Federal Court  Cour fédérale

Date: 20190924

Docket: IMM-952-19

Citation: 2019 FC 1219

Ottawa, Ontario, September 24, 2019

PRESENT: Mr. Justice Pentney

BETWEEN:

KAI WEN JI
LI PING LI
DING MING LI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Context

[1] This case concerns Kai Wen Ji (the Principal Applicant), his wife, Li Ping Li, and his step-son, Ding Ming Li (known as "Jack"), whose application for immigration status was refused because of misrepresentation. This is an application for judicial review of a decision of the Immigration Appeal Division (IAD), which denied the appeal by the Applicants from a decision

that had found them inadmissible for misrepresentation, pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicants are all citizens of China. In 2005, the Principal Applicant applied for permanent residence status under the Quebec immigrant Investor Program. He used the services of an immigration consultant, Mr. Wang, to assist him with this application. Two things happened while that application was pending: first, the Principal Applicant's son (from his first marriage) came to British Columbia on a student visa, to pursue his education; second, the Principal Applicant's first marriage ended, and he began a relationship with Ms. Li, who is now his wife.

[3] The Principal Applicant's application under the investor class was approved, and he landed as a permanent resident in 2009. He never lived in Quebec, but rather spent a short time in British Columbia before returning to China. He then married Ms. Li, and filed an application to sponsor her and his new step-son. Once again, he used the services of the immigration consultant, Mr. Wang. The sponsorship application was accepted and Ms. Li and her son came to Canada in 2010.

[4] The Applicants' problems began when Mr. Wang was investigated, and subsequently convicted, for widespread and systematic fraud on the immigration system (for a discussion of this scheme, see *Liu v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 849 [*Liu*]). As a result of the investigation, it was discovered that the Applicants had obtained status through misrepresentation. In particular, the application presented Mr. Ji as a resident in Canada at the time of the sponsorship application, when he was actually living in China; it also stated that he had been working in Canada for a fictitious company that Mr. Wang had created.

[5] A section 44 report was issued against the Applicants, and then submitted to the Immigration Division. The Immigration Division issued removal orders, on the basis that the Applicants had obtained status through misrepresentation. This finding was upheld by the IAD in a decision dated January 20, 2019, which also found that the humanitarian and compassionate (H&C) factors were insufficient to allow the appeal. It is this decision that forms the basis for this application for judicial review.

II. Issues and Standard of Review

[6] The issue in this case is whether the IAD decision is unreasonable. The Applicants raise two main arguments: first, that the credibility findings of the IAD are unreasonable; and second, that the IAD failed to consider the individual circumstances of the Applicants, and in particular of the step-son, Jack, in assessing the H&C considerations.

[7] The standard of review is reasonableness: *Li v Canada (Citizenship and Immigration)*, 2018 FC 187 at paras 22-26. The approach to review under the reasonableness standard has been expressed in a number of ways since it was first articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]. For the purposes of this case, I would underline several considerations:

- The review "is concerned mostly with the existence of justification, transparency and intelligibility" – taking into account the record and the reasons (*Dunsmuir*, at para 47);
- The key question is "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir*, at para 47);

- Assessing credibility falls within the heartland of the IAD's expertise, and this calls for deference from a reviewing court, which lacks the benefit of observing the testimony in person, as well as the specialized expertise that the decision-maker brings to the process (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 42 [*Rahal*]);
- Humanitarian and compassionate relief is discretionary and exceptional; it is not meant to be a "parallel" immigration system, but rather a safety valve to allow the consideration of the complexities of life and circumstance which can arise; deference is also due to this determination by the IAD (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 23-25).

III. Analysis

A. *Credibility Assessment*

[8] The Applicants argue that the IAD decision is unreasonable considering the cumulative impact of the IAD's failings in regard to three particular credibility assessments that will be addressed below. The core of the Applicants' claim is that the IAD made findings without referring to testimony that contradicts these points. It is unreasonable to make these findings without addressing this evidence.

[9] At the outset, it is worth recalling the principles governing judicial review of credibility findings so usefully summarized by Justice Mary Gleason in *Rahal*. In particular, that "the starting point in reviewing a credibility finding is the recognition that the role of this Court is a very limited one" (at para 42), because the original decision-maker had the advantage of observing the witnesses in person and has a specialized expertise which can assist in assessments

of credibility. In addition, the law requires the decision-maker to provide reasons for its assessment of credibility: a "generalized, imprecise and vague credibility conclusion without particulars is subject to being set aside on review" (*Rahal* at para 46, citing *Hilo v Canada (Employment and Immigration)* (1991), 15 Imm LR (2d) 199, [1991] FCJ No 228 (QL) (FCA)).

(1) The immigrant investor application

[10] The Applicant says that the IAD erroneously failed to distinguish between the immigrant investor application and the sponsorship application. There was no finding of misrepresentation in relation to the first one, and the IAD erred by conflating the two.

[11] This is based on the findings by the IAD relating to the investor application that the Principal Applicant "was prepared to file an application and undertake to respect certain obligations knowing that he would not do so" and that "he never resided in Quebec and made no effort to establish himself there."

[12] The Applicants submit that these findings ignore the testimony of the Principal Applicant to the effect that he had a plan to reside in Quebec, but when he arrived in British Columbia his plan changed because: (i) his son did not want to move, (ii) he found out that the primary language in Quebec was French, and (iii) he was advised that he did not have to live in Quebec under the terms of his investor class application. The Applicants argue that it was not reasonable for the IAD to make a credibility finding without referring specifically to this evidence.

[13] I am not persuaded. It was not unreasonable for the IAD to consider the prior application and its impact on the credibility of the Principal Applicant. I do not find that the IAD's treatment of the evidence is unreasonable. In particular, I would note the following:

- The Principal Applicant testified that he read the investor class application and signed it; he would have been aware of what he was undertaking to do as part of that application, and he acknowledged that this included residing in Quebec;
- The application was filed in 2005; while it was still pending, his son came to Canada, but enrolled in school in British Columbia rather than Quebec. It is reasonable for the IAD to find that this is a fact which calls into question the testimony of the Principal Applicant about his plan to abide by the undertakings in the application;
- The testimony about the Principal Applicant's "plan" to reside in Quebec was cursory, and did not bear the hallmarks of any serious effort to comply with the terms on which he applied to immigrate to Canada. For example, he testified that he only learned that the primary language of Quebec is French when he landed in Canada, and he provided no evidence about any plans to establish or develop a business in Quebec. In the circumstances, it was not unreasonable for the IAD to not explore this evidence in any detail in its decision.

[14] I do not find that the IAD erroneously conflated the two applications. Rather, the reasons demonstrate that the IAD was simply treating the immigrant investor application as background to its consideration of the sponsorship application. This was not unreasonable, in particular given the facts here: (i) there were two applications filed, (ii) the Principal Applicant was a successful entrepreneur, and (iii) he was familiar to some degree with the immigration process and was aware that these forms were important. The credibility of his evidence regarding the first application is relevant to the weight to be given to his evidence regarding the second.

(2) The lack of remorse and role in the misrepresentation

[15] The Applicants submit that the IAD's findings that the Principal Applicant did not demonstrate remorse, and that the misrepresentation was "egregious," were both unreasonable.

[16] The IAD found that the Principal Applicant had not demonstrated remorse for the misrepresentation. Rather, he blamed his immigration consultant, Mr. Wang, and expressed remorse for failing to pay more attention to the sponsorship application and the work Mr. Wang was doing on his behalf. The Applicants contend that this is an unreasonable finding in view of the testimony of the Principal Applicant.

[17] Again, I am not persuaded. The IAD considered the evidence and made a determination that falls within the range of reasonable outcomes. It correctly noted the factors to be considered, including whether the applicant has demonstrated remorse for the misrepresentation. It correctly noted the history of the Principal Applicant's various interactions with the Canadian immigration system, and his specific testimony regarding the sponsorship application. Nothing more was required. I do not find that the IAD was requiring the Principal Applicant to use a particular form of words to express his remorse for the misrepresentation, and I find that this was reasonably considered as one element in the overall analysis.

[18] In regard to the findings about the Principal Applicant's degree of involvement in the fraudulent scheme, the Applicants argue that it was not "egregious" in the sense that he was not a co-conspirator. This can be compared to the evidence of other immigrants who had an active involvement in the immigration fraud perpetrated by Mr. Wang: see, for example, the facts in

Liu. Instead, the Principal Applicant submits that he was "misled" and was an "unwitting dupe" of Mr. Wang.

[19] The IAD described the overall misrepresentation as "egregious," in the context of the fraudulent scheme for which Mr. Wang was convicted. I agree with the Applicants that the material issue before the IAD was the seriousness of the Principal Applicant's conduct. I do not agree, however, that the finding of the IAD on this question is unreasonable, or that the evidence suggests that he was an "unwitting dupe" of Mr. Wang.

[20] It is difficult to find fault with the conclusion that the misrepresentation was egregious, in the context of the overall fraudulent scheme, given the evidence. It should be noted, however, that the IAD's findings on this particular point are more nuanced. At paragraph 13 of the decision, the IAD finds that the Principal Applicant "was negligent or willfully blind about Wang and the application filed on his behalf." This finding is amply supported in the record. In particular, I would note:

- The Principal Applicant was a successful businessman who had previously filed an application for immigration status to Canada. He testified that he read the previous application before he signed it because he wanted to be sure that his personal information was correct;
- He did not see the sponsorship application either before it was submitted or shortly thereafter, nor did he actually sign it. Yet he testified that he was aware that it was being submitted on his behalf;
- He admitted that he was concerned that he had not seen a copy of the forms submitted by Mr. Wang, and that he asked Mr. Wang about this, but never received a copy;

- He admitted that he should have known more about the immigration regulations, and in particular that he had to be resident in Canada in order to sponsor his spouse.

[21] I do not find the specific conclusion reached by the IAD on this point to be unreasonable. The jurisprudence of this Court is clear and consistent, as is the wording of section 40 of *IRPA.* An applicant is responsible for any misrepresentation made in an application that could induce an error in the administration of the act, whether this is done "directly or indirectly." An applicant is responsible for the truth of the contents of the application, including any document submitted on his or her behalf by an authorized representative: *Haque v Canada (Citizenship and Immigration)*, 2011 FC 315. The "innocent misrepresentation" doctrine must be interpreted narrowly, to take into account both the complexities of human experience and the overall policy objectives of the legislation: see *Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 at para 38.

[22] In *Sidhu v Canada (Citizenship and Immigration)*, 2019 FCA 169 the Federal Court of Appeal described an applicant's duty of candour as an "overriding principle of the [*IRPA*]…" (at para 17). This principle must be considered in assessing the evidence of this case, and it informs the approach taken by the IAD to the degree of responsibility of the Principal Applicant. In this case, it was not unreasonable for the IAD to conclude that the Applicants' circumstances do not fit within the narrow innocent misrepresentation category, but rather that the Principal Applicant was either negligent or willfully blind. This conclusion is consistent with the jurisprudence and the facts.

(3) The finding regarding the Principal Applicant's income in Canada

[23] The Applicants argue that the IAD made an unreasonable finding that the Principal Applicant's credibility was diminished because of its doubts about whether his declared income in Canada was accurate. The Principal Applicant testified that he contributed to the tuition and living expenses for his son and step-son; the evidence showed that he paid $7,000 for tuition, provided approximately $1,300 per month for living expenses for his step-son, and that he paid approximately $20,000 in expenses for his other son. Yet his declared income in Canada was $20,000, low enough that he qualified for a GST tax credit. The IAD found that the Principal Applicant was "likely under-reporting his income in Canada."

[24] The Applicants contend that this finding is unreasonable, because it ignores the Principal Applicant's evidence on these very points. He testified that his income had declined because of an issue involving his business, and that he paid for the tuition and living expenses through his savings.

[25] On this issue, I agree with the Applicants that the conclusion reached by the IAD is not sufficiently explained to meet the threshold of reasons assessed under the standard of reasonableness. The conclusion that the Principal Applicant was likely under-reporting his income in Canada may have been well-founded given the overall assessment of his credibility and the specific evidence on this point. That is not, however, what appears from a review of the IAD decision. Reasonableness review requires that I must adopt a generous reading of the IAD decision with a view to understanding it rather than trying to simply pick it apart. A reviewing court is to approach the reasons with a view to "understanding, not to puzzling over every possible inconsistency or infelicity of expression": *Canada (Citizenship and Immigration) v*

Ratupathy, 2006 FCA 151 at para 15, cited with approval in *Galamb v Canada (Citizenship and Immigration)*, 2016 FC 1230 at para 51. However I find that it is simply not possible to follow the reasoning of the IAD on this point, in light of the evidence in the record.

[26] I do not find that this error is sufficient to render the decision as a whole unreasonable, given my findings on the other issues raised by the Applicants in relation to the credibility findings. The other findings are amply supported by the record, and are sufficient to support the IAD's overall conclusion on credibility.

[27] Overall, I find the decision to be reasonable. It falls well within the range of reasonable outcomes given the facts and the law. I do not find that the testimony that runs counter to the conclusions reached by the IAD was sufficiently direct or compelling to require a specific discussion of it in the decision. The guidance from *Cepeda-Gutierrez v Canada (Citizenship and Immigration)* (1998), 157 FTR 35, 1998 CanLII 8667 (FC) is not that every piece of contradictory evidence must be analyzed by a decision-maker. Rather, it is worth recalling the precise finding in that case:

> [17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[28] For the reasons given above, I do not find that the testimony provided by the Principal Applicant is so specific, or so persuasive, to make the IAD's failure to discuss each point in greater detail unreasonable. Furthermore, I find that the IAD has explained its credibility determinations. Its reasons do not rest on the sort of "generalized, imprecise and vague" language that was found to be inadequate in *Rahal*.

B. *Humanitarian and Compassionate Relief*

[29] The Applicants submit that the IAD failed to consider the individual circumstances of the Applicants and, in particular, the situation of the dependent step-son, Jack. The IAD found that the Applicants did not show a significant degree of establishment in Canada, or that they would experience hardship upon return to China. The Applicants argue that the IAD failed to consider that Jack has lived in Canada for many years and completed his higher-level education in this country. By failing to assess his individual circumstances, the IAD reached an unreasonable conclusion on the H&C considerations.

[30] I am not persuaded that the IAD decision is unreasonable. It considers the situation of the Principal Applicant and his wife, as well as that of the dependent step-son, Jack. The findings that Jack had been educated in China and was still able to converse in Mandarin are supported in the evidence. The panel acknowledges that Jack would prefer to remain in Canada and has ties to this country. It also considers, however, that the Applicants do not have other family members here; that the Principal Applicant had a business and substantial assets in China; and that he and his wife were educated in China and speak the language.

[31] I find that the IAD decision demonstrates a consideration of the individual circumstances of the Applicants, as well as a specific consideration of the situation of the step-son, Jack. This aspect of the decision is reasonable, and falls within the range of reasonable outcomes in respect of the evidence.

IV. Conclusion

[32] For these reasons, I am dismissing the application for judicial review. The decision of the IAD is reasonable.

[33] It may be that the Applicants feel that it is unfair that their reliance on a fraudulent immigration consultant has come back to harm them, but that does not render the decision unreasonable. The law, as it was stated by Parliament and as it has been interpreted by this Court, is clear: the onus lies on applicants to take care to provide honest and complete information in support of their application for immigration status. That is necessary to achieve the objectives of *IRPA* as well as to maintain public confidence in the integrity of the immigration system. The Applicants failed to take reasonable care; their case does not fall within the very narrow and exceptional category of "innocent misrepresentation" under *IRPA*. They also did not satisfy the IAD that they met the requirements for H&C relief.

[34] The key credibility findings of the IAD are reasonable and, in light of the specific testimony on these points, I find it was reasonable for the IAD to come to the conclusions that it did without a specific discussion of this evidence. The decision is reasonable, and the application for judicial review is dismissed.

[35] The parties did not propose a question of general importance for certification, and none arises in this case.

JUDGMENT in IMM-952-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance to be certified.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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