering Canada are not expected to reveal all their previous relationships at port of entry because that would make no sense.

[18] As for the H&C considerations, the Applicant claims that the IAD did not take into account the interest of the children. First, the IAD confused the genders of the children, as both children are females and not a boy and a girl. Second, the IAD was not alert, alive and sensitive to the best interest of the children given the evidence submitted by the Applicant, particularly as it relates to the poor quality of education and medical care offered in the small town where they

would move in comparison to what is available in Canada. In the end, the IAD concluded that the children should be satisfied with the basic amenities of the small village. More specifically, the children would be denied their rights as Canadian citizens. She further argues that the IAD seriously downplayed the humble socio-economic background of the Applicant and her current spouse in India. Third, the IAD should have examined the issue of H&C considerations as a stand-alone criterion. However, it concluded that the Applicant's misrepresentation was a highly negative factor which outweighed the positive elements of the H&C considerations analysis. Fourth, although the Applicant chose to file the record of the previous hearing rather than testifying, had the IAD wished to test the Applicant's credibility, it could have asked her any questions it wanted.

IV. Respondent's submissions

[19] The Respondent claims that the IAD's decision is reasonable because the removal order based on the Applicant's misrepresentations is valid and because the IAD adequately exercised its jurisdiction as it relates to the H&C considerations.

[20] Concerning the Applicant's misrepresentations, the IAD agreed with the ID panel's conclusion that the Applicant lacked credibility, and the assessment of credibility, just like the consideration of evidence, lies within its jurisdiction and expertise. The Applicant did not provide evidence to show that the ID panel's decision with respect to her credibility were unfounded. Therefore, considering the evidence available, the fact that the Applicant was not credible and that she did not provide sufficient explanations, it was certainly reasonable for the IAD to conclude that the exclusion order was valid.

[21] As for the evaluation of H&C considerations, the Applicant had the burden of adducing evidence in support of her allegations. The decision clearly reflects that the IAD carefully considered the Applicant's file in light of the *Ribic* factors and, based on the facts and the Applicant's testimony, it was reasonable for the IAD to find that there were no H&C consideration warranting to grant the relief sought. The Applicant did not provide evidence of the hardships she would experience in India. Also, contrary to the Applicant's claim, the IAD was indeed alert, alive and sensitive to the interest of the children as it found that it would be in their best interest to be reunited with both parents. The Applicant failed to adduce evidence contrary to the ID panel's conclusion that services, although not equivalent to Canadian services, are generally available in India. Also, the interest of the children is not a predominant factor. As for the Applicant's argument that the IAD should have examined the H&C considerations independently of the issue of misrepresentation, the IAD's reasons show that it carefully assessed all the evidence and the various positive and negative factors. The Applicant simply disagrees with the IAD's findings and asks this Court to reweigh the factors and the evidence, which cannot be done through judicial review.

V. Issues

[22] Is the decision of the IAD dismissing the Applicant's appeal of an exclusion order made against her reasonable, particularly as it relates to the determination of misrepresentations and the assessment of H&C considerations?

VI. Standard of review

[23] The above question is an issue of mixed fact and law and should be reviewed under the standard of reasonableness (see in general, *Digilov v Canada (Minister of Citizenship and Immigration)*, 2010 FC 615 at para 14, [2010] FCJ No 743, and see also *Oloumi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 428 at para 12, [2012] FCJ No 477 and *Karami v Canada (Minister of Citizenship and Immigration)*, 2009 FC 788 at para 14, [2009] FCJ No 912 (determination of misrepresentations) and *Zanchetta v Canada (Minister of Citizenship and Immigration)*, 2013 FC 195 at para 19, [2013] FCJ No 215 and *Sinniah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1285 at para 24, [2011] FCJ No 1568 (assessment of H&C considerations)).

[24] This Court shall not intervene if the IAD's reasons are "justified, transparent or intelligible" and if the decision falls in the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

VII. Analysis

[25] The IAD's decision was reasonable and this Court's intervention is not warranted.

[26] It is first alleged that the IAD misconstrued the evidence presented and that this lead to findings of misrepresentations on two accounts: the Applicant entered into a marriage of convenience and she failed to disclose that she was pregnant when she was granted permanent residence.

[27] The Applicant's memorandum refutes the findings of misrepresentation while the IAD's decision relies mostly on the numerous credibility findings noted in the ID panel's oral reasons. Indeed, the IAD confirmed these findings that the Applicant lacks credibility, and this is absolutely reasonable, given the number of discrepancies and contradictions between the Applicant's different testimonies (see pages 1-4 of the ID's decision). The Applicant did not provide any evidence to contradict the ID panel's conclusions that she lacked credibility. Although the appeal procedures calls for a *de novo* hearing, the Applicant decided not to testify on the misrepresentations issue but only on the H&C issue. It is not for the IAD to decide to assume the task of examining the Applicant. It was the burden of the Applicant. As a result, the ID panel's credibility findings remained and the IAD had to take them into consideration. The evaluation of the credibility lies within the expertise and jurisdiction of the IAD, and this Court must show high deference with regard to such conclusions (*Thach v Canada (Minister of Citizenship and Immigration)*, 2008 FC 658 at para 21, [2008] FCJ No 834). Thus, it was reasonable for the IAD to conclude that the exclusion order was valid.

[28] The second argument put forward by the Applicant is that the IAD failed to properly consider the existence of H&C considerations. The Applicant had the burden of proving that, in her case, these considerations were sufficient to warrant granting a relief under the IRPA (*Chieu*, above, at para 90).

[29] In its decision, the IAD went through a careful analysis of the various factors set out in *Ribic*, above and confirmed in *Chieu*, above, explicitly stating that the factors are not exhaustive and that the weight to be attributed to each factor varies depending on the particular facts of a

case. In the present matter, the IAD examined, amongst other factors, the Applicant's and her family's level of establishment in Canada, the family and community support available to them after a possible removal and the degree of hardship they would experience should they be removed.

[30] Also, contrary to the Applicant's argument, the IAD was in fact alert, alive and sensitive to the best interests of the children as it concluded that the best option for them would be to be reunited with both parents, an option which is only possible in India. The Applicant also claims that the services offered in India – whether educational or medical services – are of a lesser quality than those offered in Canada. That may well be the case; however, she presented no documentary evidence in support of her claims for the IAD to take into consideration.

[31] The Applicant claims that the IAD should have assessed the H&C considerations as a stand-alone criterion. However, this Court finds that the decision under review, independently of the reference to the Applicant's misrepresentation, clearly shows that the IAD considered both the positive and the negative elements relevant in the assessment of H&C considerations. While the Applicant may be dissatisfied with the outcome of the decision rendered by the IAD, it is not up to this Court to reweigh the factors and the evidence considered by the IAD (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 11, [2002] FCJ No 457; *Qiu v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 15 at para 28, [2003] FCJ No 24). The decision of the IAD as it relates to the assessment of H&C consideration is therefore reasonable.

[32] For the aforementioned reasons, this Court finds that the IAD's decision dismissing the Applicant's appeal of an exclusion order made against her is reasonable.

[33] The parties were invited to submit a question for certification, but none were proposed.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed. No question is certified.

"Simon Noël"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

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