

Federal Court



Cour fédérale

Date: 20170809

Docket: IMM-1-17

Citation: 2017 FC 760

Ottawa, Ontario, August 09, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

**HONGYING CHEN, YING CHEN, JACKY
CHEN, A MINOR, BY HIS LITIGATION
GUARDIAN HONGYING CHEN AND JERRY
CHEN, A MINOR, BY HIS LITIGATION
GUARDIAN HONGYING CHEN**

Applicants

and

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

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of the decision of an Inland Enforcement Officer [the Officer] refusing to defer their removal from Canada.

[2] The Applicants, Hongying and Ying Chen, are a married couple and are citizens of China who have three children. Two of their children, Jacky and Jerry, are Canadian citizens. Their other child, Jenny, is a citizen of the United States. The Applicants face removal after an unsuccessful refugee claim and two unsuccessful applications for permanent residence on humanitarian and compassionate [H&C] grounds.

[3] A stay of their removal from Canada was issued by Justice Gleeson on January 6, 2017 pending the final disposition of this application for judicial review. For the reasons that follow, this judicial review is granted.

I. Background

[4] In October 2016, the Applicants were notified that the removal orders against them were enforceable. The Applicants advised that their daughter would be returning to the United States to live with her grandmother. The Applicants subsequently signed a direction to report for removal which was scheduled for January 7, 2017.

[5] On December 23, 2016, the Applicants submitted a deferral request. They requested that removal be deferred until their two older children finish their school year and until the family could submit a third H&C application. The Applicants explained that their previous immigration consultants did not properly represent them and failed to provide sufficient evidence in support of their H&C claim. The Applicants raised the best interests of the children, and in particular, the legal status of their children in China in light of China's family planning policies. On the deferral request, the Applicants argued that the previous H&C decisions did not assess the children's best

interests. Finally, the Applicants explained that their circumstances had changed since the H&C decision, as they had a third child.

[6] The Officer acknowledged that the children were born in North America with no experience of China and he acknowledged that the children have strong ties to Canada, including education experience and extensive family networks. However, the Officer concluded that the children could adjust to the Chinese language, education system, and culture.

[7] The deferral was refused. The Officer relied upon the previous H&C decision to conclude that the H&C factors raised by the Applicants in their deferral request were adequately addressed.

II. Issue

[8] The Applicants raise a number of issues with respect to the Officer's decision, however it is the Officer's treatment of the best interests of the child analysis which is dispositive of this judicial review application.

III. Analysis

A. *Standard of Review*

[9] An enforcement Officer's decision on a deferral request is reviewed on the reasonableness standard (*Nguyen v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 225, [*Nguyen*]).

B. *Best Interest of Child*

[10] The Applicants acknowledge that the enforcement Officer's discretion to defer removal is limited, but they argue that the Officer is nonetheless required to assess the short-term interests of any affected child. The Applicants rely on *Turay v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1090 at para 15, where this Court held that "if the court concludes there has been a faulty analysis of the best interests of the children, the enforcement Officer's decision will be rendered unreasonable."

[11] The Applicants argue that the Officer here failed to analyse their submissions regarding the children's difficulty in obtaining legal status in China, and access to healthcare and education, as the Applicants would be in violation of China's family planning policies. The Officer relied on the H&C decision to conclude that the issues raised by the Applicants had been adequately assessed. However, in the H&C decision the Officer there notes that there was insufficient evidence to make the assessment. Further the Applicants argue they were inadequately represented on the H&C. However that issue is not necessary to address as this judicial review can be determined on the issue of the Officer's obligation to assess the best interests of the child.

[12] I agree with the Applicants that the Officer's assessment is "logically incoherent" when he states that the issues of the best interests of the children were assessed in the H&C decision. At the time of the H&C decision, the Applicants did not have 3 children. Therefore the H&C decision did not address the best interests of the third child. The H&C decision also does not

address the issues the family may face as three children would be in violation of China's family planning policies. The deferral Officer did not give these issues any consideration as he relied on the H&C decision.

[13] In *Nguyen*, Justice Boswell reviewed the jurisprudence on this issue and concluded the following:

[17] The jurisprudence has established that enforcement officers are required to consider the short-term best interests of a child in a fair and sensitive manner (see: *Joarder v Canada (Minister of Citizenship and Immigration)*, 2006 FC 230 (CanLII) at para 3, 146 ACWS (3d) 305; *Kampemana* at para 34). It is also clear that: "while the best interests of the children are certainly a factor that must be considered in the context of a removal order, they are not an over-riding consideration" (*Pangallo v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 229 (CanLII) at para 25, 238 ACWS (3d) 711).

[14] Here although the best interests of the children may not ultimately be the overriding consideration, the Officer failed whatsoever to assess the short-term best interests of the Applicants' third child. The Officer relied on the previous H&C decision, which was rendered before the third child was born, to conclude that these interests had already been adequately addressed. The Applicants' deferral request raised the possibility that their third child would be unable to obtain legal status in China, therefore depriving him the opportunity to access educational and healthcare services. The Officer, however, does not directly engage with this issue and instead, simply refers to an H&C decision which was released before the third child was born.

[15] The Officer's reliance on an H&C decision which pre-dates the child's birth as evidence to assess the child's short-term best interests is unreasonable. Even considering the Officer's narrow discretion, the Officer's reasoning lacks both justification and intelligibility, and the decision is therefore unreasonable.

[16] The application for judicial review is allowed and the decision of the enforcement Officer refusing the request for deferral of removal is set aside.

JUDGMENT in IMM-1-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of the Enforcement Officer is set aside;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1-17

STYLE OF CAUSE: HONGYING CHEN, YING CHEN, JACKY CHEN, A
MINOR, BY HIS LITIGATION GUARDIAN
HONGYING CHEN AND JERRY CHEN, A MINOR, BY
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THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

PLACE OF HEARING: TORONTO, ONTARIO

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JUDGMENT AND REASONS: MCDONALD J.

DATED: AUGUST 09, 2017

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