Federal Court  Cour fédérale

Date: 20170531

Docket: IMM-4811-16

Citation: 2017 FC 537

Ottawa, Ontario, May 31, 2017

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ZHIWEI PENG, XIAOXU PENG, CHENG PENG

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. Zhiwei Peng [Principal Applicant] and his two minor children, all citizens of the People's Republic of China, seek judicial review of an exclusion order issued by the minister's delegate pursuant to section 228 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations]. The minister's delegate determined that the applicants were

inadmissible to Canada on the ground that they intended to remain in Canada on a permanent basis without previously obtaining the requisite permanent resident visa. Consequently, he removed them from Canada.

II. Facts

[2] In February 2016, the Principal Applicant applied for and obtained a temporary resident visa in order to travel to Canada in March 2016, for a period of six days, with his wife and children. That multiple-entry visitor visa is valid until January 5, 2023, but it only allows the applicants to remain in Canada for a period of six consecutive months each visit. However, as the Principal Applicant was prevented from travelling, at the time, for professional reasons, his spouse came alone to Canada as a visitor.

[3] Once in Canada, the Principal Applicant's spouse, Ms. Zhengqing Xu, obtained a study permit valid until June 30, 2017, at which point she must leave Canada.

[4] In November 2016, the applicants came to Canada to join Ms. Xu who, at the time, had been residing and studying in Canada for over eight months.

[5] Prior to landing, the Principal Applicant completed a declaration card on which he stated that he would be remaining in Canada for a temporary period of 180 days. The applicants arrived at Macdonald-Cartier International Airport where they were interviewed by the immigration officer. The latter concluded that the applicants came to Canada with the intention of establishing themselves permanently while they only held a temporary visa. Therefore, an inadmissibility

report was issued under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[6] The subsection 44(1) report is based on the facts that the Principal Applicant is not a permanent resident; that he declared on his application for a temporary resident visa that he would be accompanying his spouse and two children to Canada; and that he was employed as an engineer in China. He obtained his temporary visa based on the fact that he would be travelling to Canada for tourism and visiting Niagara Falls and the CN tower for six days.

[7] The report also indicates that in fact, the Principal Applicant sought entry to Canada accompanied by his two children to visit his spouse who has been residing in Canada for over eight months. He arrived to visit his spouse who indicated the desire for herself and the Principal Applicant to eventually obtain work authorizations with the hope of remaining on a permanent basis.

[8] The report highlights that the Principal Applicant arrived in possession of eight suitcases containing articles which the immigration officer concluded were uncommonly possessed by travellers arriving to visit temporarily, such as winter and summer clothing, cutlery, bedding, medical records, and multiple hard drives containing important documents and photos. Additionally, the applicants arrived in Canada on a one-way ticket, the Principal Applicant is currently unemployed in his country of nationality, he sold his house in China, he sold his family vehicle, he has no previous travel history to Canada, he removed his 6-year-old son from school in China, he was in possession of $10,000 in Canadian dollars, and he was not in possession of a

permanent resident visa nor a confirmation of permanent residence, as required under the Regulations to establish himself permanently in Canada.

[9] The minor applicants were also issued subsection 44(1) reports, which outlined that they were inadmissible to Canada pursuant to paragraph 42(1)(*b*) of the IRPA for being accompanying family members of an inadmissible person.

III. Impugned Decision

[10] The subsection 44(1) report was then submitted to the minister's delegate who concluded that it was well-founded. The minister's delegate found that the applicants were not *bona fide* visitors. Accordingly, he issued an exclusion order against the applicants and removed them from Canada.

[11] The exclusion order states that pursuant to section 228 of the Regulations, it is made against the applicants because the minister's delegate is satisfied that, on a balance of probabilities, they are foreign nationals as described under paragraph 41(*a*) of the IRPA.

[12] Paragraph 41(*a*) of the IRPA provides that a person is a foreign national if, on a balance of probabilities, there are grounds to believe they are inadmissible for failing to comply with the Act.

[13] As the minister's delegate was of the opinion that the applicants entered Canada with the intention of remaining on a permanent basis, and that they did not arrive with permanent resident visas, he concluded that they were inadmissible.

IV. Issues and standard of review

[14] This application for judicial review raises the following issues:

A. *Is the decision of the minister's delegate to issue an exclusion order against the applicants reasonable?*

B. *Were the principles of procedural fairness breached?*

[15] This Court has on many occasions recognized that exclusion orders, such as those issued in this case, are administrative decisions made in the exercise of a discretionary power (see for example *Mata v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 200 at para 6). Therefore, the exclusion orders are entitled to considerable deference in view of the decision-maker's expertise and experience on the matter (*Mata*, above at para 6 referring to *Ouedraogo v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 810 at paras 21-23 and *Canada (Minister of Public Safety and Emergency Preparedness) v Cha*, 2006 FCA 126 at paras 18-22, 33, 38).

[16] In this case, the Principal Applicant is essentially challenging the merit or basis of the decisions of the minister's delegate. As a result, the applicable standard of review is one of reasonableness (*Mata*, above at para 6 referring to *Sibomana v Canada (Citizenship and Immigration)*, 2012 FC 853 at para 18). Under the standard of reasonableness, this Court is

concerned with whether the decision at issue "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[17] As for alleged breaches of procedural fairness, they are reviewable on a standard of correctness (*Sibomana*, above at para 18; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

V. Analysis

A. *Is the decision of the minister's delegate to issue an exclusion order against the applicants reasonable?*

[18] The applicants arrived in Canada without permanent resident visas. Thus, the question is whether it was reasonable for the minister's delegate to conclude that the applicants would not leave at the end of their period of authorized stay, despite their assertions that they came to Canada as temporary residents.

[19] The Principal Applicant argues that the conclusion of the minister's delegate is unreasonable because he failed to consider that the applicants came to Canada as temporary residents, and that their intent at the time was to remain for an initial period of four years, that is for the period of validity of their spouse/mother's study visa, plus the time she would eventually be allowed to remain on a temporary work visa. The minister's delegate rendered a decision which the Principal Applicant argues is inconsistent with the objectives of the Act to reunite families and attract international students.

[20] Respectfully, I disagree with the applicants on both points.

[21] In my opinion, the findings of the immigration officer and the minister's delegate fall well within a range of possible outcomes and are reasonable.

[22] The Principal Applicant is in possession of a valid seven-year multiple-entry visa. In his view, so long as his visit has a temporary purpose, this visa allows him to reside in Canada. Given that he intended to reside in Canada for a temporary period of four years, he states that he was in possession of the proper documentation and the exclusion order is therefore unreasonable.

[23] However, and as stated above, the visitor visa for temporary residents only allows the applicants to stay in Canada for a period of six months, unless another period is fixed by an officer (subsection 183(2) of the Regulations). There is no documentation in the record, or allegations by the Principal Applicant, suggesting that a period other than that which is prescribed by the Regulations is in effect. Consequently, by virtue of the interplay between subsections 183(1), (2), and (3) of the Regulations, the applicants would be under the obligation to leave Canada at the end of their six-month period of authorized stay, unless they applied for and were issued documentation allowing them to extend their stay.

[24] Nevertheless, the applicants travelled to Canada with eight suitcases which contained what would reasonably be seen as all of their belongings, after having sold their house and family vehicle, and after the Principal Applicant having resigned from his employment. It was reasonable for the immigration officer and the minister's delegate to find that this suggested an

intention to remain in Canada permanently without the appropriate documentation, contrary to the Principal Applicant's allegations.

[25] According to the record before me, the Principal Applicant's spouse has a student permit valid until June 30, 2017. The Principal Applicant explains that his spouse intends to apply for a three-year post-graduation work permit upon completion of her studies. However, the record does not show that she had so applied and that she is authorized to stay past June 2017.

[26] It is therefore unclear why, in light of their precarious status here in Canada, the applicants would sever virtually all ties with their home country if they did not intend on staying in Canada permanently.

[27] In the present case, there was sufficient evidence on record to lead the officer to believe that the applicants would have overstayed their period of authorized stay. The Principal Applicant did not provide evidence of remaining ties with his country of origin which would have indicated a likelihood of leaving Canada when required. The conclusion of the minister's delegate to issue an exclusion order in this case is reasonable.

[28] The Principal Applicant also argues that the decision is unreasonable because the minister's delegate failed to take into account the objectives of the Act with respect to family reunification and to facilitating the entry of international students.

[29] However, I agree with the Respondent that although the principle of family reunification is one of the objectives of the IRPA, it cannot supplant the basic requirement of compliance with the Act (*Bernard v Canada (Citizenship and Immigration)*, 2011 FC 1121 at para 14). Same can be said with respect to the argument that the decision is unreasonable because the minister's delegate failed to consider the importance of facilitating the entry of international students, which the Principal Applicant argues includes facilitating the entry of visiting family. The Principal Applicant does not cite jurisprudence to support this assertion and I am not convinced that the minister's delegate committed a reviewable error.

[30] The role of this Court is not to reweigh the evidence contained in the record and substitute its own conclusions or findings to those of the immigration officer or minister's delegate. The Principal Applicant has not demonstrated that the conclusion of the minister's delegate fell outside the range of possible outcomes. Therefore, and in light of the above, I am of the opinion that the decision to issue an exclusion order against the applicants is reasonable.

B. *Were the principles of procedural fairness breached?*

[31] The Principal Applicant further argues that his procedural fairness rights were breached. He alleges that he was not provided with the opportunity to make submissions or to present evidence.

[32] Respectfully, I disagree.

[33] The Principal Applicant has not demonstrated that he was not provided with the opportunity to make submissions or to present evidence. He was provided with a Mandarin translator during the interview to ensure that he fully understood what was being said to him and any documents that were presented to him. The Principal Applicant was asked questions and given an opportunity to answer and comment.

[34] During his interview with the immigration officer, the Principal Applicant even asked for an open work permit. He was then informed that such a document has to be obtained before entering Canada, and cannot be delivered at the point of entry.

[35] Counsel for the applicants argued for the first time at the hearing that this was an additional reviewable error made by the immigration officer who should have issued the required visa instead of having made a subsection 44(1) report. The Court granted counsel a delay to provide authorities supporting that new assertion.

[36] By letter dated May 18, 2017, the applicants argued that if paragraphs 199(*d*) and (*e*) of the Regulations did not apply to their situation, subsection 198(1) did. Those provisions read as follows:

Application on entry	**Demande au moment de l'entrée**
198 (1) Subject to subsection (2), a foreign national may apply for a work permit when entering Canada if the foreign national is exempt under Division 5 of Part 9 from the requirement to obtain a	**198 (1)** Sous réserve du paragraphe (2), l'étranger peut, au moment de son entrée au Canada, faire une demande de permis de travail s'il est dispensé, aux termes de la section 5 de la partie 9, de

temporary resident visa.	l'obligation d'obtenir un visa de résident temporaire.
[…]	[…]
Application after entry	**Demande après l'entrée au Canada**
199 A foreign national may apply for a work permit after entering Canada if they	**199** L'étranger peut faire une demande de permis de travail après son entrée au Canada dans les cas suivants :
[…]	[…]
(d) hold a temporary resident permit issued under subsection 24(1) of the Act that is valid for at least six months;	**d)** il détient, aux termes du paragraphe 24(1) de la Loi, un permis de séjour temporaire qui est valide pour au moins six mois;
(e) are a family member of a person described in any of paragraphs (a) to (d);	**e)** il est membre de la famille d'une personne visée à l'un des alinéas a) à d);
[…]	[…]

[37] Respectfully neither of these provisions applies to the applicants' situation.

[38] In order for section 199 to apply, an applicant must already be in Canada. That is, he or she must have been permitted entry on a valid and proper visa. The applicants were not permitted entry because the immigration officer found that they would not leave at the end of their permitted stay. They did not have the proper visa to enter Canada with the intention to stay more than six months.

[39] It is true that section 198 of the Regulations makes it possible to apply for a work permit at a port of entry, but only for those foreign nationals who are exempted from the requirement of

obtaining a temporary resident visa, may it be in reason of their country of origin, of their diplomatic status, or on the basis of their travelling itinerary or purpose (crew members). The applicants were not exempted from obtaining a temporary resident visa before entering Canada.

[40] I am therefore of the view that the Principal Applicant's procedural fairness rights were not breached in this instance, and that neither paragraphs 199(*d*) and (*e*), nor subsection 198(1) of the Regulations, applied to the applicants' situation.

VI. Conclusion

[41] In light of the above, I find that the decision of the minister's delegate is reasonable and that there was no breach of procedural fairness. Therefore, this application for judicial review will be dismissed. The parties did not propose any questions of general importance for certification and none arise from this case. Finally, the Respondent seeks an order modifying the style of cause for the sole Respondent to be the Minister of Public Safety and Emergency Preparedness and such an order will be issued.

JUDGMENT in IMM-4811-16

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;
2. No question of general importance is certified;
3. The style of cause is modified and the Minister of Immigration, Refugees and Citizenship is withdrawn as a Respondent.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4811-16
STYLE OF CAUSE:	ZHIWEI PENG, XIAOXU PENG, CHENG PENG v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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APPEARANCES:

J. Reynaldo Marquez	FOR THE APPLICANTS
Sherry Rafai Far	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Wellstein Mora Rodriguez International S.A. Montréal, Quebec	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT