Federal Court  Cour fédérale

**Date: 20161221**

**Docket: IMM-1002-16**

**Citation: 2016 FC 1395**

**Ottawa, Ontario, December 21, 2016**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**GUO LIN CHEN**

**Applicant**

**and**

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

**Respondent**

## JUDGMENT AND REASONS

## I. Overview

[1] The Applicant, Guo Lin Chen, seeks judicial review of a decision by a delegate of the Minister of Public Safety and Emergency Preparedness [the Minister's Delegate or Delegate], referring the Applicant to an admissibility hearing pursuant to s.44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] This application is dismissed because, as explained in greater detail below, the Applicant has not demonstrated that the Minister's Delegate reached an unreasonable decision or deprived the Applicant of procedural fairness in reaching that decision.

## II. Background

[3] Mr. Chen is a citizen of China who has lived in Canada for over thirteen years as a permanent resident. He and his ex-wife, Yan Yi Lin have two daughters, Le Ling Chen and Letong Chen, both of whom are also permanent residents.

[4] In 2010, Yan Yi Lin and Le Ling purchased a house in Delta, British Columbia, and on October 6, 2010 they executed a residential tenancies agreement with Wei Lun Cha. On April 28, 2011, the Delta Police Department executed a search warrant for the house and found marihuana plants and packaged marihuana on the premises. This lead to Mr. Chen being criminally charged in June 2014 and eventually being convicted for unlawfully producing a controlled substance contrary to s. 7(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA] and unlawfully possessing a controlled substance in an amount exceeding three kilograms, for the purpose of trafficking, contrary to s. 5(2) of the CDSA. He was sentenced in July 2014 to a 1 year term of imprisonment on each of these counts, to be served concurrently.

[5] On February 6, 2015, an officer of Citizenship and Immigration Canada [CIC] issued a report under s. 44(1) of IRPA, reporting Mr. Chen as inadmissible to Canada under s.36(1)(a) of IRPA based on his criminal convictions. On March 11, 2015, Mr. Chen was interviewed by a Canadian Border Services Agency [CBSA] agent and was provided the opportunity to make

written submissions as to why the Minister of Public Safety and Emergency Preparedness [the Minister] should not seek a removal order against him. The CBSA received Mr. Chen's submissions through his counsel on March 26, 2015.

[6] On July 22, 2015, the Minister's Delegate referred the s.44(1) report to the Immigration Division of the Immigration and Refugee Board of Canada under s.44(2) of IRPA for an admissibility hearing. On February 15, 2016, the Immigration Division issued Mr. Chen a Notice to Appear for an admissibility hearing on March 30, 2016. The July 22, 2015 referral by the Minister's Delegate is the decision under judicial review in this application.

## III. Issues and Standard of Review

[7] The parties' arguments raise the following issues for the Court's consideration:

A. Was the decision by the Minister's Delegate, to refer the s. 44(1) report to the Immigration Division for an admissibility hearing, reasonable?

B. Did the Minister's Delegate breach natural justice and procedural fairness owed to the Applicant?

[8] Implicit in the first issue is a conclusion that the standard of review applicable to a decision by a Minister's delegate pursuant to subsection 44(2) of IRPA is reasonableness (see *Canada (Minister of Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237, at para 31; *Valdez v Canada (MPSEP)*, 2016 FC 377, at para 18. The parties are agreed on this position, and I concur.

[9] The parties also agree, and again I concur, that the procedural fairness issue raised in his application is reviewable on a standard of correctness (see *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para 43).

## IV. Analysis

### A. *Was the decision by the Minister's Delegate, to refer the s. 44(1) report to the Immigration Division for an admissibility hearing, reasonable?*

[10] In relation to permanent residents, except in the case of inadmissibility for failure to comply with residency obligations under s. 28 of IRPA, section 44(2) of IRPA provides that, if the Minister is of the opinion that a report prepared under s. 44(1) is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing. While the parties disagree on the scope of the discretion afforded to the Minister's Delegate to decline to make this referral, they agree that such discretion exists and that it was exercised in the Applicant's case. Therefore, nothing in particular turns on the scope of the discretion in the present case. Rather, the Applicant argues that the exercise of the discretion by the Minister's Delegate was unreasonable, in that the Delegate ignored or misconstrued the Applicant's evidence and submissions or failed to analyse how the factors considered contributed to the decision.

[11] The Applicant argues that the Minister's Delegate ignored the fact that he has very few family ties to China, only his mother and older sister who are in failing health. He submits that the Minister's Delegate failed to properly consider the emotional and financial hardship that he would suffer if returned to China and that would be imposed on family members in both China

and Canada whom he supports. In connection with theses submissions, he also refers to evidence of his physical limitations, that he is approaching the retirement age in China, and of limited employment prospects and increased cost of living in China.

[12] The Delegate acknowledged the submissions that the Applicant would be unable to work in China due to lack of education and back problems. The Delegate also noted that the Applicant's primary occupation since arriving in Canada in 2002 had been working as a cook in a Chinese restaurant, a labour-intensive job, and concluded there was no reason he could not work in a similar employment in China. While the Minister's Delegate did not expressly refer to the evidence of employment and economic circumstances in China, an administrative decision-maker is not obliged to make explicit findings on every argument presented (see *NLNU v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, at para 16). I also note that this is evidence of a general nature related to country conditions, and cannot conclude the absence of an express reference in the decision to this evidence renders the decision unreasonable.

[13] With respect to the Applicant's support of family members, the Minister's Delegate referred to the submissions that the Applicant provides financial assistance to his younger daughter but also found the evidence of his monthly commitments to be inconsistent with the income he declared to tax authorities. While the Delegate did not expressly refer to the financial dependence of the Applicant's mother, the decision acknowledged that the Applicant's removal from Canada would be emotionally and possibly financially difficult for his daughters and family. However, the Delegate found that the Applicant's criminal actions in Canada were too severe to overcome this mitigating factor. The reasons for the decision demonstrate that the

submissions were considered but did not outweigh the effect of the Applicant's criminal convictions.

[14] The Applicant also argues that the Minister's Delegate failed to consider the finding by the British Colombia Supreme Court, in convicting the Applicant, that he was a good candidate for rehabilitation. However, the Delegate did note this finding and the fact that the Applicant had no other criminal record but also concluded that he continued not to accept any responsibility for his actions and conviction, as his submissions claimed ignorance of the criminal activities and blamed his tenants for same. There is no basis to conclude that the Minister's Delegate treated this aspect of the Applicant's circumstances unreasonably.

[15] Finally, the Applicant submits that the Minister's Delegate unreasonably discounted his submission that he faced a risk of being subjected to the death penalty for crimes respecting drugs in China. The Delegate gave little weight to this submission, as there was no evidence the Canadian authorities would disclose the Applicant's criminal history in Canada to Chinese authorities. The Applicant argues that decisions of the criminal courts are reported and that even communication in the course of removing him to China could bring his history to the attention of Chinese authorities. The Respondent notes that that there is no evidence that Chinese authorities are aware of the Applicant's crime or of any prospect that he would be subject to prosecution in China for a crime committed in Canada. As with the Applicant's other arguments, I do not find the Delegate's treatment of this submission to take the decision outside the range of possible, acceptable outcomes as would be necessary to conclude that it is unreasonable.

[16] Overall, the decision by the Minister's Delegate demonstrates consideration of the mitigating factors offered by the Applicant. However, taking into account the large and commercial scale of the trafficking operation in which the Applicant was found by the criminal court to have been involved, the significant and serious nature of the Applicant's role in that operation, and the Applicant's failure to accept responsibility for his actions, the Delegate concluded that the mitigating factors did not override the seriousness of the offences. On this basis, the Delegate made the decision to refer to the Applicant to an admissibility hearing. Taking the decision as a whole, there is no basis for a finding that it is unreasonable.

B. *Did the Minister's Delegate breach natural justice and procedural fairness owed to the Applicant?*

[17] The procedural fairness argument raised by the Applicant relates to a set of guidelines published by Citizenship and Immigration Canada, entitled "ENF 6 - Review of reports under A44(1)" [the Guidelines], which provide guidance on removal orders, reviewing reports prepared under s. 44(1) of IRPA, and the referral of the these reports to the Immigration Division. The Applicant relies on s. 8 of the Guidelines, entitled "Procedure: Handling possible claims for refugee protection", which prescribes a set of procedures for a Minister's delegate to follow in connection with the possibility of refugee claims. The complete text of section 8 is as follows:

> **8 Procedure: Handling possible claims for refugee protection**
>
> Although there is no requirement in IRPA for the Minister's delegate to ask whether the subject of a determination wishes to make a claim for refugee protection, he should be aware of Canada's obligation under the *United Nations Convention relating*

*to the Status of Refugees*, and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

A99(3) excludes persons under removal order from making a claim for refugee protection. Therefore, the Minister's delegate should satisfy himself that removal would not be contrary to the spirit of Canada's obligations before issuing an order, even when the subject does not explicitly request access to the refugee determination process.

It must also be recognized that some people who may have a legitimate need of Canada's protection are unaware of the provision for claiming refugee status.

There is a set of procedures for handling a possible claim for refugee protection:

- Where the subjects of a determination for an administrative removal order have not made a claim, the Minister's delegate should ask them how long they intend to remain in Canada.

- If the persons indicate that their intention is or was to remain temporarily, the Minister's delegate should proceed with the removal order decision and issue the removal order, if appropriate.

- If the persons indicate that their intention is or was to remain in Canada indefinitely, the Minister's delegate is to inquire about their motives for leaving their country of nationality and the consequences of returning there before making a decision on issuing a removal order.

- Where the responses indicate a fear of returning to the country of nationality that may relate to refugee protection, the Minister's delegate is to inform the subjects of the definition of a "Convention refugee" or "person in need of protection" as found in A96 and A97, and ask whether they wish to make a claim.

- Where the subjects indicate an intention not to make a claim, the Minister's delegate should proceed with the decision and issue a removal order, if appropriate.

> - Where the subjects are uncertain, the Minister's delegate informs them that they will not be able to make a claim for refugee protection after a removal order has been issued [A99(3)], and provide them with an opportunity to make the claim before proceeding with a removal order decision.
>
> - If the persons do not express an intent to make a claim, despite the explanation that this is their last opportunity, the Minister's delegate should proceed with the decision and issue the removal order, if appropriate.
>
> - Whenever the persons indicate a fear of returning to their country of nationality, the Minister's delegate is to refrain from evaluating whether the fear is well-founded. As well, the Minister's delegate must not speculate on their eligibility before they have made a refugee claim, nor speculate on the processing time or eventual outcome of a claim.
>
> These procedures do not preclude any subject from making a claim to Convention refugee status at any time before a removal order is issued, regardless of the responses provided to the officer.
>
> In order to address concerns that may arise subsequent to the issuing of a removal order, it is important that the notes accurately reflect—in detail—the questions asked and the information provided by the subject during an exchange such as the aforementioned.
>
> (Emphasis added)

[18] The Applicant argues that the purpose of the Guidelines is to ensure that a prospective refugee who is being considered for s. 44(2) removal is notified of his or her right to make a refugee claim before the possible issuance of a removal order. The Applicant submits that the Minister's Delegate was aware of his intention to remain in Canada indefinitely and that his submissions raised risk of being subjected to the death penalty if he were removed to China. In

reliance on the two paragraphs highlighted above in s. 8 of the Guidelines, it is the Applicant's position that the Delegate was required to inform him of the possibility of making a refugee claim, and to ask whether he wished to do so, before proceeding with the referral to the Immigration Division.

[19] The Applicant raises this argument as a procedural fairness issue, referring to my recent decision in *Vakurov v Canada (Minister of Citizenship and Immigration)*, 2016 FC 841 [*Vakurov*]. That case involved a judicial review of an exclusion order issued by a Minister's delegate to a foreign national. The applicant in that case argued that he had a fear of returning to Ukraine and was deprived of the opportunity to claim refugee protection because the delegate issued a removal order without following the Guidelines and affording him an opportunity to assert a claim. The Court concluded that the Guidelines gave rise to the application of the doctrine of legitimate expectations and that, as the evidence demonstrated that the delegate in that case did not follow the Guidelines, the applicable procedural fairness obligations were not met.

[20] However, as argued by the Respondent, the decision in *Vakurov* is distinguishable, and my conclusion is that the arguments which prevailed in that case have no application to the case at hand. As noted in *Vakurov*, in paragraphs 19 to 22, only a clear, unambiguous and unqualified process can give rise to procedural fairness obligations under the doctrine of legitimate expectations (see *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, at paras 94 to 95; *Canada (Minister of Citizenship and Immigration) v Don*, 2014 FCA 4, at paras 51 to 53). There is no such process prescribed by the Guidelines that is

applicable to the Applicant's circumstances. The difference turns on the fact that *Vakurov* involved a foreign national, such that the role of the Minister's delegate under s. 44(2) of the IRPA was to consider making a removal order. In contrast, the Applicant in the present case is a permanent resident of Canada, such that the role of the delegate under s. 44(2) was not to make a removal order, but rather to consider referring the s. 44(1) report to the Immigration Division for an admissibility hearing.

[21] This is significant, because it is being subject to a removal order which, under s. 99(3) of IRPA, precludes a person from making a claim for refugee protection. This point is expressly set out as follows in s. 8 of the Guidelines:

> A99(3) excludes persons under removal order from making a claim for refugee protection. Therefore, the Minister's delegate should satisfy himself that removal would not be contrary to the spirit of Canada's obligations before issuing an order, even when the subject does not explicitly request access to the refugee determination process.

[22] The procedures for handling a possible claim for refugee protection, set out in s. 8 of the Guidelines, are also expressly framed in the context of a Minister's delegate issuing a removal order. The Guidelines do not prescribe a process, intended to address possible claims for refugee protection, that applies where the delegate is considering a s. 44(1) report in connection with a permanent resident and whether to refer the report to the Immigration Division.

[23] The Applicant submits that s. 19.1 of the Guidelines makes s. 8 apply to reports concerning foreign nationals, as s. 19.1 states that decisions to refer a report to the Immigration

Division for an admissibility hearing should be guided by the same factors as decisions to write an inadmissibility report concerning a foreign national, or to issue a removal order in cases where the Minister's delegate has the jurisdiction to do so. However, s. 19.1 is entitled "A44(1) reports concerning foreign nationals" , in contrast to the immediately following s. 19.2, entitled "A44(1) reports concerning permanent residence of Canada". It is s. 19.2 that applies to the Applicant's circumstances as a permanent resident, not s. 19.1 which applies to reports related to foreign nationals. Section 19.1 therefore provides no basis for a conclusion that the s. 8 procedure for handling possible refugee claims applies to the case at hand.

[24] Finally, the Applicant notes that he does not contest his inadmissibility. As such, he argues that, once the decision was made to refer the s.44(1) report to the Immigration Division, it became automatic that the Immigration Division will issue a removal order. The only exercise of discretion which might have avoided that result was that afforded to the Minister's Delegate. Therefore, unless the Guidelines are interpreted to apply to the Delegate's decision to refer the Applicant for an admissibility hearing, there is no process by which he will receive notice of the potential to apply for refugee protection.

[25] This argument does not assist the Applicant in asserting a breach of his procedural fairness obligations, as the Guidelines still do not prescribe a clear, unambiguous and unqualified process, applicable to his circumstances, that would give rise to such obligations. Moreover, the Applicant acknowledged at the hearing of this judicial review that he is not precluded from making a refugee claim any time before the Immigration Division issues a removal order. It is this fact which most fundamentally distinguishes the Applicant's circumstances from those in the

*Vakurov* case and which, in addition to a plain reading of the Guidelines, supports the conclusion that s. 8 of the Guidelines has no application to his circumstances.

## V. Certified Question

[26] The Applicant proposes that, if the Court makes a decision on this judicial review based on s. 8 of the Guidelines having no application to permanent residents, then the Court should certify the following question:

> Does s. 8 of the guidelines entitled "ENF 6 - Review of reports under A44(1)" apply only to foreign nationals?

[27] The Applicant argues that the answer to this question would be dispositive of an appeal, because his procedural fairness argument would then represent a ground to set aside the Minister's Delegate's decision, and that it is a question which applies more broadly than the circumstances of this case.

[28] The Respondent opposes certification, on the basis that the Guidelines are clearly directed only at the consideration of s. 44(1) reports before issuing removal orders.

[29] I agree with the Respondent's position. The parties have not identified any divergence in the jurisprudence applicable to the procedural fairness issue argued in the case at hand. *Vakurov* relates to a decision to issue a removal order, and s. 8 of the Guidelines make no reference to circumstances where the Minister's Delegate is referring the s.44(1) report to the Immigration Division, let alone making such a reference in a clear, unambiguous and unqualified way. I am

therefore unable to conclude that the proposed question rises to the level of a serious question of general importance. The Court accordingly declines to certify the proposed question.

## JUDGMENT

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

No question is certified for appeal.

"Richard F. Southcott"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **STYLE OF CAUSE:** | GUO LIN CHEN v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
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