Federal Court  Cour fédérale

Date: 20190319

Docket: IMM-783-18

Citation: 2019 FC 338

Ottawa, Ontario, March 19, 2019

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ZIHAO DENG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Deng challenges the decision of the Immigration Appeal Division [IAD] dismissing his appeal of the decision issuing a departure order against him, because he failed to comply with the residency obligation for permanent residents set out in section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] At the conclusion of the hearing, the parties were informed that this application would be allowed, with reasons to follow. These are the reasons why I have decided that the decision under review must be set aside. Although other issues were raised, my decision is based on the issue of the best interests of the child [BIOC] analysis, or lack thereof, by the IAD.

[3] Mr. Deng, a citizen of China, was born on July 12, 1999. He entered Canada with his father on February 4, 2010, when he was 10 years old, and was granted permanent residence. He returned to China on February 18, 2010, to live with his mother. It was not until 2014, when he was 15 years old, that he returned to Canada unaccompanied.

[4] Mr. Deng was physically present in Canada for 296 days in the five-year period since becoming a permanent resident; however, subsection 28(2) of the Act requires a presence of at least 730 days.

[5] Mr. Deng was informed by letter dated January 30, 2015, that Citizenship and Immigration Canada had initiated an investigation into whether he had satisfied the permanent resident obligations in subsection 28(2) of the Act. That letter refers to the humanitarian and compassionate considerations specified in subsection 28(2)(c) of the Act. It provides that notwithstanding a failure to reside in Canada for the requisite number of days, that residency obligation is subject to:

> a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of permanent resident status overcomes any breach of the residency obligation prior to the determination.

[6] Mr. Deng made written submissions under this provision. A report under subsection 44(1) of the Act was prepared on June 5, 2015, summarizing in point form the relevant details regarding the absences from Canada and stating: "Does not meet the other provisions pursuant to subsection A28(2)." This report resulted in the issuance of a departure order on October 21, 2015, that states that Mr. Deng is described in:

> Subsection 41(b) in that, on a balance of probabilities, there are grounds to believe [that he] is a permanent resident who is inadmissible for failing to comply with the residency obligation of section 28 of the Act.

[7] Mr. Deng filed an appeal of the departure order to the IAD on November 12, 2015. He was then 16 years old. Nearly 26 months later, on January 8, 2018, his appeal came before a Panel of the IAD, and a decision was rendered January 29, 2018, dismissing his appeal. At the time of the hearing of his appeal, Mr. Deng had turned 18 years of age - he was no longer a minor.

[8] An examination of the Record reveals that the delay that resulted in Mr. Deng aging out lies entirely with the IAD. Mr. Deng's 18th birthday was July 12, 2017. The IAD determined in April 2017 that he had abandoned the appeal and Mr. Deng had to take steps to get it re-opened. It was re-opened by another IAD Panel because of a breach of natural justice: the IAD had failed in its duty to ensure that Mr. Deng was properly represented by a Designated Representative. The IAD had decided that an individual named Mr. Liang was Mr. Deng's Designated Representative: however, there was no evidence that he agreed to serve as such or even if he continued to be a resident of Canada. Mr. Liang was listed only as undertaking to serve as Mr. Deng's custodian "in the event of an emergency" and as pointed out in the decision to re-open

the appeal, "whether this [appeal] qualifies as an emergency is debatable." As a result, the IAD found that the duty to ensure Mr. Deng, a minor, was represented was not met and the appeal was re-opened. But for this error, it is probable that the appeal would have been heard when Mr. Deng was a minor.

[9] At the IAD hearing, Mr. Deng submitted that the departure order was not valid in law as the officer failed to address the BIOC, as required by the Act. The IAD summarized his submission as follows:

> When the decision was made in 2015, the appellant was a minor, yet there is no evidence in the Appeal Record that the officer considered the "best interests of the child" test. Nor is there any evidence directly confirming that any H&C considerations were analyzed and rejected.

[10] The IAD appears to accept the submission, writing:

> It is not entirely clear from the Appeal Record exactly what H&C considerations were considered by the Immigration Officer or what the officer's understanding of the "best interests of any child" were. As such, there are questions outstanding with respect to whether the decision was made in a procedurally fair manner.

[11] Having noted this, the IAD decided to make its own determination, explaining that:

> [A]n appeal to the IAD is *de novo* appeal in the broadest sense. It is not a judicial review of the original decision or simply an assessment of whether that decision is defensible in law As such, even if I were of the view that the visa officer acted in a procedurally unfair manner or otherwise erred in law in his assessment of the appellant's situation, I find that it would not be appropriate to overturn that decision and remit the matter to another officer. Rather, having heard oral evidence from the appellant and his father, it is the responsibility of the IAD to make a finding on the merits of the case.

[12] The IAD then turned to consider the H&C factors relevant to Mr. Deng's application. As I explained above, I will not discuss all of these factors. What is relevant in this matter is that under the heading of "Best Interest of the Child", the IAD merely stated:

> As confirmed by the Federal Court in the *Moya* decision [*Moya v Canada (Citizenship and Immigration*, 2012 FC 971], this factor is restricted to children under the age of 18. As such, in this appeal, there was no evidence that it would be in the best interests of any child to grant special relief.

[13] The question that must be addressed is whether the IAD's decision not to consider the BIOC was reasonable.

[14] Mr. Deng submits that the IAD was required to consider BIOC when reaching its decision. As I understand his position, the officer who made the first level decision made a mistake in law by failing to consider BIOC. Consequently, when the IAD decided to undertake its own determination, it had to consider the BIOC because its role is to make the decision that the officer should have made. To fail to consider the BIOC again, just because Mr. Deng was no longer a child at the time of the IAD appeal, is to repeat the same mistake made by the officer.

[15] The Minister submitted that the IAD reasonably did not consider BIOC for Mr. Deng because he was not a child at the time of the *de novo* hearing. As I understand the Minister's position, the IAD is only entitled to consider BIOC under paragraph 67(1)(c) of the Act.

[16] Section 67 of the Act provides as follows:

> 67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

> (a) the decision appealed is wrong in law or fact or mixed law and fact;
>
> (b) a principle of natural justice has not been observed; or
>
> (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.
>
> (2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order or refer the matter to the appropriate decision-maker for reconsideration.

The Minister submits that for paragraph 67(1)(c) to apply, the child at the time of the appeal must be under 18 years of age, which Mr. Deng was not.

[17] I note that while paragraph 67(1)(c) is one reason to allow an appeal, paragraph 67(1)(a) states that the IAD is to allow an appeal if: "the decision appealed is wrong in law or fact or mixed law and fact."

[18] In this matter, the IAD identified, and I agree, that the officer did not clearly consider BIOC. Indeed, other than the overarching statement that Mr. Deng failed to comply with the obligations in section 28 of the Act, there is nothing in the Record suggesting that the officer turned his or her mind to the BIOC; a consideration statutorily required by paragraph 28(2)(c) of the Act. I also note that the Minister's Guideline, OP 10, Permanent Residency Status Determination, which was referred to at the IAD hearing and contained in the Application Record, requires more of persons making permanent residency status determinations where there are BIOC considerations than was found in the Appeal Record:

> What the manager has to do is demonstrate somewhere on the record that they have carefully considered the interests of the children and that these interests have been "identified and defined" in a manner beyond mere mention. An indication on the record of what is in the children's interest and the reasons for this opinion would be the minimum required to demonstrate that the manager was sensitive to the children's interest.

[19] Was the officer wrong not to consider BIOC? The answer, in my view, must be yes. The officer had to consider BIOC because Mr. Deng was a child at the end of his five-year residency period. As is explained below, this is the relevant date for someone like Mr. Deng as to whether a BIOC assessment is required.

[20] An officer assesses the residency obligation in subsection 28(1) with respect to the five-year residency period. However, paragraph 28(2)(c) states that an officer must examine whether there are sufficient humanitarian and compassionate considerations "taking into account the best interests of a child directly affected by the determination" to overcome any breach in that residency obligation. These decisions are made subsequent to the relevant period. The Act does not explicitly state which date is relevant for the child to have been a child. In my view, while the analysis in s. 28(2)(c) is not restricted to considerations in that five-year period, considerations within it cannot be ignored when determining whether a child is a child.

[21] First, this is evident from the wording of subsection 28(2) which states that the humanitarian and compassionate considerations including BIOC "govern" the residency obligations under subsection 28(1) and that subsection refers to the residency obligation being complied "with respect to every five-year period." Accordingly, there must be an examination of these humanitarian and compassionate considerations including BIOC in relation to the period

under examination. It makes no sense that an officer need look only at things as they exist at the date of the decision.

[22] Second, in *Noh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 529 [*Noh*], Justice Russell explains that for section 25 BIOC considerations, a child must have been a child at the time of application. He or she need not still be a child at the day of the decision. This makes sense, because otherwise unfairness could be created given that the Minister is solely responsible for the timing of the process. Hypothetically, a decision could be rendered on the day of the application, or the Minister could wait many years to avoid the BIOC considerations. Using the day of application is thus the only fair date on which to rely.

[23] Under section 28, there is no "application" *per se*; however, there is the end-date of the relevant five-year period under review. Similar to the application date, the timing of the end-date is not a date determined by the Minister. Parallel to the analysis in *Noh*, fairness dictates that if there is a child at the end of the five-year period who would be affected, then his or her best interests must be considered, and this is required <u>even if that person turns 18 after the end-date of the period</u>.

[24] This is not to say that the situation after the date of the decision can be ignored. Paragraph 28(2)(c) specifically says the decision-maker must take into account the best interests of a "child directly affected by the determination." Children at the time of a decision are directly affected even if they did not exist at the end of the period. For example, a child may have been born to the permanent resident after the end-date, and the loss of his or her parent's status may

adversely affect the interests of that that child. Accordingly, a child born after that five-year period must still have his or her best interests considered.

[25] It is my view that where, as here, there is a person involved and he or she was a minor at the conclusion of the five-year period, (and most particularly, where that is the person whose status is now under review) that person's interests as a child affected must be examined.

[26] In this matter, Mr. Deng was a child at the time of the end-date of the five-year period. The officer did not consider his BIOC. As a result, the officer's decision was wrong in law.

[27] I turn to the decision under review. As subsection 67(2) of the Act explains:

> If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration. [emphasis added]

[28] In this matter, the IAD decided to make the determination that the officer should have made. However, it too failed to consider the BIOC. As a result, it made the same mistake as the officer. The consequence is that Mr. Deng has never had his BIOC considered, notwithstanding that it was a requirement of the Act that it be taken into account.

[29] I have been directed by the Minister to subsection 67(1), which explains that "To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of, that […]". The Minister says that because of this reference and the fact that the hearing is *de novo*, the IAD is to consider the facts as they are at the time of the hearing.

[30] In my view, subsection 67(1) does not change the IAD's responsibility to make the decision that should have been made. Irrespective of Mr. Deng's aging, he was a child at the relevant end-date. That he was a child then is a fact that has not changed. The decision that should have been made was one that considered the BIOC.

[31] To find otherwise would mean that Mr. Deng's entitlement to BIOC is dependent on the timing of the IAD process. This is not a reasonable interpretation. Here, the length of time the IAD took to hear the appeal resulted in Mr. Deng becoming an adult. The situation is aptly described by Justice Russell in *Noh* at paragraph 66:

> In this case (and others like it) we have H&C applicants who could have benefited from the best interests of a child who has aged out of the protection solely because of the time between the filing of the application and its consideration by the Respondent. It seems to me that to hold that officers are not required to consider the best interest of a child directly affected in this situation would ignore the reality that administrative delays in processing applications generally lie at the Respondent's feet**.** In my view, it is no answer for the Respondent to rely on his own tardiness in evaluating the Applicant's H&C Application to extinguish an obligation he would have been under had he acted promptly. As such, the Officer was bound to consider Min Ji's best interests when evaluating the H&C Application in this case. [emphasis added]

[32] This is not to suggest that the IAD on a *de novo* appeal may not consider new evidence or changes in the law; however, it errs if it fails, as this Panel did, to consider the factual matrix that was present during the decision under review.

[33] Even if I had found that the IAD was correct in holding that it need not consider BIOC because Mr. Deng was an adult at the time of the appeal, I would still have found its decision to embark on its own assessment unreasonable.

[34] In deciding to carry out its own assessment rather than remitting the matter back to an officer for redetermination, the IAD did not consider the possible impact on Mr. Deng of that decision. BIOC had not ever been considered by the officer, and even the IAD acknowledges that it should have been. By conducting its own assessment knowing it would not be considering BIOC, the IAD would have known that BIOC would never be considered for Mr. Deng. Before deciding to embark on its own assessment in such circumstances, rather than referring the matter back, the IAD had a duty to consider the possible prejudice that course of action causes to Mr. Deng. It removes his right to have BIOC considered, thus subverting the express requirement of the Act. The decision not to refer the matter back to an officer without factoring in this consideration renders that decision unreasonable.

[35] For these reasons, this application must be allowed and the appeal remitted back to a different Panel of the Immigration Appeal Division for determination.

[36] The parties, when asked, advised the Court that they had no question to propose for certification.

JUDGMENT in IMM-783-18

THIS COURT'S JUDGMENT is that this application is allowed, the decision of the Immigration Appeal Division on the appeal by Mr. Deng of his departure order is set aside, his appeal is remitted to a different Panel of the Immigration Appeal Division for determination in keeping with these Reasons, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-783-18
STYLE OF CAUSE:	ZIHAO DENG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 19, 2019
JUDGMENT AND REASONS:	ZINN J.
DATED:	MARCH 19, 2019

APPEARANCES:

Peter Lulic	FOR THE APPLICANT
Suzanne Bruce	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Peter Lulic Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Department of Justice Canada Ontario Regional Office Toronto, Ontario	FOR THE RESPONDENT