

Federal Court



Cour fédérale

Date: 20150813

Docket: IMM-2165-14

Citation: 2015 FC 966

Ottawa, Ontario, August 13, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**SANG WONG
SUK YI PANG
WEN BIN WONG
SONG JING WONG**

Applicants

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants seek judicial review of the decision of a Canada Border Services Agency's enforcement officer [the officer] to deny the Applicants' deferral of removal requests,

pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Supplementary time had been given to the parties in respect of any new developments or information that may have come to light with respect to previous representation on their part; none of significance was received to change the outcome.

II. Factual Background

[3] The Applicants are a family from Malaysia of Chinese ethnicity composed of two adults and two children, who face removal from Canada.

[4] The Applicants initially came to Canada on December 25, 2011, as visitors and claimed refugee protection on February 6, 2012.

[5] Mr. Wong, the principal Applicant, alleges that he was defrauded in Canada of over 10 000 dollars paid to a real estate agent posing as an immigration consultant who convinced the Applicants to withdraw their refugee claim. With the help of a different immigration consultant, the Applicants withdrew their refugee claim and filed an H&C application, which was ultimately denied.

[6] As a result, on March 26, 2013, the Applicants were informed that their date of removal was scheduled for April 2, 2014.

[7] On March 28 and March 31, 2014, the Applicants submitted two requests for a deferral, in which they sought an administrative deferral of removal.

[8] The Applicants' requests were refused by way of letters dated March 31 and April 1, 2014, which form the impugned decisions.

[9] On April 1, 2014, the Applicants were granted a stay of removal by Justice James Russell of this Court, pending the outcome of the application for judicial review.

III. Decision under Review

[10] In its decision and reasons, upon reviewing the Applicants' submissions and evidence in support of their request, the officer finds that there are insufficient grounds warranting a deferral, particularly given the narrow discretion afforded to the officer under section 48 of the IRPA (Refusal letters dated March 31, 2014 and April 1, 2014, Certified Tribunal Record, at pp 1-8).

IV. Legislative Provisions

[11] The following are the relevant legislative provisions from the IRPA:

Enforceable removal order

48. (1) A removal order is enforceable if it has come into force and is not stayed.

Effect

(2) If a removal order is enforceable, the foreign national against whom it was

Mesure de renvoi

48. (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.

Conséquence

(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le

made must leave Canada immediately and the order must be enforced as soon as possible.

territoire du Canada, la mesure devant être exécutée dès que possible.

V. Standard of Review

[12] It is established that the officer's decision is subject to the deferential standard of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25 [*Baron*]; *Ortiz v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 18 at para 39; *Ovcak v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1178 at para 8).

[13] The Court must therefore assess whether the impugned decision is justified, transparent and intelligible and whether it falls within the range of possible acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47).

VI. Issues

- a. Is the officer's decision reasonable?
- b. Did the officer fail to consider the best interests of the children affected?

VII. Analysis

[14] Subsection 48(2) of the IRPA provides that officers must enforce removals "as soon as possible".

[15] Removal officers have limited discretion in assessing requests to defer removal (*Baron*, above at para 80; *Simoes v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ 936 [*Simoes*]; *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ 295 [*Wang*]; *Perez v Canada (Minister of Public Safety and Emergency Preparedness)*, [2007] FCJ 849). As expressed by Justice Marc Nadon of the Federal Court of Appeal in *Simoes* at para 12:

In my opinion, the discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" [now, "as soon as possible"] for a removal order to be executed, a removal officer may consider various factors such as illness, other impediments to travelling, and pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system.⁷ For instance, in this case, the removal of the Applicant scheduled for May 10, 2000 was deferred due to medical reasons, and was rescheduled for May 31, 2000. Furthermore, in my view, it was within the removal officer's discretion to defer removal until the Applicant's eight-year old child terminated her school year.

[16] The boundaries of an enforcement officer's discretion to defer a removal is circumscribed by the Court in *Wang*, above, where Justice J.D. Denis Pelletier found that "deferral should be reserved for those applications or processes where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment in circumstances" (*Wang*, above at para 48). The principles often cited by the Court have been conveniently summarized by Justice Nadon in *Baron*, above:

- There are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths.
- The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act. In considering the duty to comply with

section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission.

- In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.

- Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application.

[Emphasis in original.]

[17] The Court notes that an officer's discretion in assessing requests for deferrals is generally limited to technical aspects, such as travel arrangements or the impact of interrupting a child's school year (*Munar v Canada (Minister of Citizenship and Immigration)*, [2006] 2 FCR 664 at para 40). Although the best interest of the child is an important consideration in the removals process, it is not one which, in and of itself, can preclude the enforcement of a removal order (*Simoes*, above at para 15).

[18] Moreover, although it is not the enforcement officer's duty to undertake substantial risk assessments when faced with a request for a deferral, situations of changed circumstances of increased risk, or where applicants could be exposed to a threat to personal safety, a risk of death, extreme sanction or inhumane treatment could warrant a deferral, in exceptional

circumstances (*Toth v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1051 at para 23).

[19] Upon review of the officer's decision and reasons, the parties' submissions and the evidentiary record on file, it is clear that the officer engaged in a thorough, transparent, and in-depth analysis of the Applicants' particular circumstances and applicable factors in rendering its decision.

[20] The officer's reasons extensively address the Applicants' submissions and supporting evidence, including those pertaining to:

- a) the alleged fraud of which the Applicants were victim and their pending application to reinstate their refugee claim;
- b) the alleged risk of death, extreme sanctions or inhumane treatment faced by the Applicants in Malaysia;
- c) the Applicants' complaints filed with the Toronto Police Services and with the Real Estate Council of Ontario;
- d) the psychological reports submitted by the Applicants demonstrating hardship;
- e) the best interests of the children affected by the decision.

(Officer's letters dated March 31 and April 1, 2014, Certified Tribunal Record, at pp 8-14)

[21] The officer demonstrates a genuine concern in ensuring that all potential variables were taken into account, in rendering its decision. This is notably apparent in the fact that the officer

provides a decision in response to the Applicants' second request dated April 1, 2014, despite the fact that the officer had already rendered and communicated its decision to the Applicants on March 31, 2014.

[22] The officer's reasons also reflect a careful and astute consideration of the best interests of the minor Applicants, Song Jing and Wen Bin. Among others, the officer recognizes that the removals process is particularly difficult for the children affected and that there will be a period of adjustment for them upon return to Malaysia. The officer also contemplates the consequences of the removal on the children's educational paths, and sought clarifications in this respect.

[23] Upon review of the officer's decision and reasons, parties' submissions and the evidentiary record, including evidence relating to the immediate best interests of the children affected, the Court finds no basis upon which to intervene.

[24] Moreover, the Court notes that the Applicants had submitted a request for a 90-day administrative deferral in order to allow the children to complete their school years (in June 2014), which has now passed.

VIII. Conclusion

[25] In light of the foregoing, the application is dismissed.

JUDGMENT

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

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

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2165-14

STYLE OF CAUSE: SANG WONG, SUK YI PANG, WEN BIN WONG,
SONG JING WONG v THE MINISTER OF PUBLIC
SAFETY AND EMERGENCY PREPAREDNESS

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