Federal Court  Cour fédérale

Date: 20140415

Docket: IMM-5767-13

Citation: 2014 FC 362

Ottawa, Ontario, April 15, 2014

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

XIAO XIAO ZHANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Zhang was not warmly received when he landed at the Vancouver's International Airport on 2 August 2012. He is a Chinese national but also a Canadian permanent resident. The immigration officer was of the opinion that he had failed to maintain the residency obligation set out in section 28 of the *Immigration and Refugee Protection Act* [IRPA]. More particularly, he had not been physically present in Canada for at least 730 days in the five-year period preceding that particular arrival.

[2] Section 41 of IRPA provides that a person is inadmissible for failing to comply with the permanent residency obligations. The officer prepared a report to the Minister pursuant to section 44 of IRPA that same day. The Minister's Delegate, Elek Adamski, issued a removal order in accordance with section 44(2) of the Act. Mr. Zhang, as was his right, appealed to the Immigration Appeal Division of the Immigration and Refugee Board of Canada [IAD]. The relevant section of IRPA is 67(1) which provides:

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(a) the decision appealed is wrong in law or fact or mixed law and fact;	a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice has not been observed; or	b) il y a eu manquement à un principe de justice naturelle;
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[3] The IAD found that Mr. Zhang was approximately eight months short on his residency requirement, that Mr. Adamski was a Minister's Delegate authorized to issue a removal order, and that there were insufficient humanitarian and compassionate considerations [H&C] to warrant relief.

[4] This is the judicial review of that decision.

I. Issues

[5] Although the issues were not argued in this order, I shall consider them as follows:

a) In spite of the fact that it is admitted that Mr. Zhang was short a number of days on 2 August 2012 when he was written up (the actual shortfall being a matter of debate), he met the requirement the day he appeared before the IAD. Should the five-year period be retroactive from that date?

b) Was the person who signed the departure order authorized to do so by the Minister?

c) What was the actual shortfall? This may be a relevant factor in assessing humanitarian and compassionate considerations; and

d) Other humanitarian and compassionate considerations.

II. The Relevant Five-year Period

[6] There can be no doubt with respect to the residency obligation. Section 62 of the *Immigration Regulations* makes it perfectly clear that days of residence in Canada after a report is prepared under subsection 44(1) of the Act cannot be taken into consideration. The fact that Mr. Zhang has remained in Canada since he was written up may demonstrate his intentions with respect to residency - a factor which might be taken into account in H&C considerations.

III. Authority of the Minister's Delegate

[7] The Minister is entitled to delegate authority pursuant to section 6 of IRPA. The material before the IAD indicated that the authority to make a prescribed removal order under subsection 44(2) of IRPA was delegated to a number of officers with the Canada Border Service Agency. Included in the list were Superintendents. There was some debate as to whether Mr. Adamski was a Superintendent or rather a shift supervisor. The IAD member found that he was a Superintendent. That finding was reasonable and should not be disturbed.

[8] However, Mr. Adamski's own testimony put the material before the IAD in doubt. He said that it was not enough to be a Superintendent in order to issue a removal order. One also had to successfully complete a Minister's Delegate Review Training course, which he had.

[9] In my opinion, this contradiction was of such importance that the IAD was assessing Mr. Ademski's authorization on an incomplete record. That was unreasonable, and as such the decision should be set aside.

[10] Following the negative decision of the IAD, counsel made an access to information request.

[11] In the application record before this Court, but not before the IAD, is a letter from Mr. Tessier, Manager, Access to Information and Privacy Division, Canada Border Services Agency. The letter was written in response to an access to information request which was,

among other things, to provide "a list of the names and positions of all the Minister's Delegates, including without limitation the Managers, Superintendents, Chiefs of Operations, and Directors, at the following port of entry during the years 2011 and 2012: Vancouver International Airport (YVR)". Attached was a two-page list of Vancouver's Superintendents, Chiefs, Director and BSOs (Border Service Officers) who have received the Minister's Delegate Review Training course. Mr. Adamski's name is nowhere to be found.

[12] In addition, Mr. Zhang then sought leave for an extension of time to file further evidence, being a second letter from Mr. Tessier, dated 29 January 2014. That letter was in response to a slightly different request which narrowed the first request to Minister's Delegates who had authority to issue removal orders against permanent residents for breach of residency obligations. However, the accompanying list is exactly the same.

[13] Prothonotary Lafrenière refused to grant an extension on the basis that it added nothing to the existing record. The appeal of that order was heard together with the application for judicial review. In light of the above, the appeal is moot.

[14] Mr. Zhang was unable to ask the IAD to reopen his appeal in order to consider the material he gathered from his Access to Information Request. Section 71 of IRPA specifically provides:

71. The Immigration Appeal Division, on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to	71. L'étranger qui n'a pas quitté le Canada à la suite de la mesure de renvoi peut demander la réouverture de l'appel sur preuve de manquement à un principe de

observe a principle of natural justice.	justice naturelle.

[15] Natural justice and procedural fairness were observed in this case. As the Court of Appeal held in Nazifpour v Canada (Citizenship and Immigration), 2007 FCA 35, [2007] FCJ No 179 (QL), section 71 has the effect of ousting the IAD's equitable jurisdiction.

[16] The question then arises as to whether it is open to Mr. Zhang to bring this material to the attention of the Court. The Minister says it is not.

[17] The general rule is that judicial review is based on the material which was before the Tribunal whose decision is being challenged. However, there are exceptions such as procedural fairness or jurisdiction. In this case, the jurisdiction of the IAD is not in issue, but the jurisdiction of the Minister's delegate certainly is.

[18] In accordance with the Federal Court's Immigration and Refugee Protection Rules made under the Immigration Act, portions of the Federal Courts Rules also apply except to the extent they are inconsistent. Parts 1, 6 and 10 form part of the Immigration Rules.

[19] It is a general principle, as set out in rule 3, in Part 1, that the Rules are to be interpreted and apply it so to, among other things, secure the just determination of every proceeding.

[20] Rule 351 in Part 6 provides that in special circumstances the Court may grant leave, to a party in appeal, to present evidence on a question of fact. Rule 399(2) allows the Court on

motion to set aside and vary an order by reason of a matter that arose or was discovered subsequent to the making thereof.

[21] But for the fact that the decision was made on an incomplete record, I would have had to determine whether the information now proffered could have been obtained sooner and, if not, whether this Court should nevertheless exercise its residual discretion (Shire Canada Inc. v Apotex Inc., 2011 FCA 10, [2011] FCJ No 49 (QL) at paras 17 and following).

IV. The Shortfall

[22] The officer who wrote up the section 44(1) report calculated a shortfall of 247 days, a calculation which the IAD in essence accepted. Mr. Zhang's position is that he was only short 86 days. As aforesaid, the amount of the shortfall may be a relevant factor in the H&C considerations.

[23] It is clear that an error had been made by the officer in that he failed to take into account a passport stamp indicating an arrival of Mr. Zhang in Canada on 8 July 2011. The officer, who testified before the IAD, also said that he had referred to a document known by the acronym ICS which was described as a travel history. That document was not in the record before the IAD. Counsel for the Minister concedes it should have been, but takes the position it doesn't really matter because in any event there was a shortfall. I disagree, because of the H&C factors.

V. Summary

[24] This judicial review is granted as there was an inadequate record before the IAD for it to conclude that Mr. Adamski was a Minister's Delegate authorized to issue a removal order; and secondly, because there was a clear error as to the shortfall in the number of required days, a point which has considerable bearing on humanitarian and compassionate considerations.

VI. Remedy

[25] Mr. Zhang submits that the appropriate remedy is simply to quash the removal order. I do not consider this an appropriate remedy. Mr. Adamski's authority has to be clarified, and so the appropriate remedy is to remit the matter back to a duly authorized officer to consider the matter on a fresh record.

VII. Certified Question

[26] Mr. Zhang submitted a question querying whether the IAD is bound by section 62 of IRPA which provides that days after a report prepared under section 44(1) of the Act do not count.

[27] The answer is clearly that the IAD is bound.

[28] Furthermore, the Court can only certify a serious question of general importance if it would support an appeal. Mr. Zhang has succeeded in this judicial review. The Minister proposed no question.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is granted.

2. The matter is referred back to another member of the Immigration Appeal Division of the Immigration and Refugee Board of Canada for redetermination on a new record.

3. There is no serious question of general importance to certify.

4. The appeal of Prothonotary Lafrenière's Order, dated 4 March 2014, is dismissed.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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