Federal Court  Cour fédérale

Date: 20220802

Docket: IMM-6091-21

Citation: 2022 FC 1152

Ottawa, Ontario, August 2, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

YU QIN WU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Yu Qin Wu, seeks judicial review of a decision of the Immigration Appeal Division ("IAD"), dated August 17, 2021, affirming the refusal of the Applicant's application to sponsor her husband for permanent residence. The spousal application was refused on the basis that the Applicant's husband did not have the required Authorization to Return to Canada ("ARC"), since a deportation order had previously been issued against him.

The IAD determined that there were insufficient humanitarian and compassionate ("H&C") factors to justify the exercise of special relief in the Applicant's case.

[2] The Applicant submits that the IAD's decision is unreasonable, as the IAD failed to reasonably consider the H&C factors presented by the Applicant.

[3] For the reasons that follow, I find that the IAD's decision is reasonable. Accordingly, this application for judicial review is dismissed.

II. **Facts**

A. *The Applicant*

[4] The Applicant is a 41-year-old Canadian citizen. She came to Canada in 2007, having been sponsored by her ex-husband. The couple divorced in 2010.

[5] On May 4, 2018, the Applicant married her current husband, Fei Lian ("Lian"), a citizen of China. Together, they have a child who was born in China in 2019, and is a Canadian citizen. Their child lives in China with the Applicant's parents. Mr. Lian also has a 14-year-old child from a previous marriage who lives in China with his mother.

[6] On January 15, 2008, Mr. Lian arrived in Canada using false documents and later made a claim for refugee protection. His refugee claim was refused on November 10, 2009. His Pre-Removal Risk Assessment was also refused on January 11, 2011.

[7] Mr. Lian returned to China in December 2016, but failed to report his departure to the Canada Border Services Agency. A warrant was issued for his arrest, but was later quashed when it was discovered he had left Canada.

[8] In April 2019, the Applicant submitted an application to sponsor Mr. Lian for permanent residence in Canada. Mr. Lian also applied for an ARC to overcome his previous deportation order. On May 8, 2020, Mr. Lian's ARC was refused.

[9] In a decision dated May 8, 2020, a visa officer from IRCC Hong Kong ("Officer") refused the Applicant's spousal sponsorship application. The Officer determined that the Applicant's spouse did not meet the requirements for immigration to Canada because he did not have authorization to return to Canada, as is required under subsection 52(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") and subsection 226(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-27 ("*IRPR*") where a deportation order was issued.

[10] The Applicant subsequently appealed the Officer's decision to the IAD.

B. *Decision Under Review*

[11] In a decision dated August 17, 2021, the IAD dismissed the Applicant's appeal and found that there were insufficient H&C factors to justify the exercise of special relief. The genuineness of the Applicant's marriage to Mr. Lian was not in dispute.

[12] The IAD found that Mr. Lian had demonstrated a certain disregard for Canadian immigration law in using false identity documents to enter Canada, in failing to depart Canada, and in failing to report his departure from Canada. The IAD determined that these offences were not serious and only a slightly negative factor in the appeal.

[13] With respect to the establishment factor, the IAD found that both the Applicant and Mr. Lian had a lack of establishment in Canada. Despite having lived in Canada for eight years, Mr. Lian was unemployed for most of this time, he did not own any property, he acquired little English skills, and there was no evidence that he had a lasting social circle. Mr. Lian also had no family members in Canada other than his wife. Conversely, Mr. Lian is well-established in China, where his eldest son lives and where he is currently employed. Similarly, the IAD found the Applicant had a low degree of establishment, despite her lengthy stay in Canada.

[14] Further, the IAD found the Applicant to be an evasive witness. The Applicant could not give a reasonable explanation for why she travelled back to China when Mr. Lian returned in December 2016, when she had testified they were not in a relationship at the time. She also failed to provide a credible explanation for her financial situation and the IAD found that it was evident the Applicant has another source of income that she was not revealing.

[15] With respect to hardship, the IAD determined that Mr. Lian does not face hardship in China, and if there was to be hardship for Mr. Lian or the Applicant, it is more likely to occur in Canada than in China. Both the Applicant and Mr. Lian have family in China. The IAD found that they did not have a viable plan with regard to how they would manage life in Canada on the

Applicant's modest income. Mr. Lian has a lack of formal education beyond junior high school, has little work experience in Canada and is not fluent in either English or French. The IAD found that it was difficult to understand how the couple would afford daycare for their child, even if they were both employed in Canada. The IAD acknowledged that there would be a degree of hardship for the Applicant and her family if the appeal were dismissed and the Applicant remained in Canada, but found that this hardship could be avoided, as there were no significant barriers to her return to China.

[16] With respect to the best interest of the child ("BIOC") analysis, the IAD found that the best interests of the children impacted by the decision would be best served if Mr. Lian remains in China and the Applicant relocates to China. The IAD noted that the Applicant and her husband have the support of extended family in China, who would be able to provide assistance if both the Applicant and Mr. Lian were employed. They have no such support in Canada. It would also be in the best interests of Mr. Lian's eldest son, who would remain in China, to have continued in-person contact with his father.

III. **Issue and Standard of Review**

[17] The sole issue in this application for judicial review is whether the IAD's decision is reasonable, and in particular, whether the IAD erred in its assessment of the H&C factors.

[18] Both parties agree that the applicable standard of review in assessing the IAD's decision is reasonableness. I agree. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") confirmed that reasonableness is the

presumptive standard of review when reviewing the merits of an administrative decision and I do not find that the issue raised warrants a departure from this presumption (at paras 10, 16).

[19] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[20] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

IV. **Analysis**

A. ***Relevant H&C Factors***

[21] The Applicant submits that the IAD failed to take into account relevant H&C factors and applied an overly narrow approach to its assessment. The Applicant also argues that given that the legal impediment to Mr. Lian's sponsorship was at the low end of the scale, the Applicant should not have had to show an exceptional level of establishment or hardship. The fact that the Applicant's son would benefit from his family living in Canada should have been sufficient.

[22] I agree with the Respondent's argument that the IAD considered all of the factors and circumstances presented and did not err in its approach to the assessment of the H&C considerations. I find that the Applicant failed to identify any specific factors or evidence that the IAD failed to consider. In my view, the Applicant's arguments on this point amount to a disagreement about the weight afforded to the H&C factors, which was at the IAD's discretion.

B. ***Establishment***

[23] The Applicant submits that the IAD's establishment assessment was unreasonable. The Applicant argues that she failed to include evidence of her social establishment in Canada because her evidence was focused on establishing the genuineness of her marriage. The Applicant maintains that the IAD failed to consider that in returning to China, she would not be able to earn the same income and enjoy the benefits and opportunities of living in Canada. The Applicant further submits that the IAD failed to consider Mr. Lian's status as a refugee claimant in assessing his establishment and that a period of unemployment is normal for refugee claimants settling into a new country.

[24] The Respondent contends that the IAD reasonably concluded that the Applicant's establishment in Canada was low, based on the evidence presented. If the evidence was not reflective of the Applicant's reality, it was her onus to provide further evidence. The Respondent submits that Mr. Lian remained on social assistance for six and a half years, which was likely beyond the usual period of unemployment for refugee claimants. Nevertheless, the IAD considered several factors in assessing Mr. Lian's establishment, including his lack of English skills, property and lasting social circle.

[25] I agree with the Respondent. The onus was on the Applicant "[…] to provide the evidence and justification that will allow the IAD to exercise its discretion in the applicant's favour" (*Latif v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 104 at para 56). While establishing the genuineness of her marriage was necessary, the IAD determined that this was not in dispute, and the Applicant was still required to demonstrate sufficient H&C grounds to warrant special relief. The IAD is not to be faulted for insufficiencies in the evidence put before it (*Daniels v Canada (Citizenship and Immigration)*, 2018 FC 463 at para 32).

[26] Further, although the Applicant argues that the IAD failed to consider how a major impediment to the Applicant's return to China would be that she would not be able to earn the same income as in Canada, the Applicant fails to point to anything in the evidence to support this assertion. The IAD considered both the Applicant's employment status in Canada and Mr. Lian's employment in China. I also find that the IAD was entitled to consider the fact that Mr. Lian was unemployed for over six years while in Canada. The Applicant's arguments with

regard to the IAD's assessment of Mr. Lian's establishment again amount to a disagreement with the IAD's weighing of this factor.

C. ***Hardship***

[27] The Applicant submits that the IAD erred by dismissing Mr. Lian's strong ties to Canada, given that his wife and son are both Canadian citizens. The Applicant further submits that the IAD erred in finding that the Applicant and Mr. Lian would likely struggle to earn a living and care for their son in Canada. Specifically, the Applicant argues that it was unreasonable of the IAD to conclude that the Applicant and Mr. Lian would not be able to afford daycare if both of them were working, without questioning how the Applicant planned on paying for daycare, namely if she qualified for a daycare subsidy. The Applicant argues she did not have an opportunity to respond to this finding with evidence such as subsidies for low-income families.

[28] The Respondent maintains that the IAD expressly acknowledged that the Applicant and her son had citizenship in Canada, but reasonably found that Mr. Lian had no other family members presently in Canada, but for his wife. Furthermore, when questioned about her plan for the family if Mr. Lian and her son were to relocate to Canada, the IAD found that the Applicant did not seem to have a viable plan. If the Applicant planned to rely on daycare subsidies, it was her onus to mention this to the IAD.

[29] I agree with the Respondent. I find that the Applicant's argument that the IAD dismissed Mr. Lian's connection to Canada through his wife and son once again amounts to a mere disagreement with the IAD's weighing of this factor. Furthermore, the IAD's decision indicates

that the Applicant had an opportunity to answer the IAD's question regarding the care of her son in the event that both she and Mr. Lian were working. I find that it was reasonable of the IAD to conclude that the explanation provided was unsatisfactory.

[30] During the hearing, the Applicant's counsel argued that the IAD made a baseless conclusion that the Applicant and Mr. Lian would struggle in Canada, pointing out that the Applicant demonstrated good fiscal management by sending money to China and accumulating savings. However, as noted by counsel for the Respondent, the IAD's decision indicates that the Applicant's monthly expenses are roughly $900.00, and that her income was $13,819.00 in 2020, and less than $9,970.00 in 2019. Despite this low income, the Applicant managed to travel to China four times in five years, to send money to China, and to amass some savings. In my view, based on the evidence before the IAD, it was reasonable of the IAD to find that it was "[…] difficult to understand how the [Applicant and Mr. Lian] would be able to afford [daycare]", even if they were both employed. As rightly noted by the Respondent, while the Applicant's submissions before this Court point to the availability of subsidized daycare, this evidence was not before the IAD, nor did the Applicant argue before the IAD that she would rely on daycare subsidies. As such, the Applicant cannot now argue that it was unreasonable for the IAD not to raise the availability of daycare subsidies. The onus remained on the Applicant to present such evidence to the IAD and to put her "best foot forward" (*Nhengu v Canada (Minister of Citizenship and Immigration)*, 2018 FC 913 at para 6). The jurisprudence of this Court is clear that it is not the role of the decision-maker to fill in the blanks left by the applicant (*Su v Canada (Citizenship and Immigration)*, 2022 FC 366 at para 30; *Brambilla v Canada (Citizenship and Immigration)*, 2018 FC 1137).

D. ***BIOC***

[31] The Applicant submits that while the IAD placed significant focus on the affects of Mr. Lian's separation from his eldest son in China, it failed to consider that the Applicant's son would suffer from the loss of not living in Canada. The Applicant further submits that the IAD failed to consider that a refusal of the appeal would either lead to the maintenance of the status quo, whereby the Applicant would remain in Canada and continue to be separated from her family, or the Applicant's son would join her in Canada, and she would struggle as a single mother without the support of her husband.

[32] The Respondent contends that the IAD's decision acknowledges that the Applicant's son's best interest would be to live with both his parents in Canada or China. The IAD reasonably found that given the Applicant's low level of establishment in Canada, her lack of significant obstacles in returning to China, Mr. Lian's employment in China and the presence of family members in China, the Applicant's son's best interests would be served in China. The Respondent further submits that the IAD recognized the potential hardship of maintaining the status quo, but found that these circumstances were within the Applicant's control. It was reasonable in these circumstances for the IAD to find that the Applicant's son's interests would be best met if the entire family were in China.

[33] I agree with the Respondent. I also do not find that the IAD erred in its assessment of the best interests of the Applicant's son compared to those of Mr. Lian's eldest son. The IAD adequately considered what was in the best interests of both children affected by this application.

[34] Overall, the Applicant's submissions amount to a disagreement with the IAD's assessment of the evidence. It is not the role of this Court to reweigh the evidence (*Vavilov* at para 125). I find that the IAD reasonably exercised its discretion in determining that a cumulative assessment of the factors in this case do not merit H&C relief.

V. **Conclusion**

[35] For the reasons above, I find that the IAD's decision is reasonable. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-6091-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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