Federal Court  Cour fédérale

Date: 20160425

Dockets: IMM-5053-15

Citation: 2016 FC 460

Ottawa, Ontario, April 25, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

BING LIU

Respondent

JUDGMENT AND REASONS

[1] The Minister seeks judicial review of a decision by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board, allowing Ms. Liu's appeal of a decision of the Immigration Division [ID]. The ID found that Ms. Liu had obtained permanent resident status by way of a marriage of convenience, and that she was therefore inadmissible for misrepresentation. On appeal, Ms. Liu admitted that the marriage had been a fraud and she thus

accepted the ID's finding of inadmissibility; however, she asked that the appeal be allowed on humanitarian and compassionate [H&C] grounds. This submission was accepted by the IAD.

Background

[2] Ms. Liu was born in China on September 20, 1983. In February 2004, she arrived in Canada on a student visa, which she subsequently extended until 2008. In 2006, she made arrangements to enter into a fraudulent marriage for the purpose of obtaining status in Canada. On June 17, 2006, she married Daniel Pitts, in a marriage of convenience for which she paid the person who arranged the marriage $30,000. A small portion of this "fee" went to Mr. Pitts for his co-operation in the scheme.

[3] On September 19, 2007, Ms. Liu became a permanent resident of Canada, following a spousal sponsorship application made by Mr. Pitts. She and Mr. Pitts divorced on April 9, 2010.

[4] On April 14, 2012, Ms. Liu married her current husband, with whom she has two children: a four-year-old daughter and a one-year-old son.

[5] In 2008, the Minister and CBSA commenced an investigation of alleged marriage fraud for immigration purposes in an effort known as Project Honeymoon. Ms. Liu was one of those whose marriage attracted their attention.

[6] A report was written by an officer pursuant to section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, who was of the opinion that Ms. Liu was inadmissible to Canada

"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" as provided for in paragraph 40(1)(a) of the Act. That report was grounded in part on paragraph 4(1)(a) of the Regulations which provides that "a foreign national shall not be considered a spouse … of a person if the marriage … was entered into primarily for the purpose of acquiring any status or privilege under the Act."

[7] On March 15 and May 8, 2013, the respondent appeared before the ID at an admissibility hearing. During the hearing, she maintained that her marriage to Mr. Pitts had been genuine and through her lawyer submitted an affidavit from Mr. Pitt to the same effect. She was not believed. At the conclusion of the hearing on May 8, the ID found the respondent inadmissible for misrepresentation and issued an exclusion order against her.

[8] On appeal to the IAD, Ms. Liu admitted that her marriage to Mr. Pitts was a marriage of convenience. She therefore did not contest that the exclusion order was validly issued.

[9] The IAD explored why she had not admitted this fact before the ID, and its summary of her evidence is shocking to the Court as it must be to anyone in the legal profession:

> She stated that when she received a letter from Immigration Canada indicating that she was being investigated she went back to the lawyer, David Molson, who assisted her in arranging the false marriage, for advice. He advised the applicant not to admit the fraud to prevent her from being deported to China. (emphasis added)

[10] She asked the IAD to allow her appeal on H&C grounds, notwithstanding her admission, especially in light of her and her family's establishment in Canada and the hardship that they would all face were the exclusion order upheld.

[11] In its decision, the IAD considered several factors, namely: the seriousness of the misrepresentation; Ms. Liu's remorse; her establishment in Canada; the impact on her family if she is removed from Canada; the impact on her if she is removed; and the best interests of her two children.

[12] With respect to the seriousness of the misrepresentation, the IAD noted that Ms. Liu had knowingly and willingly entered into a marriage of convenience for the purpose of duping the immigration authorities. It concluded that her misrepresentation was "very serious" and as such stated that the threshold for H&C relief was "relatively high."

[13] With respect to remorse, the IAD noted:

> The appellant stated during the hearing that she was very sorry that she lied and presented a fraudulent marriage as real. She stated that she needs to be punished for her behavior. She asks for forgiveness. She cried and wiped her eyes. She expressed the awareness that by her actions she violated the law and may have taken an opportunity away from someone else. She indicated that she is very sorry for her family and children who may be hurt as a result of her actions.

[14] The IAD also considered the Minister's submission that Ms. Liu had maintained her fraud for many years, including by lying under oath at her ID hearing. The Minister submitted

that her expression of remorse was "too little too late." However, the IAD concluded that her remorse was genuine.

[15] With respect to establishment, the IAD found that Ms. Liu was well-established in Canada; she had been educated here, had a full-time job, volunteered, had a husband and children, and owned a home. The IAD considered the Minister's submission that her establishment should be given little weight because she was not entitled to be in Canada and had "only established herself through fraud." The IAD concluded that this approach would be "unnecessarily punitive." It stated that:

> In order to assess whether special relief is appropriate I need to consider her circumstances as they are. Though it is true that she may not have been able to establish herself but for the misrepresentation, this is speculative, as she may have established herself here through other means, such as extended student visas for example.

[16] With respect to the impact on the family, the IAD held that, if Ms. Liu is removed, she plans for her husband and children to come with her. This could lead to her husband losing his permanent resident status in Canada, because he may not be able to maintain the residency requirements of that status. It may also lead to her children losing their Canadian citizenship, as China does not accept dual citizens. Finally, it would lead to the shut-down of the husband's car repair shop, of which he is a 40% owner. The IAD concluded that the respondent's removal would have serious consequences for her family.

[17] With respect to the impact on Ms. Liu, the IAD noted that she had been in Canada for 11 years and would have to leave behind her job, home, and future career if she were removed to

China. It also noted that the respondent had expressed her desire to have more children and feared forcible sterilization in China, pursuant to the one-child policy. It concluded that "[t]he negative impact on [her] should she be required to leave Canada is readily apparent. This is a positive factor for [her]."

[18] Finally, with respect to the best interests of the children, the IAD found that it would not be in her children's best interest to either grow up without their mother or accompany her to China, were she to be removed. The IAD considered her additional submission that her son had recently been diagnosed with a peanut allergy and would not be able to access adequate medical care in China; however, the IAD concluded that there was not enough evidence to prove that her son had such an allergy.

Issue

[19] There is only one issue raised in the Minister's application: Was the IAD's decision reasonable? The Minister submits that it was not reasonable because the IAD does not explain why it accepts that the respondent's remorse is genuine, and because the IAD erred in its assessment of the respondent's establishment.

Analysis

A. *Remorse*

[20] The Minister submits that the IAD did not explain why it found Ms. Liu's remorse to be genuine. It claims that this case is therefore similar to that of *Canada (Minister of Public Safety and Emergency Preparedness) v Lotfi*, 2012 FC 1089, 221 ACWS (3d) 405 at para 20, where

this Court held that the IAD had unreasonably failed to "provide any explanation or evidentiary basis for concluding that the Respondent has demonstrated remorse" for his misrepresentation.

[21] I am unable to agree with the Minister. The IAD did provide an explanation for its finding of genuine remorse. It observed that Ms. Liu said that she was sorry, and that she cried and wiped her eyes. It took note of her recognition that her actions had harmed her family, as well as prospective immigrants who abide by the rules.

[22] It is true that the IAD did not actually state that its finding of genuine remorse is an inference drawn from the statements and demeanour of Ms. Liu. While it would have been preferable if the IAD had made this statement, it did not need to do so; the inference is reasonably clear in the decision as it is. The IAD had the opportunity to observe Ms. Liu as she expressed her remorse, and so is well-placed to assess its genuineness. The IAD's finding on this point is not unreasonable.

B. *Establishment*

[23] The Minister submits that the IAD erred in its assessment of Ms. Liu's establishment. It states that:

> There is no question that the Respondent's establishment in Canada could not have occurred absent her blatantly fraudulent behaviour. However, the IAD, in considering the issue of establishment did not feel the Respondent's misrepresentation was a relevant factor.

[24] The Minister submits that Ms. Liu's misrepresentation is a relevant factor, and indeed may be the determinative one, when assessing establishment. The Minister relies on the decision of Justice Nadon in *Tartchinska v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 373 (FCTD), 185 FTR 161 [*Tartchinska*].

[25] *Tartchinska* involved a request made by a mother and son in Canada for an exemption from making a visa application from outside Canada on humanitarian and compassionate grounds. They had been in Canada since 1992, and without status since 1995, after they had exhausted all avenues following the refusal of their refugee claims. Their request was refused by the officer.

[26] On review, they argued, in part, "that it was unreasonable for the Immigration Officer to view their 'accumulation' of time in Canada negatively" and took the position that "the officer should not have been concerned with why the Applicants are still in Canada, but rather, with whether their time in Canada is meritorious of a positive recommendation." That submission was soundly rejected by Justice Nadon, who wrote at para 22:

> I understand that the Applicants hoped that accumulating time in Canada despite a departure order against them might be looked on favourably insofar as they could demonstrate that they have adapted well to this country. In my view, however, applicants cannot and should not be "rewarded" for accumulating time in Canada, when in fact, they have no legal right to do so. In a similar vein, self-sufficiency should be pursued legally, and an applicant should not be able to invoke his or her illegal actions to subsequently claim a benefit such as a Ministerial exemption. [emphasis added]

[27] In addition to *Tartchinska*, the Minister relies on a similar statement from Justice Shore in *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11, [2009] FCJ No 4 at para 56: "Individuals who, like the applicants, have no legal right to remain in Canada but have done so absent circumstances beyond their control should not be rewarded for accumulating time in Canada." The Minister also points to a similar statement from the same judge in *Quiroa v Canada (Minister of Citizenship and Immigration)*, 2007 FC 495, [2007] FCJ No 661at para 22.

[28] The Minister submits that in ignoring this jurisprudence, the IAD has allowed Ms. Liu to benefit from her lies, has encouraged others to lie to the authorities, and has undermined the integrity and fairness of the immigration system. The Minister submits that Ms. Liu should get no credit for her establishment in Canada, obtained during the period she was in Canada illegally and had the ability to leave.

[29] I agree with the Minister's submission that the decision is unreasonable because "the IAD, in considering the issue of establishment did not feel [Ms. Liu's] misrepresentation was a relevant factor." In my view, it is a relevant factor when considering a person's degree of establishment. To do otherwise is to place the immigration cheat on an equal footing with the person who has complied with the law. Whether the impact of the fraud is to reduce the establishment to zero or to something more is a question for the discretion of the decision-maker based on the particular facts before him or her. But it must be considered.

[30] In the case at bar, I further find that the IAD erred when it wrote: "Though it is true that she may not have been able to establish herself but for the misrepresentation, this is speculative,

as she may have established herself here through other means, such as extended student visas for example." The IAD is criticizing the Minister for speculation and then does exactly that. One cannot assess establishment on what "might" have happened; one must do so based on what did happen.

[31] Lastly, I find it troubling that the IAD failed to consider that the fraudulent marriage was the route deliberately taken by Ms. Liu when she had a legal right to remain in Canada for a further period of two years (and, as the IAD notes, may have been able to extend that time) because she did not wish to wait the time for the legal process available to her.

[32] I agree with counsel for Ms. Liu that the IAD heavily weighed in her favour the best interests of the children, and trust it will do so again when this application is redetermined; but the failure to properly weigh her establishment, as discussed, renders the decision unreasonable.

[33] No question was proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed and the matter is remitted back to the Immigration Appeal Division for redetermination in accordance with these Reasons.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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