Federal Court  Cour fédérale

Date: 20181009

Docket: IMM-808-18

Citation: 2018 FC 1001

Toronto, Ontario, October 9, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

LIN GAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Lin Gao seeks judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision [Decision] by the Immigration Appeal Division [the IAD] dated January 31, 2018. The IAD found that Mr. Gao had failed to satisfy his residency obligation under section 28 of the IRPA, and that there were insufficient humanitarian

and compassionate [H&C] grounds to grant relief pursuant to paragraph 67(1)(c) of the IRPA. For the reasons that follow, the application for judicial review is dismissed.

II. Background

[2] Mr. Gao is a Chinese citizen who, along with his wife, was granted permanent residence in Canada in 2010. His daughter came to Canada in 2008 to complete high school and subsequently begin university.

[3] In the relevant 5 year period – from February 2, 2011 to February 2, 2016 – Mr. Gao was present in Canada for 539 days out of the 730 day minimum required to maintain permanent residence under section 28 of the IRPA, or otherwise stated, fell 191 days short of the mark.

[4] Mr. Gao claims that during the relevant period, he was frequently required to travel to China for two main reasons: (i) to assist in the care of his ill mother, and (ii) to make arrangements to conclude long-term projects at his architecture firm.

[5] On March 30, 2016, Mr. Gao was refused a travel document as he did not satisfy the residency requirement.

[6] Mr. Gao appealed this negative determination to the IAD, and focused the appeal on H&C grounds. The IAD considered several H&C factors: the extent of Mr. Gao's non-compliance with the residency obligation; the reasons for his departure from Canada and prolonged stay abroad; ties to China; his degree of establishment and ties in Canada; and

hardship that would occur should he lose permanent resident status. The IAD concluded there were insufficient H&C grounds to grant relief.

[7] Mr. Gao does not challenge the legal validity of the physical residency determination, but rather argues, as he did before the IAD, that his appeal should have been granted on H&C grounds. More specifically, Mr. Gao argues that the IAD failed to consider and address contradictory evidence of his mother's illness, his change of circumstances in 2014, his establishment in Canada through his businesses and memberships, and his family in Canada.

III. Issues and Standard of Review

[8] Both parties agree that the IAD's assessment of whether H&C relief should be granted to overcome the requirements of a residency obligation is reviewable on the standard of reasonableness (*Gill v Canada (Citizenship and Immigration*), 2018 FC 649 [*Gill*] at para 11). The Decision warrants considerable deference as it involves a high degree of discretion (*Ahmad v Canada (Citizenship and Immigration*), 2017 FC 923 at para 18).

[9] This application for judicial review only raises one legal issue: did the IAD err by ignoring relevant evidence in support of Mr. Gao's appeal on H&C grounds?

IV. Analysis

A. *Did the IAD err by ignoring relevant evidence in support of Mr. Gao's appeal on H&C grounds?*

[10] Mr. Gao relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17, to argue that the IAD failed to consider contradictory evidence regarding (i) Mr. Gao's mother's illness and (ii) Mr. Gao's establishment and ties in Canada.

(1) *Evidence regarding Mr. Gao's mother's illness*

[11] The IAD found that while caring for a parent is a positive factor in the H&C analysis, it is diminished by the fact that Mr. Gao knew that his mother was ill when he sent in his permanent residence application, and the fact that his mother had additional support in China.

[12] Mr. Gao argues that the IAD failed to consider various facts, including evidence demonstrating: (i) that he began the immigration process in 2008, before he learned of his mother's illness; (ii) his mother's unanticipated and subsequent health problems; and (iii) his siblings were unable to care for their mother. Mr. Gao relies on *Canada (Citizenship and Immigration) v Tefera*, 2017 FC 204 [*Tefara*] at para 31, which states as follows:

> I accept that a decision-maker is presumed to have weighed and considered all the evidence presented to it unless the contrary is shown (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) (QL) at para 1). I also agree that failure to mention a particular piece of evidence in a decision does not mean that it was ignored (*Newfoundland Nurses* at para 16). But, when an administrative tribunal is silent on evidence clearly pointing to an opposite conclusion and squarely contradicting its findings of fact, the Court may intervene and infer that the tribunal overlooked the contradictory evidence when making its decision (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paras 9-10; *Cepeda-Gutierrez* at para 17). This is the case here. The IAD was faced with contradictory evidence and, in those circumstances, it had the obligation to provide an analysis and explain why it preferred one part of the evidence over the other. It did not.
>
> [Emphasis added]

[13] After reviewing the Decision in light of the record, I do not find that the evidence is "clearly pointing to an opposite conclusion and squarely contradicting its findings of fact", as was the case in *Tefara*. The IAD accurately stated the date of application in relation to Mr. Gao's mother's diagnosis, and although the IAD did not discuss her unanticipated health problems at length, it noted that "she was in and out of hospital because of her illness." Although the reference is brief, it cannot be said that the mother's illness was overlooked. The Decision also mentions a caregiver.

[14] Although the IAD did not specifically mention that Mr. Gao applied to the province of Quebec under its investment program in 2008, the tribunal still observed that Mr. Gao did not apply for permanent residence until July 2009, after his mother's diagnosis. The IAD noted that "the decision to become a permanent resident of Canada was taken freely by the Appellant." In my view, it was open to the IAD to conclude that Mr. Gao knew about his mother's diagnosis before applying to the federal authorities in 2009. The failure to mention a particular piece of evidence does not mean that it was ignored (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[15] Therefore, I find it was reasonable for the IAD to conclude that Mr. Gao's mother's illness was not sufficient to warrant special relief in overcoming the breach of his residency obligation.

(2) *Evidence of Mr. Gao's establishment and ties in Canada*

[16] In considering his establishment in Canada, Mr. Gao submits that the IAD failed to address (i) his business which owns and operates a farm, (ii) his involvement in a second Canadian company, and (iii) his memberships in local organizations. Mr. Gao also notes that, in considering his ties to Canada, the IAD failed to address his change in circumstances in 2014, such as moving remaining belongings to Canada, and spending time with his wife in Canada after her cancer diagnosis. Mr. Gao further argues that the IAD did not consider the evidence that Mr. Gao's daughter and son-in-law plan on relocating to Canada from Australia upon completion of their studies.

[17] In its Decision, the IAD found that Mr. Gao's Canadian properties appear to be personal investments rather than evidence of roots and deep connections to settle in Canada. It found that the investments and purported business activities do not contribute to the broader economic benefit through employment, innovation or the provision of products or services. It further found that, aside from letters of support from a neighbour in Muskoka and their son-in-law's parents, "evidence of substantial social and community connections or roots one might reasonably expect to arise from efforts to settle in the country" was absent from the case.

[18] I do not find that the IAD erred in its assessment of Mr. Gao's degree of establishment by overlooking evidence. The tribunal considered Mr. Gao's establishment factors including Mr. Gao's business and investment interests, his properties, letters of support and his family ties.

The IAD also gave Mr. Gao the opportunity to address his connections in the community – including his business abroad and involvement with the Canadian company.

[19] I neither find that it failed to provide the opportunity to explain, nor omitted to consider, establishment attributes. Rather, the tribunal reasonably weighed evidence and held that establishment was insufficient to overcome the residency shortfall. As Justice Gagné concluded in *Gill* at paragraph 30:

> . . . this Court has held that an applicant's degree of establishment in Canada, even where an applicant has spent lengthy periods of time in Canada, is not sufficient in and of itself to justify allowing an appeal or granting an application based on H&C grounds (*Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 (CanLII) at para 35). This holding is reinforced in this case by the fact that establishment is just one of eight *Ambat* factors to be considered in the exercise of equitable jurisdiction in the context of a residency appeal.
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> [Emphasis added]

[20] Like in *Gill*, I do not find that Mr. Gao's documentary evidence, including photographs, a letter of support confirming Mr. Gao's membership with a local rate payer's association, an invoice from The Lorne Park Estates Association for membership dues, and a statement confirming membership with the Canada China Agriculture Development Council contradict or undermine the IAD's determination of Mr. Gao's lack of sufficient evidence of social establishment.

[21] With respect to Mr. Gao's change in circumstances in 2014 (moving remaining belongings to Canada, changed travel patterns, and generally more time spent in Canada, including due to his wife's illness), I agree with the Respondent that whether these changes

demonstrate a stronger pull towards Canada is a matter of weight of the evidence, and was properly in the domain of the IAD. These considerations were balanced along with the other factors. This Court has regularly held that its role is not to reweigh evidence (*Hadun v Canada (Citizenship and Immigration)*, 2018 FC 428 at para 26).

[22] Similarly, with regard to Mr. Gao's daughter and her husband's future plans, the IAD observed that the couple was abroad, and there was no guarantee that they would ultimately settle here in Canada. Once again, the IAD addressed the relevant evidence, and from it, drew a justifiable and transparent conclusion.

V. Conclusion

[23] Having found that the IAD did not overlook evidence and that the Decision was otherwise reasonable, it will stand. This application is accordingly dismissed. Neither party raised a question for certification. I agree that none arises.

JUDGMENT in IMM-808-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No questions for certification were proposed, and none arose.

3. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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