Federal Court Cour fédérale

Date: 20150108

Docket: IMM-3891-13

Citation: 2015 FC 28

Toronto, Ontario, January 8, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

YUE JIAO HUANG

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review [JR] pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Applicant, Ms. Huang, challenges the decision of a Canada Border Services Agency [CBSA] Officer who referred her case to an admissibility hearing at the Immigration Division [ID].

[2] Among other remedies, the Applicant seeks an order quashing the decision. The Respondent seeks an order dismissing the application for JR.

I. Facts

[3] The Applicant, Ms Yue Jiao Huang, is a 52 year old citizen of China. She first entered Canada on September 7, 1995, and obtained permanent resident status that very day because her then-husband was a Convention refugee.

[4] On May 7, 2012, the Applicant was convicted of a criminal offence under subsection 7(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [*CDSA*]: production of a substance. Specifically, she had been arrested while working on a marijuana farm. She was given a 12 month conditional sentence.

[5] On June 11, 2012, CBSA Officer [Officer #1] Michael Scheiding issued an inadmissibility report against the Applicant pursuant to subsection 44(1) of the *IRPA*.

[6] A call in notice dated June 12, 2012 informed the Applicant of this development and invited her to complete an information form and attend an interview.

[7] On July 10, 2012, the Applicant attended the interview in the company of her adult son. She was interviewed by another CBSA Officer [Officer #2].

[8] Officer #2 prepared a Case Review and Recommendations, signed on July 23, 2012. The Minister's Delegate [MD], reviewed Officer #1's report and Officer #2's Case Review and Recommendations. On July 29, 2012, she signed a decision referring Officer #1's report to the ID for an admissibility hearing. This referral is the decision challenged by the Applicant in this JR application.

[9] On May 23, 2013, Justice Harrington declined to stay the proceedings before the ID.

[10] On May 24, 2013, the ID found the Applicant inadmissible. A deportation order was issued. That same day, the Applicant filed an appeal of the deportation order with the Immigration Appeal Division [IAD].

[11] On June 7, 2013, the Applicant filed the notice of application in the underlying application for JR.

[12] On August 29, 2013, Justice Zinn refused to grant leave for JR of the deportation order.

[13] On September 26, 2013, Justice Bédard refused to grant leave for JR of Officer #1's subsection 44(1) report.

[14] On February 28, 2014, the IAD rendered a decision staying the deportation order against the Applicant for three years, with conditions upon which the parties had consented.

[15] On August 21, 2014, Justice Russell granted leave for an application for JR challenging the MD's subsection 44(2) report issued on July 29, 2012, wherein she referred the matter to the ID for an admissibility hearing. It is that action – namely the s. 44(2) referral to the ID, which is now being decided.

II. Issues

[16] The Applicant raised many issues in submissions and at the hearing. During the hearing, they were summarized, for simplicity, as follows:

1. Should an extension of time be granted?
2. Is the application for JR moot or barred by the principle of finality?
3. Should proceedings against the Applicant be stayed?
4. Did the Respondent breach the duty of fairness?
5. Did the Officer err by overlooking evidence in rendering the decision?

III. Standard of Review

[17] The first three issues raise questions of law that were not dealt with by the decision-maker. The Court must provide its own answers to these questions, i.e., apply a standard of correction.

[18] The standard of correctness also applies to the fourth issue. In his concurring reasons in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 129, Justice Binnie stated that judges should review procedural fairness from the standpoint of correctness. The Supreme Court confirmed this

view in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, and more recently in *Mission Institution v Khela*, 2014 SCC 24 at para 79.

[19] The standard of reasonableness applies to the fifth issue: *Dunsmuir*, above, at para 54. In rendering the decision, the MD applied the *IRPA*, a statute within her expertise, to the facts before her.

IV. Decision under Review

[20] The decision rendered by the MD does not contain reasons. It merely states that she has referred Officer #1's report to the ID for an admissibility hearing. Officer #1's report and Officer #2's Case Review and Recommendations underlie the MD's decision, which were adopted by reference in making the referral.

[21] In his brief report made under subsection 44(1) of the *IRPA*, Officer #1 expresses the opinion that the Applicant is inadmissible pursuant to paragraph 36(1)(a), due to her conviction under subsection 7(1) of the *CDSA*.

[22] Officer #2 provides more detailed reasons in his Case Review and Recommendations. He begins with an overview of humanitarian and compassionate [H&C] factors and other background information. He explains that he interviewed the Applicant in the presence of her son, who acted as her interpreter. He states that "[a]t the start of the interview Ms Huang was advised of the opportunity of having counsel present" and was further advised about the purpose of the interview. He then states that he handed her a copy of Officer #1's report. In return, she

submitted a background personal information form, an Ontario health card, a social insurance number card and a Canadian permanent residence card.

[23] Officer #2 asks the Applicant about any hardships she would face if returned to China. She states that she has lived in Canada since 1995, that she is not comfortable with the "way of life" in China, that she suffers health problems whenever she visits China and that she does not have any relatives or friends there. She adds that she would not likely find a job in China, and that her sons would suffer most if she were removed.

[24] Officer #2 then canvasses the Applicant's potential for rehabilitation. He offers her version of the circumstances surrounding her criminality. She claims that she met people from her area in China (Fujian Province) at a Tim Horton's. She did not know these people beforehand. They told her that they earned $300 per day doing farm work and she expressed an interest in such work. She states that she was unaware that the farm grew marijuana. She attended the farm three times. She only grew suspicious the second time. At first, the Applicant denies ever receiving payment. Officer #2 found this implausible and questioned her further. Ms Huang then admits that she received two cash payments of $300 on her third visit (a fact which she disputed in this JR). She was then arrested.

[25] Officer #2 relates that Ms Huang pleaded guilty at trial on the advice of her lawyer. There were eight or nine total co-accused in the offence.

[26] Ms Huang says that she is old and won't do anything wrong again. She has not entered any rehabilitation program as part of her sentencing. Officer #2 writes that "[t]he offence is of an isolated nature, as Ms Huang does not have any other known criminality in or out of Canada". He further writes that she was polite during the interview but that she initially denied accepting payment.

[27] Officer #2 nonetheless recommends a referral to an admissibility hearing. He explains that the offence Ms Huang committed carries a maximum penalty of seven years imprisonment, although she received a 12 month conditional sentence. The Officer notes that the illegal narcotics trade is often surrounded by violent activity and that narcotics themselves can cause injury, "up to and including death".

[28] Officer #2 questions whether Ms Huang would have ever stopped participating in this illegal endeavour had she not been arrested. He notes that the police seized marijuana worth $12,000,000 from the operation, which he describes as "highly efficient, organized and lucrative".

[29] Officer #2 questions Ms Huang's declared level of involvement. She insisted that she worked as a cook and occasionally tended to the plants. She denied knowing any of the other accused. According to the Officer, "[h]er credibility comes in to question when the list of co-accused is analyzed". He raises a suspicion that her ex-husband, who had sponsored her as a permanent resident, might have been involved in the operation.

[30] Officer #2 weighs the H&C factors invoked by Ms Huang, including (1) ownership of a house in Toronto, (2) the caretaking of her granddaughter, (3) her residence in Canada for seventeen years, (4) her lack of family or friends in China and (5) her strong relationship with her son. However, when weighed these against several negative establishment factors and the severity of the offence. he recommends a referral to an ID admissibility hearing.

[31] The MD later adopts these reasons and acts on this recommendation by referring the file.

V. Relevant Legislation

[32] Paragraph 36(1)(a) of the *IRPA* explains that a foreign national or permanent resident can be inadmissible on grounds of serious criminality for acts committed within Canada.

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

[33] Subsection 44(1) of the *IRPA* provides for the preparation of a report by an Officer who believes that a foreign national or permanent resident is inadmissible.

44. (1) An officer who is of the opinion that a	44. (1) S'il estime que le résident permanent ou

permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

[34] Subsection 44(2) of the *IRPA* permits the Minister to refer a report prepared under subsection 44(1) to the ID for an admissibility hearing.

44. (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the ID for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	44. (2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

[35] Subsection 7(1) of the *CDSA* criminalises the production of a controlled substance. Paragraph 7(2)(b) sets out the sentencing provisions for the production of marijuana. I reproduce the relevant text of the *CDSA* as it existed at the time the referral decision was made.

7. (1) Except as authorized under the regulations, no person shall produce a substance included in Schedule I, II, III or IV.	7. (1) Sauf dans les cas autorisés aux termes des règlements, la production de toute substance inscrite aux annexes I, II, III ou IV est interdite.
(2) Every person who contravenes subsection (1)	(2) Quiconque contrevient au

[…]	paragraphe (1) commet : […]
(b) if the subject matter of the offence is cannabis (marihuana), is guilty of an indictable offence and liable to imprisonment for a term not exceeding seven years; […]	b) dans le cas du cannabis (marihuana), un acte criminel passible d'un emprisonnement maximal de sept ans […]

VI. Submissions of the Parties

A. *Should an extension of time be granted?*

[36] The Applicant contends that, when the subsection 44(2) referral was disclosed to her (in the disclosure package dated September 6, 2012), she neither knew the purpose nor ramifications of an "admissibility hearing". It was only once the deportation hearing began that she understood its impact and the need to challenge it.

[37] Through her legal counsel, Ms Huang attempted to subpoena the officers involved in rendering the decision. She also attempted to obtain a stay of proceedings. These attempts failed. Ms Huang argues that, on these facts, she has met the standard for granting an extension of time: *Grewal v Canada (Minister of Employment & Immigration)*, [1985] FCJ No 144 (FCA). In particular; she contends that (a) the delay is excusable; (b) she never acquiesced; (c) she has an arguable case and (d) the delay has not caused prejudice to the Respondent.

[38] On the other hand, the Respondent argues that this Court should exercise its jurisdiction to decide the time extension (which was not decided by the leave judge) against the Applicant; as

this Court did in *Deng Estate v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 59 at paras 15-18.

[39] The Respondent acknowledges that the July 29, 2012 referral decision was only communicated to the Applicant in the disclosure package dated September 6, 2012. However, the Applicant first sought legal advice in November 2012. She filed the application for leave and JR on June 7, 2013. Therefore, the leave application was filed at least 8 months past the statutory time limit and 7 months after the Applicant obtained legal advice.

[40] The Respondent submits that a four-part test is indeed required for deciding whether to grant an extension of time, but the appropriate test was set out in *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846 (FCA), rather than the older *Grewal* test relied on by the Applicant, as above. *Hennelly* states that a party seeking an extension must demonstrate (a) the continuing intention to pursue his or her application, (b) that the application has some merit, (c) that no prejudice to the Respondent arises from the delay and that (d) there exists a reasonable explanation for the delay.

[41] The Respondent argues that the request to extend time should be dismissed on the sole basis that it is not grounded on proper evidence. There is no sworn evidence directly supporting the request. The only explanation is found in the written argument. This is wholly inappropriate.

[42] Moreover, the Respondent submits that the Applicant cannot succeed under the four-part test. First, she has not established a continuing intention to pursue her application. She elected

other avenues to address her immigration matters. She appears to have held no intention whatsoever to seek JR of the referral decision until those other avenues failed to provide results. The fact that she was self-represented at certain times warrants no departure from the applicable legal principles: *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41 at paras 34-35 [*Hogervorst*].

[43] Second, the Applicant raises no arguable issue. This application is moot, or otherwise stated, subject to the principle of finality. All matters of fact and law were addressed by the IAD, which issued a three-year stay of removal.

[44] Third, granting an extension of time would be contrary to the public interest in maintaining the strict deadlines legislated by Parliament, which promote the finality of administrative decisions: *Hogervorst*, above, at para 42. In this case, the Applicant delayed bringing this application but pursued other processes, notably an appeal at the IAD. The Applicant could have contested the referral decision at the IAD but declined to do this – even though she was represented by the same counsel who brought this application. Instead, she obtained a stay based on a joint recommendation achieved through the concurrence and support of the Department of Justice.

[45] Fourth, there is no reasonable explanation for the delay. The Applicant decided to pursue other avenues to settle her immigration matters. Such decisions do not provide a reasonable explanation for delay: *Hogervorst*, above, at para 39.

[46] Therefore, the Respondent submits that the Applicant has not met the onus for obtaining an extension of time. Granting an extension in this case would not be in the interests of justice.

B. *Is the application for JR moot or barred by the principle of finality?*

[47] The Respondent submits that the two-step test for mootness is set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342.

[48] The first step requires the Court to determine whether the proceedings are technically moot: would deciding the matter have any practical effect in resolving a legal controversy between the parties? Proceedings are technically moot if the issues between the parties have become "academic" or if "the tangible and concrete dispute has disappeared": *Borowski*, above, at page 353.

[49] The second step requires the Court to determine whether the Court should exercise its discretion to decide the case, notwithstanding that it is technically moot. Three policy rationales assist the Court in making this determination: (a) the presence of an adversarial context; (b) judicial economy; and (c) the need for the Court to be sensitive to its role as the adjudicative branch in our political system.

[50] This application is technically moot, according to the Respondent, because the IAD granted a stay of the deportation order for three years. There is no longer any live controversy between the parties. Furthermore, there is no policy reason to continue with this JR.

[51] Alternatively, the Respondent submits that this application is a collateral attack on the decision of the ID, which found the Applicant inadmissible and issued a deportation order. The Applicant unsuccessfully applied for leave to judicially review that deportation order. She also unsuccessfully applied to challenge the subsection 44(1) report. She did not contest the validity of these decisions in her IAD appeal.

[52] The Respondent therefore contends that this JR application constitutes a collateral attack on the decisions rendered by the ID and the IAD, since it tries to challenge those decisions by striking out their foundation. The proper course of action for the Applicant would have been to challenge the IAD decision by way of JR, yet she did not do so – for obvious reasons, given the benefit of a three-year stay of the removal order issued against her. It would also be collateral on attack on the ID inadmissibility decision according to the Respondent.

[53] In *Hogervorst*, above, at para 21, the Federal Court of Appeal held that such collateral attacks are impermissible because they "encourage conduct contrary to the state's objectives and tend to undermine its effectiveness".

C. *Should proceedings against the Applicant be stayed?*

[54] The Applicant requests that the Court prohibit the Respondent from instituting any future removal procedures against her. She argues at length that the Respondent has worked unfairness against her by changing the law and denying her access to the IAD to challenge such procedures in the future. She insists that the Respondent has committed a prejudicial abuse of process against her and that a stay is the only remedy that can remove that prejudice: *R v O'Connor*,

[1995] 4 SCR 411; *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 at paras 74-76; *R v Pham*, 2013 SCC 15.

D. *Did the Respondent breach the duty of fairness?*

[55] The Applicant submits that both the MD and Officer #2 disregarded procedures required by the *Immigration Manual* on Enforcement [ENF], thus tainting the referral decision with unfairness on the following three grounds:

a) by failing to give her the opportunity to make submissions prior to the issuance of the subsection 44(1) report which deprived the MD of the lawful authority to make a referral under subsection 44(2); contrary to *Immigration Manual*, ENF 5 at paras 8.10 and 11.1.

b) The MD also breached her duties by failing to secure the approval of the Chief of Operations in signing off on her decision, as well as in failing to make notes detailing the process she followed in exercising her decision-making powers, contrary to the *Immigration Manual*, ENF 6 at para 5.1.

c) The MD's failure to provide sufficient reasons breaches fundamental principles of fairness, and she exacerbated this breach by relying on Officer #2's Cass Review. The Applicant contends that Officer #2 also breached the right to procedural fairness both in denying her right to counsel by not deferring the hearing (*Mervilus v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1206 at paras 17-25) and in "forcing" her son to act as an interpreter without paying him, contrary to the *Immigration Manual*, ENF 5 at para 8.10 and ENF 6 at para 5.6. In

further support of this argument, the Applicant cites *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 at para 4; *Zhao v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1157 at para 16; and *Xu v Canada (Citizenship and Immigration)*, 2007 FC 274.

[56] The Applicant reminds the Court that, although the *Immigration Manuals* are not a source of law, breaches of required procedures may be considered reversible errors: *Nguyen v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 702 (FCA) at paras 6-7; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

[57] The Respondent strongly opposes the allegations of procedural unfairness. As the MD had the full legal authority to make a referral decision under subsection 44(2). Furthermore, the law is clear that the duty of fairness only requires that the Applicant have the right to make submissions (either orally or in writing) and to obtain a copy of the report: *Richter v Canada (Citizenship and Immigration)*, 2008 FC 806 at para 18, affirmed 2009 FCA 73; *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429. The Applicant was afforded all of these opportunities. The call in notice clearly informed her of her right to counsel and right to an interpreter. She was also clearly notified of the nature of the proceedings, the purpose of the interview and the possible outcomes.

[58] The Respondent points out that Officer #2's Case Review clearly states that, at the beginning of the interview, the Applicant was advised of her right to counsel and the purpose of the interview. This is confirmed by the Applicant's signature. In any event, there is no absolute

right to counsel, only a right to a fair hearing. In this case, there was a fair hearing. The Applicant and her son agreed that he would act as an interpreter. Her son speaks English and swore an affidavit in English in these proceedings. There is no evidence that any translation issues arose during the hearing. The Applicant is presumed to have waived her right to further raise this issue.

[59] Finally, the Respondent counters the argument that the reasons were insufficient. To the contrary, the reasons are adequate because the Applicant clearly understands the basis on which the referral was made. The MD had every right to issue the subsection 44(2) report on the record before her, and endorse the Case Review's findings.

E. *Did the Officer err by overlooking evidence in rendering the decision?*

[60] The Applicant contends that a reversible error stems from the numerous incorrect or unsubstantiated factual findings contained in Officer #2's reasons, which the MD adopted. Specifically, the Applicant raises the following points about Officer #2's conclusions:

a) He had no evidence that the operation was "highly efficient, organized and lucrative". Even if this were true, it is irrelevant: Ms Huang did not own the farm. The employer's assets and revenue have no bearing on her culpability.

b) He stated that the Applicant admitted to being paid for her criminal work, when she never did this.

c) He speculated that the Applicant's ex-husband was involved in the criminal enterprise. In reality, he now lives in China.

d) He did not consider that the Applicant was not imprisoned and only received a suspended sentence. Therefore, paragraph 36(1)(a) of the *IRPA* should not apply to her.

[61] According to the Applicant, the cumulative effect of these factual errors is to render the decision as a whole unreasonable: see *Gebremichael v Canada (Minister of Citizenship and Immigration)*, 2006 FC 547 at para 50; and *Sarkis v Canada (Minister of Citizenship and Immigration)*, 2006 FC 595 at paras 12-13 and 21.

[62] The Applicant advances that it is impossible to know what decision the MD would have rendered had she not been influenced by these factual errors. For this reason, her decision must be quashed: *Canada (Public Safety and Emergency Preparedness) v Lotfi*, 2012 FC 1089 at paras 24-25 and *Barua v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1571 (FCT) at para 22.

[63] The Respondent counters with the argument that all relevant factors were considered, including the nature of drug offences and the size of the operation involved and contradictory evidence about payment received. Officer #2 noted his concerns about the Applicant, including her degree of establishment in Canada. He questioned whether she would have stopped her criminal behaviour had she not been arrested. The Respondent says that the decision is entirely reasonable and that it is not open to this Court to reweigh all the evidence the Officer considered.

[64] The Respondent argues that Ms Huang's criminal sentence was considered both by Officer #1 when he wrote the subsection 44(1) report and by the ID. Both decision-makers provided justifiable reasons on the matter. Moreover, these two decisions are not properly before the Court on this JR. The principle of finality bars the Applicant from raising this argument here.

[65] Finally, the Respondent states that paragraph 36(1)(a) was correctly interpreted. The *Criminal Code*, RSC 1985, c C-46 sets out the conditional sentencing regime at sections 742 to 742.7, under the heading "Conditional Sentence of Imprisonment". In *R v Wu*, 2003 SCC 73 at para 25, the Supreme Court wrote that "[a] conditional sentence is a sentence of imprisonment […] It is imprisonment without incarceration". In *R v Proulx*, 2000 SCC 5 at para 29, the Supreme Court wrote that "[s]ince a conditional sentence is, at least notionally, a sentence of imprisonment, it follows that it too should be interpreted as more punitive than probation." The Supreme Court has further recognized that a conditional sentence does not suggest that the criminal conduct is less serious than conduct deserving of a jail term: *R v Fice*, 2005 SCC 32 at para 17. The case law rejects the argument that a sentence served in the community reduces the sentence of imprisonment for the purposes of the *IRPA*: *Martin v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 347 at para 5; *Cartwright v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 792 at paras 65-71.

VII. Analysis

[66] I dismissed this application from the bench, primarily due to my conclusion on the first issue. Namely, an extension of time is not granted for reasons which I discuss below. With respect to the remaining issues, I will touch on them briefly. In short, I agree with the

Respondent that this application would have failed even if it had been brought within the appropriate time frame.

A. *Should an extension of time be granted?*

[67] In *Deng Estate*, the Federal Court of Appeal held that a judge has jurisdiction to decide a motion for an extension of time if the judge who granted leave did not explicitly decide the matter. At para 16, Justice Létourneau endorsed *Canada (Minister of Human Resources Development) v Eason*, 2005 FC 1698 at para 20, which states that:

> While Mr. Eason did apply for the extension of time and for leave, it cannot automatically be inferred that the member turned her mind to the issue of extension of time simply because she granted leave. The granting of an extension of time must be explicitly considered by the decision maker.

[68] In *CSWU, Local 1611 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 512 at para 49, Justice Zinn expressed misgivings with *Deng Estate* but nonetheless felt bound to apply it. Specifically, he wrote that:

> Absent the decision of the Court of Appeal in *Deng*, I would have thought that it would be proper to presume, in the absence of contrary evidence, that a leave judge considering an application that includes a request for an extension of time, properly applied the provisions of Rule 6 of the *Immigration Rules* and did not exceed his jurisdiction by granting leave when no extension of time had been granted. Absent *Deng*, I would also have thought, given the express wording of Rule 6 that a request for an extension of time is to be heard “at the same time” as the leave application, that it is the leave judge alone and not the judge hearing the application that has jurisdiction to grant the extension of time. However, I feel that I am bound by the Court of Appeal’s decision in *Deng Estate* and will thus determine whether to grant an extension of time because Justice Russell did not specifically address this request in his Order granting leave.

[69] In the present case, Justice Russell did not expressly grant an extension of time in his order granting leave. The Court therefore retains jurisdiction to address the matter. The appropriate test is set out in *Hennelly*, above, at para 3. There is no reason to follow the framework in *Grewal*, as it predates *Hennelly* and is similar in any event.

[70] In my view, an extension of time should not be granted. To begin, the Applicant has not sworn an affidavit explaining the reasons she failed to meet the statutory timelines. Instead, only her son provided sworn testimony in this JR and he did not address this matter. This deficiency in the record is not determinative, however, since consideration of the Applicant's written and oral submissions has led me to conclude that she clearly fails to meet the first and fourth steps of the substantive test set out in *Hennelly* (continuing intention and reasonable explanation). As such, there is no need to address the second and third steps, although I would endorse the Respondent's submissions on these points.

[71] With respect to the first step, the Respondent correctly points to *Hogervorst*, above, at paras 34-35, for the proposition that an Applicant who elected to pursue other administrative and legal avenues for overturning an administrative decision cannot be said to have held the continuing intention to challenge that decision on JR. The Federal Court of Appeal also stated that it is immaterial that the Applicant might have been self-represented at some point, since "[o]nly chaos can result when decisions are made ad personam rather than according to the rule of law": para 35.

[72] Here, the Applicant took the certain positive steps to address the situation in the nine months between leaving of the s. 44(2) decision and filing this JR;

a) She attempted to subpoena the Officers involved;

b) She petitioned the Federal Court for a stay of proceedings;

c) She attended an admissibility hearing at the ID; and

d) She filed an appeal of her deportation order with the IAD.

[73] The Applicant clearly turned her mind to her immigration situation and made decisions about how best to address it. Had she intended to challenge the subsection 44(2) referral decision, there is no reason she could not have done so during the span of time she initiated these other proceedings.

[74] The Applicant has advanced no acceptable explanation for this significant delay. Her claim that she was unaware that the referral decision could result in deportation is unpersuasive. Before applying for JR, she undertook various legal and administrative steps with the assistance of counsel – such as attempting to subpoena the Officers and filing an application for a stay at the Federal Court. These efforts suggest that she was well aware of the consequences she faced.

[75] Furthermore, the call-in letter clearly stated that a "decision to allow you to remain in Canada or to seek to have a removal order issued against you will be made in the near future" and that the "Minister's Delegate may […] refer your case to an Admissibility Hearing where a

removal order may be issued against you". It is difficult to envision language expressing the potential consequences of a referral decision more clearly than this.

[76] The *Hennelly* steps are conjunctive. If the Applicant fails to make out even one of the four steps, as is the case here, granting an extension of time is not in the interests of justice.

B. *Is the application for JR moot or barred by the principle of finality?*

[77] I am not persuaded that this application is moot because there is still the possibility of deportation.

[78] However, I agree that it constitutes a collateral attack. The principle of finality militates against quashing the referral decision. The first step under *Borowski* is not met: the application is not technically moot. A live issue remains between the parties, namely the question of whether the Respondent may cause the Applicant to be deported on the basis of the referral at some point after the three-year stay has ended.

[79] The IAD decision did not put to rest the legal possibility of deportation. Rather, it found that the removal order was "valid in law" and merely stayed it for three years. The IAD cautioned that it will reconsider the matter in February 2017, "at which time it may change or cancel any non-prescribed conditions imposed, or it may cancel the stay and then allow or dismiss the appeal". A temporary, conditional stay does not resolve the underlying dispute between the parties. Ms Huang still faces a real possibility of removal in the future.

[80] However, it is on the basis of collateral attack that the Applicant falls short on this second issue: I am of the opinion that the present application is an impermissible collateral attack on the decisions rendered by the ID and the IAD. The Federal Court of Appeal has explained that such attacks must not be allowed: *Hogervorst*, above, at paras 18-21. When several administrative decisions are related, one cannot challenge an initial decision in order to indirectly invalidate a subsequent decision. To quote *Hogervorst*, above, at para 20: "the second decision must be attacked directly, not collaterally: see Vidéotron Télécom Ltée c. S.C.E.P., 2005 FCA 90 (F.C.A.), at paragraph 12".

[81] The Applicant applied for leave to judicially review the ID's admissibility decision but she was turned down. She neither brought a JR challenging the ID's finding that the deportation order was valid, nor challenged the ID's decision on inadmissibility. If this Court allowed her to attack the referral decision, with the possible consequence of annulling the finding of inadmissibility, it would undermine these two decisions. This would run counter to the principle "that court orders be considered final and binding unless they are reversed on appeal" (*R v Litchfield*, [1993] 4 SCR 333 at page 349), – a principle which the Supreme Court extended to administrative decisions in *R v Consolidated Maybrun Mines Ltd*, [1998] 1 SCR 706. Should proceedings against the Applicant be stayed?

C. *Should proceedings against the applicant be stayed given the alleged abuse of process?*

[82] The Applicant does not succeed in identifying any abuse of process committed by the Respondent. I observe that, in *Pham*, the accused successfully appealed his sentence because the trial judge was unaware of its immigration consequences. Here, Ms Huang is not appealing her

criminal sentence. Rather, she is challenging an administrative decision. The principle of finality, which I explained above, prevents her from using this challenge to undermine the criminal sentence which was lawfully imposed upon her.

[83] In any event, the Respondent does not have the authority to reduce Ms Huang's sentence. Nor is it abusive for the Respondent to seek her removal on the basis of that sentence in line with the legislation: it may perhaps be heavy-handed, but it is certainly not abusive. However, that is all academic at this moment in time, because the Applicant obtained three year stay of deportation.

D. *Did the Respondent breach the duty of fairness?*

[84] In my view, there was no breach of the duty of fairness at any stage of the proceedings. I note that the case law establishes a relaxed duty of fairness in the context of subsection 44(1) and 44(2) decisions. This duty confers two rights: the right to make submissions (either written or oral) and the right to obtain a copy of the reports: *Hernandez*, above, at paras 70-72; *Richter*, above, at para 18. The Applicant made oral submissions at the interview and obtained copies of both the 44(1) and 44(2) decisions.

[85] Contrary to the Applicant's submissions, the *Immigration Manual* does not prohibit holding interviews after a subsection 44(1) decision is made. Paragraph 8.10 of the *Immigration Manual*, ENF5 reads as follows:

> All permanent residents who <u>are or may be subject to a report</u> are to be informed of the criteria against which their case is being assessed and of the possible outcome if the case is referred to the

> Immigration Division for an admissibility hearing […] All permanent residents shall also be provided with the opportunity to make submissions.
>
> [Emphasis added]

[86] In my view, the words "are or may be subject to a report" captures both permanent residents against whom the Respondent has yet to issue a 44(1) report and those against whom the Respondent has already issued such a report. What is important is that the individual be granted an opportunity to make submissions at some point before a referral decision is made. Here, Ms Huang made oral submissions after the 44(1) report was issued but before the 44(2) referral occurred. Officer #2 summarized her submissions in the Case Review and Recommendations which the MD perused before making the impugned decision. As such, there was no denial of fairness.

[87] Furthermore, there is no requirement for the MD to secure the approval of the Chief of Operations before making a referral decision. The MD, acting in her capacity as a Supervisor, was authorized to make a 44(2) referral from the 44(1) report.

[88] The MD did not provide reasons and was entitled to rely on those and endorse Officer #2. Indeed, the Supreme Court stated in *Baker*, above at para 44, that "the notes of [a] subordinate reviewing officer should be taken, by inference, to be the reasons for decision". The adequacy of these reasons must be considered within a reasonableness analysis, not the analysis of procedural fairness: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 21-22.

[89] I reject the Applicant's contention that she was never made to understand the nature of the proceedings and her possible deportation. Her allegation that the call-in letter disguised the nature of the proceedings is wholly unmeritorious. The said letter specifically indicated that a "decision to allow you to remain in Canada or to seek to have a removal order issued against you will be made in the near future" and that the "Minister's Delegate may […] refer your case to an Admissibility Hearing where a removal order may be issued against you".

[90] There was no violation of Ms Huang's right to counsel. To begin, there is no automatic right to counsel in section 44 proceedings. Moreover, the call in letter clearly advised Ms Huang: "You may also be accompanied by legal counsel at your own expense". At the interview, where she was in the company of her son who speaks and reads English, she signed a paper stating that she had been advised that she could have counsel present. There is no reason to disregard this statement.

[91] There was no unfairness relating to interpretation. The call in letter stated: "If you require an interpreter, please bring a translator with you to the interview." The Applicant brought her adult son with her and he appears to have volunteered to act as an interpreter. There is no evidence that the Respondent coerced him in any way, nor that any language issues arose during the interview. The *Immigration Manual*, ENF6 at para 5.6 only requires that the Respondent provide an interpreter "[i]f need be". In the circumstances of this case, there was no need because the Applicant's son ensured that she could communicate with Officer #2.

E. *Did the Officer err by overlooking evidence in rendering the decision?*

[92] The Respondent committed no reviewable error. The Applicant is asking the Court to reweigh the relevant factors, which is not its function in JR. Officer #2 adequately referenced the relevant factors in his Case Review and Recommendations, which underlie the MD's referral.

[93] I note that the factors listed in the *Immigration Manual*, ENF6 at para 19.2 are the following: age at time of landing; length of residence; location of family support and responsibilities; conditions in home country; degree of establishment; criminality; history of non-compliance and current attitude. For cases involving criminality, the following three additional factors are relevant: the circumstances of the incident; the sentence imposed; and the maximum sentence that could have been imposed.

[94] The record shows that Officer #2 turned his mind to these factors. He discussed them at some length. For this reason, the MD's subsequent decision to refer the matter to the ID is reasonable.

[95] Moreover, the case law rejects the Applicant's interpretation of paragraph 36(1)(a) of the *IRPA*. Specifically, the Applicant contends that her twelve-month conditional sentence does not amount to "imprisonment" within the meaning of this provision, and so she does not fall within the ambit of persons sentenced to "a term of imprisonment of more than six months". However, the Supreme Court has clarified that a conditional sentence constitutes a sentence of imprisonment in *Wu*, *Proulx* and *Fice*. These cases suffice for rejecting the Applicant's argument. The Respondent further cites *Martin* and *Cartwright*, yet those cases dealt with the

interpretation of subsection 64(2) of the *IRPA*, and so they are not directly applicable to the present case.

VIII. Conclusions

[96] This application for JR is dismissed.

[97] The Applicant proposes 25 questions for certification. I decline to certify any of these questions, since they are not serious questions of general importance which would be determinative on appeal.

[98] Questions 1 to 15 address my conclusion that I have jurisdiction to grant or refuse an extension of time. *Deng Estate* settled the law on this issue.

[99] Questions 16 to 22 address mootness. Given my conclusion that this application was not moot, these questions would not be relevant on an appeal.

[100] Questions 23 to 25 address collateral attack. Once again, the law is settled: see *Hogervorst*.

[101] Finally, 3 of these 25 questions relate to the Applicant's approach of seeking administrative remedies prior to challenging the referral decision by way of JR. Paragraph 72(2)(a) of the *IRPA* clearly states that an Applicant must exhaust her "rights of appeal" prior to seeking judicial review. However, from the moment she was informed of the referral decision

until her ID hearing, the Applicant in this case did not exercise rights of appeal but instead sought alternative remedies. The case law shows that an Applicant is entitled to seek JR of a referral decision even if she has not exhausted her rights before the ID: see *Richter*. Thus, the Applicant has not raised any serious question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

There are no certified questions.

"Alan Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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