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Dockets: IMM-1028-07
IMM-1098-07
IMM-1026-07
IMM-1099-07

Citation: 2007 FC 941

Ottawa, Ontario, September 21, 2007

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

DONG HU LI & DONG ZHE LI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] These are four applications for judicial review, in which two brothers, Mr. Dong Hu Li and Mr. Dong Zhe Li (the applicants), brought two applications each with respect to the same exclusion order that was issued against them on February 26, 2007, by Mr. David Findlay (the Minister's Delegate). All four applications were heard together. They are based on the same set of facts and raise identical issues.

I. Issues

[2] The applicants seek an order quashing the exclusion order on the following grounds:

1. The Minister's Delegate violated the principles of procedural fairness by denying the applicants the opportunity to instruct counsel as guaranteed by section 10(b) of the *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. (the *Charter*);
2. The Minister's Delegate failed to give notice of the Overstay Hearing and did not disclose the section 44 Reports until asked for at the meeting; thereby undermining their right to make submissions, in violation of the principles of procedural fairness;
3. The Minister's Delegate erred in fact and in law by finding that the applicants were each barred from making a refugee claim after having rendered an oral exclusion order, and
4. The Certified Tribunal Records are incomplete and therefore do not comply with the requirements of the *Federal Courts Rules* (the Rules), S.O.R./98-106.

[3] The first two issues of procedural fairness are dealt with in applications IMM-1028-07 *Dong Hu Li v. Minister of Citizenship and Immigration (MCI)*, and IMM-1026-07 *Dong Zhe Li v. MCI.*, whereas the third issue regarding the oral exclusion order forms the basis of applications IMM-1098-07 *Dong Hu Li v. MCI*, and IMM-1099-07 *Dong Zhe Li v. MCI.* The final matter pertaining to the adequacy of the Certified Tribunal Record was resolved by way of motion in Vancouver, on August 29, 2007. This issue is therefore moot.

[4] For the reasons that follow, this Court finds that each of the three remaining substantive issues is without foundation in fact and in law. The applications shall therefore be dismissed.

II. Facts

[5] The applicants are Chinese citizens who came to Canada on New Years Eve 2004. They each entered the country on a Temporary Residents Visa (TRV), which they did not seek to extend upon expiration. Instead of leaving the country when their visas expired, the applicants remained in Canada illegally and took concerted steps to avoid Canadian authorities. In fact they went into hiding at the Sheraton Wall Centre Hotel in downtown Vancouver after the arrest of an associate GAO, Shan and his wife, LI, Xue, on February 16, 2007.

[6] Based on information provided by the Chinese authorities, the applicants allegedly fled the People's Republic of China (China), a few weeks before they were both charged with theft of over 170 million Yuan (equivalent of $24,500,000 CA), through negotiable instruments fraud. The brothers were the subject of a warrant for arrest dated January 24, 2005 issued by the People's Protectorate of Harbin City, Heilongjiang Province, China, under article 194 of the *Criminal Law of the People's Republic of China*. If committed in Canada, this offence would be equivalent to paragraph 380(1)(a) of the *Canadian Criminal Code*, R.S.C. 1985, c. C-46, fraud over $5,000.00, an indictable offence punishable by a maximum term of imprisonment of fourteen years

[7] Armed with these Chinese arrest warrants on November 14, 2006, the Immigration Enforcement Officer, Cheryl Shapka (Officer Shapka) issued an inadmissibility report pursuant to subsection 44(1) of the *Immigration and Refugee Protection Act*, (the Act), S.C. 2001, c. 27. [The relevant passages of the Act are attached to these reasons in Annex "A"]. Moreover, Officer Shapka issued a second inadmissibility report against the applicants for having overstayed their visitor's visa. Two days later, on November 16, 2006, Officer Shapka issued warrants for their arrest.

[8] The applicants went underground and succeeded in eluding the Canadian authorities. When officers of the Vancouver Police Department (VDP) eventually tracked them down at the hotel and came knocking at their door on Friday, February 23, 2007, they refused to open the door to the police. Resorting to the use of a Special Entry Warrant, the VDP officers entered the applicants' hotel suite. The applicants were arrested and taken into custody that same day.

[9] Both applicants were detained at the North Vancouver RCMP detachment where they were read their rights. In addition, Officer Shapka interviewed each applicant separately at the RCMP detachment and informed them that they had been arrested for inadmissibility to Canada as a result of the serious fraud charges against them in China, pursuant to paragraph 36(1)(c) of the Act. She also informed them that they were arrested and detained pursuant to section 55 of the Act because of their refusal to leave Canada or apply for an extension when their TRV expired.

[10] The applicants were afforded an opportunity to contact a lawyer, Mr. Stanley Foo who met with the applicants separately on Friday, February 23, 2007. He spoke with them twice on Friday and on two separate occasions on Saturday, February 24, 2007.

[11] On Friday, February 23, 2007, Mr. Foo also contacted Leonard Kompa, a criminal lawyer with experience in immigration law. Over the course of the weekend, both lawyers discussed the matter on six different occasions, with one face to face meeting on Sunday, February 24, 2007 and exchanged documentation. Mr. Foo retained Mr. Kompa to appear as his agent and represent the applicants at their detention review hearing and admissibility hearing, which were scheduled for the afternoon of Monday, February 26, 2007.

Events on Monday, February 26, 2007: Affidavit evidence

[12] The applicants have each sworn affidavits dated March 25, 2007, in support of their applications detailing the events on Monday, February 26, 2007. The applicants' affidavits differ and contradict in parts the three affidavits signed by their Lawyer Mr. Leonard Kompa (The Kompa affidavits). The Kompa affidavits were sworn on March 15, 2007, March 21, 2007 (the March Kompa affidavits) and April 13, 2007. The contents of the March Kompa affidavits are identical, whereas that sworn on April 13, 2007 has additional elements notably to paragraphs 15, 17 and 19. Both the applicants' affidavits and the Kompa affidavits differ significantly in parts from the affidavit of Mr. David Findlay (the Findlay affidavit), which was sworn on May 3, 2007. For the reasons I explain below, I shall rely on the details of the events on Monday, February 26, 2007 provided in the Findlay affidavits.

[13] First, each affiant was cross examined on the following dates:

a. Cross-Exam on affidavit of David Findlay took place on July 26, 2007;
b. Cross-Exam on affidavit of applicant Dong Hu Li took place on August 1, 2007;
c. Cross-Exam on affidavit of applicant Dong Zhe Li took place on August 1, 2007; and
d. Cross-Exam on affidavit of Leonard Kompa took place on August 2, 2007.

[14] Second, having carefully reviewed the transcript of the cross examination of each affiant, I arrive at the following observations:

a. David Findlay: By way of background, Mr. Findlay has worked with Immigration Canada for almost 29 years and with the Canada Border Services when that agency took over the investigations services in 2002. At that time Mr. Findlay served as an Inland Enforcement Officer. On February 26, 2007, he was acting as a Minister's Delegate, a function he has carried out for almost seven years. As a Minister's Delegate, his role is to hear certain types of cases such as detention reviews. The Minister's Delegate can also release people and issue orders, including deportation orders, exclusion orders and partial orders.

I find Mr. David Findlay's evidence to be credible. Under cross examination, his answers are consistent with his affidavit, which in turn reflect the recorded notes from the Minister's Delegate Hearing, dated February 26, 2007. In addition, there is no evasion in responding to questions of the cross examiner. On the contrary, Mr. Findlay is straight forward and precise in his answers.

b. Applicant Dong Hu Li: Mr. Dong Hu Li was cross examined with the aid of Mr. Miguel Tu, an interpreter who provided interpretation from Mandarin to English and English to Mandarin. I find the applicant Dong Hu Li answered the questions as he understood them and provided clarification when there was apparent confusion. His answers did not always reflect his prior statements contained in his affidavit and at times contradicted the evidence provided in the Kompa affidavits.

c. Applicant Dong Zhe Li: Mr. Dong Zhe Li was also cross examined with the aid of the interpreter, Mr. Miguel Tu. The applicant's answers to the questions are consistent with those of his brother's, Dong Hu Li and provide additional information that in his recollection contradicts the evidence in the Kompa affidavits. For example, under cross examination, the applicant Dong Zhe Li responded as follows:

> **Q. 164 ff, p. 27:**
> **[. . .]**
> **Q.** Okay. So then Mr. Findlay in the afternoon said he was a Minister's Delegate?
> **A.** Yeah, he said that in the afternoon while he was reading out a document to us.
> **Q.** Okay. And he asked you some questions as well, didn't he?
> **A.** Nothing.
> **Q.** He didn't?
> **A.** He didn't ask anything.
> **Q.** He didn't ask you any questions?
> **A.** No.
> **Q.** It's just that Leonard Kompa in his affidavit in these judicial reviews says that Mr. Findlay did ask you some questions. Is Mr. Kompa wrong?
> **A.** I'm not sure, because in my recollection that officer did not ask me any question.
> **Q.** So whose recollection is right, yours or Mr. Kompa's?
> **A.** I don't know, because in my recollection all he did was he came in and read out a document to us.
> **[. . .]**

d. Mr. Leonard Kompa: Mr. Leonard Kompa was called to the Bar of British Columbia in November 1988. Between 1988 and 1994, his practice consisted of approximately 75% immigration law and 25% criminal law. Since 1994 onwards, his practice has been approximately 85% criminal law and 15% litigation matters mainly in administrative law, including some immigration law cases. In terms of actual immigration files, Mr. Kompa stated under cross examination that he has handled no more than five or six immigration matters a year, and in the last three years, probably one or two a year. In terms of 2007, 2006, the present file was one of the few immigration files that he had. (Cross-Exam on Affidavit of Leonard Kompa, Q 23 ff, at page 6. See also Q. 3, p. 1; and Answer to Q. 21, p. 5.)

After a careful review of Mr. Kompa's three affidavits and the transcripts of his cross examination on these affidavits, I observe that Mr. Kompa has experience in criminal law but limited practice in immigration law since 1994. His experience is largely under the Old Immigration Act, which was repealed in 2002. I do not find Mr. Kompa demonstrated a full grasp of the process under the present Act. Mr. Kompa did not know elementary procedures of an admissibility proceeding under the present Act. For instance, by his own admission, he did not know what a section 44 Report is. He acknowledges that Mr. Findlay is an Immigration Officer and that as the Minister's Delegate he was dealing with the overstay and that the consequence of an overstay hearing is removal. This is what Mr. Kompa had to say in this regard under cross examination:

Q. 476, p. 103:
[. . .]
Q. Mr. Findlay tells you he is a dealing with the overstay, isn't that right?
A. At some point in time, but that's not until –
Q. Your affidavit says you asked him when he came back in the room what his role was and he said that he was dealing with the overstay?
A. Yes.
Q. Is that true?
A. Yes.
Q. All right. So what did you understand by his telling you he was dealing with an overstay?
A. Again, it was unclear to me, and it's at that point in time that I ask him does he have a copy of a report, or I believe I said, "Look, I haven't seen any disclosure and it's" --
Q. Well, you had disclosure, you had three volumes of disclosure. Why were you asking Mr. Findlay for disclosure?
A. No, but in terms of the overstay. My experience in terms of dealing with Immigration under the old Act was there had to be some sort of Minister's report generated at some point in time.
[. . .]

Q. 483, p. 104:
Q. So when Mr. Findlay said he was dealing with the overstay you asked him for disclosure, is that right?
A. Yes.
[. . .]

Q. 484 p. 105:
Q. Because you were anticipating a report, is that right?
A. Or some sort of disclosure, yes.
[. . .]

Q. 488 p. 105:
Q. Is this a s. 44 report that you're referring to?
A. Again, I'm not sure about the current sections of the Act.
Q. They used to be called s. 27 reports, under the new Act they're called s. 44 reports?
A. I'm not familiar with the section.
Q. You were expecting a report that made allegations about inadmissibility, is that right?
A. Yes.

Q. And your purpose in requesting that report was so that you could have an opportunity to discuss the consequences with the Li brothers?
A. Correct.
Q. Okay. And what were those consequences?
A. Again, if eventually the allegations were established, they may face eventual removal from Canada.
Q. Mr. Findlay handed you the report. Did you tell him you needed more time to talk to your clients now that you saw these allegations, that there were these allegations with these consequences?
A. Again, given – given his demeanour, given his mindset, I knew it was useless at that point in time.
[. . .]

Q. 528 p. 112:
Q. Mr. Findlay told you he was a Minister's Delegate didn't he?
A. Yes.
Q. Mr. Kompa, did you know that a Minister's Delegate had authority under s. 44(2) of IRPA – I R P A – to make a removal order?
A. No.
[. . .]

More importantly however, I do not find Mr. Kompa to be consistent in his story. Mr. Kompa changed his story on more than one occasion and demonstrated vagueness in answering questions or was quite simply, not factual in his answers under cross examination. For instance, and to cite but one of the more egregious passages, in his response to Q. 289, p. 66, Cross-Exam on affidavit of Leonard Kompa, he responded as follows:

[. . .]
Q. You're not sure if you reviewed Mr. Findlay's affidavit before or after you swore Exhibit 1?
A. No, before I – there's two affidavits you've referred me to. One of them is sworn April 13, the other affidavit is sworn March 15. And your question was do I have an explanation for the additional information in the April 13 affidavit. My recollection is after I swore the March 15 affidavit I had reviewed Mr. Findlay's affidavit and the additional paragraphs were added in in [*sic*] response to some of the issues he had raised in his affidavit.

> **Q.** It's just that Mr. Findlay's affidavit was sworn on May 3rd, 2007?
> **A.** Okay. Other than that –
> **[. . .]**
>
> **At Q.** 292 p. 67, the questions continue:
> **Ms. SOKHANSANJ:** All right. Well, I'm trying to understand why it is that these two versions are different.?
> **A.** No
> **Q.** Mr. Kompa, your first explanation was because you looked at Mr. Findlay's affidavit in between, but that doesn't correspond with the date of Mr. Findlay's affidavit. So what is the second explanation? I would like to understand it better.
> **A.** Mr. Elgin and I had discussions about the affidavits that needed to be prepared for the Federal Court matter, and in terms of there were some discussion about the wording and language, and there was additional information that was inserted at one point in time.
> **[. . .]**

Mr. Kompa also did not do the necessary preparation to be able to deal with the cross examination. He acknowledged that he did not consult his notes prior to the cross examination although he had time to do so. (See Cross-Exam on Affidavit of Leonard Kompa, pp. 61 and 62). Moreover, he allowed some elements to be added to his affidavit because of third party intervention even though they were not material witnesses. In addition, there are contradictions not only between Mr. Kompa's accounts and that of the applicants but also with the clear evidence provided by Mr. Findlay.

> Finally, an examination of the transcripts clearly indicates that the applicants only made known their intent to file a refugee claim near the end of the interview and after the exclusion order had been pronounced. Mr. Kompa states that he was an agent of Mr. Foo who nonetheless had the opportunity to see the clients the morning of February 26, 2007. Indeed, as Mr. Kompa admits at page 72 of his cross examination, the applicants never informed him that they were at risk in China. In essence Mr. Kompa was inconsistent in many instances not only with his clients but also with the contents of his multiple affidavits.

[15] To conclude the findings of fact based on the affidavits and cross examination on affidavits, I rely only on the account of events provided by Mr. David Findlay particularly in the instances where there are differences in the accounts of events provided as between the applicants account and Mr. Kompa's and as between the evidence provided by Mr. Findlay.

[16] As such, the Court accepts as fact that Mr. Kompa knew before hand who Mr. Findlay was and his purpose of the admissibility hearing to deal with the overstay of the applicants. The Court further accepts as fact that prior to the commencement of the overstay hearing, the Minister's Delegate gave Mr. Kompa about 10 minutes to meet with the applicants together with an interpreter and upon Mr. Kompa's request an additional time of about 5 minutes was given to Mr. Kompa to complete his consultation with the applicants.

[17] At the end of this additional time, the Minister's delegate returned and asked if they were ready to proceed and the lawyer responded in the affirmative. The Minister's Delegate introduced himself and explained the purpose of the hearing to determine if the applicant had overstayed their status. Counsel asked whether there would be another admissibility hearing with the Adjudication Branch and the Minister's delegate said "No;" these types of hearings were held with a Minister's Delegate. Counsel asked if there were any disclosures and the Minister's delegate gave him the section 44 reports.

[18] The Overstay Hearing proceeded with the Minister's delegate ascertaining the information contained in the section 44 reports. Notably, the applicants came to Canada on December 31, 2004 with temporary resident visas valid for six months. The applicants did not apply for an extension of their visas at the end of their term of validity. They did not receive an extension of their visas. They have remained in Canada continuously since their arrival in December 2004. There is a warrant for their arrest in China.

[19] The Minister's Delegate read these findings of the section 44 reports and after each item of information asked the applicants if everything was true and correct and they replied "Yes." The Minister's Delegate then explained that since there was no argument on the facts of the case that the applicants had overstayed their status, the Minister's Delegate was ordering them excluded.

[20] Counsel then asked if the Minister's Delegate would also be dealing with his clients' detention hearing; to which he was informed that this would be dealt with by the Immigration Division of Application upstairs later that day. Counsel then stated that the applicants may want to make an application for refugee status; at which point the Minister's Delegate informed Counsel that as he had already concluded his hearing and ordered the applicants excluded, they were no longer eligible to make a refugee claim, pursuant to subsection 99(3) but that they could make an application under the Pre-Removal Risk Assessment (PRRA).

[21] Counsel informed the Minister's delegate that the applicants wanted to make a refugee claim. The Minister's Delegate asked if the applicants had made their intentions known to the arresting Immigration Officer and Counsel did not know and the applicants were not sure. That is why the Minister's Delegate explained that if the applicants had previously made it known that they wanted to apply for refugee status then they would not be barred from pursuing a refugee claim. However, since the applicants were not sure if they had and Counsel did not know, the Minister's Delegate informed them that he had to review their files and speak with the Immigration Officer who had interviewed them immediately after arrest. The Minister's Delegate further explained that if there had not been any previous indication, then his exclusion order would stand but if they had told someone previously, then he would lift the exclusion order. The Minister's Delegate advised Counsel that he would inform of the results of his review the following morning, on February 27, 2007 and concluded the hearing.

[22] The Court further accepts as fact that neither applicant nor Mr. Kompa raised any objections after the proceedings began and did not make any prior disclosure of their intention to make a refugee claim until after the Minister's Delegate had rendered his oral exclusion order.

[23] The Court also accepts as an undisputed fact that after the applicants' declared that they may have an intention to make a refugee claim, the Minister's Delegate informed them of the bar to making such a claim pursuant to subsection 99(3) of the Act. The Minister's Delegate further undertook to verify that the applicants did make their intentions known prior to the making of his exclusion order in order to avail them of the full benefits of the Act.

[24] The Court accepts that the Minister's Delegate reviewed the applicants' immigration files and their arrest profiles, including interviewing Officer Shapka. Following this review, the Minister's Delegate confirmed that the applicants did not make their intentions known to any immigration officials or to the arresting officers of the VPD. As such they were therefore ineligible to make a refugee claim in light of the exclusion order. The applicants' overstay hearing reconvened on Tuesday, February 27, 2007, where the Minister's Delegate disclosed the results of his review revealing that neither applicant had ever expressed any intention to file a refugee claim until the moment after which the exclusion order was made and the meeting neared its conclusion.

[25] In light of this presentation of the facts, the applicants allege that the Minister's Delegate breached the principles of procedural fairness and erred in law by stating that they could not apply for refugee status because they were subject to a removal order. They also allege that the Minister's Delegate did not give them proper notice of the Overstay hearing and limited their time to confer with and instruct Counsel.

III. Impugned decision

[26] The essence of the applicants' contentions centres on the Minister's Delegate proceedings and the ensuing oral exclusion order of February 26, 2007, which was confirmed in writing on February 27, 2007, following inquiries to determine whether the applicants had made refugee claims prior to the pronouncement that an exclusion order was being issued against them. The Minister's Delegate asked the applicants to sign the exclusion order but upon Counsel's urging, they both refused to sign. As is required by the Guidelines, the Minister's Delegate marked the order "Refused to sign" and provided them with copies. The Minister's Delegate then asked them if they wished to make a PRRA application and both brothers said "Yes." That is why the Minister's delegate gave them each copies of the application and a covering letter indicating the address and dates the application and further written submissions had to be given to the PRRA Unit.

IV. Analysis

1. *Breach of the principles of procedural fairness: Right to Counsel*

Standard of Review

[27] It is trite law that where there is an alleged breach of the principles of procedural fairness, the standard of review is one of correctness. In such circumstances, the reviewing Court is not required to undertake the pragmatic and functional analysis to determine the applicable standard of review.

[28] To read the applicants' allegations, the unwary observer would believe that the applicants were represented by someone who was not knowledgeable of their case and to make matters worst, they were denied sufficient time to meet with this total stranger on the afternoon of February 26, 2007. The applicants and Mr. Kompa neglect to inform the observer however that they had met with their other lawyer Mr. Stanley Foo on the morning of February 26, 2007 and he would have had advised them that he would not be representing them that afternoon but that one of his associates with criminal law experience would act as his agent on their behalf in the proceedings that would follow.

[29] Notwithstanding the fact that Mr. Stanley Foo has been totally absent from these proceedings, it is professionally disingenuous for Mr. Kompa, his agent to then pretend that he was merely having his very first meeting with the applicants and he was truly unaware of the issues of their case. Mr. Kompa was contacted by the applicants' lawyer Mr. Stanley Foo at the earliest opportunity on Friday evening. The evidence is undisputed: both Messrs Foo and Kompa spoke on three separate occasions that Friday, February 23, 2007. They spoke at least twice again on the following day, Saturday, February 24th and had a face to face meeting on Sunday, February 25, 2007 and documentation was exchanged. He also met with them for at least 15 minutes.

[30] Admittedly, the applicants have not provided the Court with the benefit of an affidavit from Mr. Stanley Foo or a cross examination on affidavit, such that it can be ascertained what if anything Mr. Stanley Foo told the applicants about the proceedings in the afternoon that he would not be able to attend or that an agent would represent them on his behalf. Be that as it may, the Court is unmoved by the applicants' simple pretences that they were without Counsel; finding themselves as it were in a hapless situation reluctantly agreeing under pressure from the Minister's Delegate to be represented by Mr. Kompa when the Minister's Delegate arrived to begin the admissibility hearing on the applicants' overstay status.

[31] Moreover, when Mr. Kompa asked for some time to meet with his clients, the Minister's Delegate acquiesced even though the request came within minutes of the start of the hearing. The Court notes that Mr. Kompa was late in arriving at the Court House to meet with the applicants. At the end of the initial ten minutes, although the applicants and Mr. Kompa dispute the length of this initial meeting, the Minister's Delegate returned to the room and asked if Mr. Kompa and the applicants were ready to proceed. They were not and asked for some more time. The Minister's Delegate granted their request. At the end of the allotted additional time, the Court notes that the Minister's Delegate did not proceed directly to the meeting. On the contrary, the Minister's Delegate again asked if the applicants and Mr. Kompa were ready to proceed with the meeting. And they said "yes."

[32] That is why the Court fails to follow the applicants' argument that they were not given a reasonable opportunity to exercise their right to Counsel as guaranteed by section 10 (b) of the Charter. In fact, the applicants were given time to meet with Counsel. Counsel was not unrehearsed in their file. As agent of the applicants' Counsel, he was prepped and provided with documentation over the course of the weekend. The applicants and Mr. Kompa were asked repeatedly if they were ready to proceed, and the meeting did not proceed until they agreed that they were ready to do so. Moreover, the Court fails to find in the documents before it any instance in which the applicants or their Counsel raised an objection or asked for an adjournment of the overstay proceedings once they began.

[33] The applicants have not satisfied this Court that the Minister's Delegate breached the principles of procedural fairness by denying them adequate access to Counsel.

2. *Breach of the principles of procedural fairness: Failure to provide prior notice of the meeting and disclosure of the section 44 Reports*

[34] With respect to the applicants' allegations that the Minister's Delegate failed to provide prior notice of the overstay hearing and disclosure of the section 44 reports, or did not have an opportunity to make submissions, the evidence shows that the Minister's Delegate did give Mr. Kompa a copy of the 2-page report on each applicant when he requested it during the hearing. The Minister's Delegate used this report to question the applicants. The Minister's Delegate asked if they understood the contents of the report as each allegation was read and they agreed with its contents. Neither the applicants nor Mr. Kompa raised any objections to the questions or to the contents of the reports even when they were invited to raise any questions. The applicants did not dispute the facts relevant to the overstay allegation, which forms the essence of the section 44 reports.

[35] This two-page report is succinct and clear for both applicants. Pursuant to subsections 41(A) and 29 (2), the applicants were inadmissible for having failed to comply with the Act in that they were admitted into Canada under temporary resident visas for a period of not more than six months and they neither applied for nor received an extension of their temporary resident status in Canada and were subject of an arrest warrant from China for the offence of negotiable instruments fraud.

[36] The applicants' allegation that they were not given prior notice of the overstay hearing is without foundation in fact. On the warrant for arrest for each applicant, it is clearly indicated that an admissibility hearing is to be held. (See Applicant's Record Tab 7 in each of the 4 applications). The admissibility hearing involved their overstay status, fact that Mr. Kompa acknowledges under cross examination.

[37] For these reasons, the Court finds that the applicants' allegations of breach of procedural fairness are unsupported by the evidence both with respect to the access to disclosure of the section 44 reports and to the allegations of failure to give notice of the overstay proceedings.

3. *The oral exclusion order: ineligibility to file a refugee claim*

Standard of Review

[38] As stated near the beginning of these reasons, this issue is dealt with in IMM-1098-07 *Dong Hu Li v. M.C.I.* and in the corresponding applicant file IMM-1099-07 *Dong Zhe Li v. M.C.I.* The applicants call upon this Court to determine whether the Minister's Delegate erred in fact and law in his interpretation of subsection 99(3) when he declared that they were ineligible to claim refugee status because they were subject to a removal order.

[39] Without undertaking the four-part analysis in the functional and pragmatic approach, this question is one of law requiring the Court to determine whether the Minister's Delegate was correct in his interpretation of the relevant provisions of the statute. The standard of review is one of correctness.

[40] It is this Court's studied opinion that the Minister's Delegate was correct in declaring that the applicants were subject to an exclusion order and thus precluded them *ipso facto* from filing a refugee claim. The applicants argue that at the time Mr. Kompa declared that the applicants "may wish" to make a refugee claim, they were not yet subject to a removal order because the exclusion order had not been prepared and signed by the Minister's Delegate. There is no provision in the Act, nor is there anything in the Minister's Guidelines, the applicants further argue that would make Mr. Findlay's oral declaration an effective removal order for the purposes of subsection 99(3).

[41] Moreover, Section 236 of the *Immigration and Refugee Protection Regulations* (the Regulations) SOR/2002-227 provides that a person against whom a removal order has been made shall be provided with a copy of the order when it is made. The applicants argue that since the Minister's Delegate did not give them a copy of the order until the following day, February 27, 2007, then the order was not made.

[42] The applicants draw the Court's attention to a line of jurisprudence where this Court has decided that oral decisions such as those made by telephone cannot be considered to be formal decisions with legal import. In *Hinson v. Canada (MCI),* [1994] F.C.J. No. 1372. at paragraph 15, Mr. Justice Bud Cullen stated as follows:

> 15 In the case at bar, it must be determined whether the telephone call was a "final decision" or a "true legal determination". The Respondent submits that the telephone call, if it was placed, was an administrative error and does not affect the final decision which followed. Given the repercussions for any applicant of a section 114(2) determination, I find it difficult to believe that a telephone call could be accepted as a final determination of the application, particularly without written confirmation immediately following. Accordingly, I think that the telephone call was not a final determination of the applicant's section 114(2) application. The telephone call was not a "decision" and is not subject to judicial review.

[43] Similarly, with respect to the absence of enabling legislation conferring formal finality to oral decisions, the applicants highlight the decision of the Federal Court of Appeal, in *Shairp v. Canada (Minister of National Revenue - M.N.R.),* [1989] 1 F.C. 562, [1988] F.C.J. No. 923, which stands for the proposition that a judge can only dispose finally of a matter by filing and entering a written decision. In *Shairp,* above, a Tax Court judge rendered an oral decision in favour of the appellant. However, during the recess, he had a change of heart after having reviewed the jurisprudence. He recalled the parties and declared that he was dismissing the matter. When the written decision was released under the Judge's signature, he had reverted to his original oral ruling and allowed the appeal.

[44] In dismissing the appeal in *Shairp,* above, Mr. Justice Marceau held as follows at paragraph 7:

> 7 If I think that the Tax Court Judge could do what he did, it is because I do not see how his morning pronouncement could be seen as having disposed of the appeal before him. In my view, in the absence of any specific provision empowering him to deliver judgment orally in open court, such as Rule 337(1) of the general rules of this Court,2 a judge of a court of record can only dispose finally, on behalf of the court, of a matter he has been seized of by filing and entering a written decision. There is no such provision to that effect in the rules of practice of the Tax Court of Canada and I even doubt such a provision could accord with the above cited section 17 of its enabling statute, which, by contemplating only the possibility of oral reasons, seems to exclude in any event oral decrees. It follows, in my view, that until judgment is filed the pronouncement of a judge, even made in open court and in the presence of a registrar, is merely an expression of opinion and a declaration of intention, which in law have no decisive effect and therefore remain subject to reconsideration. One would certainly assume that only in extraordinary circumstances would a judge, who sees fit, at the end of a hearing, to publicly pronounce his reasoned opinion and express his intention as to how he will dispose of the case, would later present differing reasons and a completely different judgment. But his jurisdiction to do so would seem to me to be unfettered if he continues to be seized of the matter as obviously he does.

[45] Likewise, the Federal Court of Appeal in *Dass v. Canada (Minister of Employment and Immigration),* [1996] F.C.J. No. 194, addressed the issue of the formality of decisions. A decision is said to be formal when notice is actually given to the parties affected by the decision. In *Dass,* above, the decision was made in the form of a letter. It was formal. However, it was not formalized, in that it was not communicated to the affected parties. At paragraph 17, Mr. Justice Barry Strayer held as follows:

> I see no reason to depart from the normal requirements of administrative law that a decision is taken to have been made when notice of that decision is given to the parties affected with some measure of formality.8 Judicial review cannot be sought of decisions until they have been formulated and communicated to the parties affected. Why should the courts take it upon themselves to examine the interdepartmental and intradepartmental correspondence to determine if and when a decision, though never communicated, was indeed taken? A court would certainly not entertain an argument by the Minister that notwithstanding the communication of a favourable decision to an applicant the Minister is not bound by it because previously there had been an internal, interim, uncommunicated decision to the opposite effect. Why then should we reverse a communicated decision of a negative sort in favour of an uncommunicated tentative, internal but favourable assessment? This is, after all, institutional decision-making of a multifaceted nature involving the collection of information from many sources, some of which are not under the control of the Minister or indeed of Canada. I therefore think it inappropriate for the Court to go through the file and determine for itself that at a certain point all requirements had been met for landing and therefore a decision to grant landing must be taken to have been made at that time. Instead it appears to me that the appropriate procedure, and one which is normally followed, is that when a favourable decision has been made to grant landing a written Record of Landing, signed by an Immigration Officer as authorized by subsection 14(2) of the Act, is delivered to the applicant.9 There was no such document delivered in this case. If, of course, the decision is negative that too should be considered made when communicated in a definitive manner to the applicant.

[46] Finally, in *Verrall v. Canada M.E.I.),* [1996] F.C.J. No. 633, Mr. Justice McKeown held at paragraph 10:

> 10 As in Dass, supra, no such document was delivered in this case. An oral communication by an immigration officer to the applicant's solicitor is certainly not the type of formal communication of which Strayer J.A. spoke in Dass, supra. In my view, the January 27, 1994 decision set out in an internal department document was not communicated to the applicant in writing as was required by Strayer J.A. Subsection 9(1) is a discretionary remedy: see Shah v. Canada (Minister of Employment and Immigration) (1994), 170 N.R. 238 (F.C.A.). The immigration officers had the relevant material before them and made their decisions exercising their discretion in a reasonable fashion. The application for judicial review is dismissed.

[47] This Court readily acknowledges the soundness of the above-mentioned decisions of both this Court and the Federal Court of Appeal. This is particularly true where the Courts have called into question the formality of decisions, such as those made by telephone or that were put into writing but never communicated to the affected individuals. However, the facts of the present case are clearly distinguishable from the customary elements of formality established by these earlier decisions.

[48] In the present applications, the decision of the Minister’s Delegate was formal. It was delivered directly to the parties immediately concerned. The applicants were given an opportunity to hear the contents of the section 44 reports, upon which the exclusion order was made. There is no evidence that the applicants expressed a fear of risk of returning to China or revealed their intention to file a refugee claim until after the exclusion order was made. Moreover, contrary to the applicants’ interpretation of section 236 of the Regulations, there is no requirement in the statutes that the exclusion order shall be in writing.

[49] Granted, the physical delivery of the signed exclusion order was postponed so as to exhaust all possibility that the Minister's Delegate application of subsection 99(3) would not violate the rights of the applicants to make a refugee claim. I believe the Respondent's position more apt when it relies on the decision by the Federal Court of Appeal in *Avci v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1424, 2003 FCA 359 in which Mr. Justice John Evans held as follows at paragraph 6:

> 6 The oral delivery of reasons or a decision in this manner is a sufficiently formal act marking a panel's final decision, after which members cannot be permitted to change their minds. Accordingly, we reject counsel's argument that the dictation of reasons on to a recording machine in chambers is to be equated with the delivery of reasons from the Bench.

[50] In *Avci*, above, the application for judicial review was allowed from a decision of a Federal Court Judge who had dismissed an application for judicial review of a decision of the Refugee Board. In allowing the judicial review, Mr. Justice Evans held that when the Refugee Board reserves its decision at the end of a refugee determination hearing, it remains seized of the matter and does not become *functus officio* until it has rendered written signed reasons and transmitted them to the registrar.

[51] In fact, this Court would more fully adopt the findings of Mr. Justice Yvon Pinard in the matter of *Malongi v. Canada (Minister of Citizenship and Immigration),* [2005] F.C.J. No. 1357, 2005 FC 1090, which dealt with a similar fact pattern mirroring the applicants' circumstances in the matters before this Court. Indeed, in *Malongi*, above, the applicant, among other things was subject to an exclusion order and was therefore precluded from filing a refugee claim. However, after the exclusion order was made, Mr. Malongi who had never expressed any intention in filing a refuge claim, changed his mind and sought to over turn the oral exclusion order before it was provided in written form.

[52] At paragraph 11 of that decision, Mr. Justice Pinard held as follows:

> 11 Finally, with respect to the applicant's argument to the effect that section 44 of the Act was not respected given that there was neither a removal order, nor a report setting out the relevant facts in writing before the applicant changed his mind and claimed refugee protection, I find that this is unfounded. First, subsection (1) of section 44 of the Act does not require that the report setting out the relevant facts be in writing. In this case, the evidence indicates that the Minister's delegate was present with the immigration officer at the time of the applicant's statements regarding his passport and the absence of problems for him in his native country. Subsection (2) of section 44 does not further require that the removal order be in writing for it to be valid. In this case, the same Minister's delegate states at paragraph 11 of his affidavit, that he then made a verbal exclusion order against the applicant, while informing him of the consequences of that order. It is not disputed that this verbal order was made before the applicant later attempted to claim refugee status. In my view, the requirement of section 236 of the Regulations to the effect that when a removal order is made (the French reads: "Dès la prise d'une mesure de renvoi"), a copy of the order shall be provided to the person against whom the removal order was made, does not necessarily imply that the verbal removal order cannot come into effect unless it is first put into writing. If Parliament's intention had truly been to require that a removal order could not come into effect until it was in writing, it would have clearly said so in the Act,

> specifically in subsection 44(2) or subsection 99(3). In my view, section 236 of the Regulations simply prescribes a useful administrative tool. [Emphasis by this Court]

[53] Finally, in response to the applicants argument that there is no provision in the Act or the Regulations that an oral exclusion order is a final decision, the Court would draw attention to sections 45 and 169 of the Act. Under subsection 45 (d), the Minister's Delegate is authorized to make the removal as in this case. There is no indication that such a removal order should be in writing. If Parliament wanted to fetter the hands of the Minister's Delegate in that way, it would not have deprived itself of this option.

[54] Similarly, under subsection 169(c), it is clearly enunciated that decisions and reasons may be rendered orally or in writing, except a decision of the Refugee Appeal Division, which must be rendered in writing. The exclusion order made by the Minister's Delegate was not a decision of the Refugee Appeal Division. As such, the oral exclusion order was in this Court's humble opinion, not only correct but also a formal decision.

[55] For these reasons, the oral exclusion order engaged subsection 99(3) of the Act and the applicants are therefore ineligible to file a refugee claim because they are the subject of a removal order.

[56] Although the applicants and the respondent were invited to submit written questions for certification, by letter dated September 7, 2007, the parties have declined the invitation to do so. In light of the circumstances of this case, the Court accepts the express wishes of the parties.

[57] The parties did not seek costs for these proceedings and none is awarded.

JUDGMENT

THIS COURT ORDERS THAT:

- The application for judicial review in each of the following files is dismissed:
    - IMM-1028-07 *Dong Hu Li v. MCI;*
    - IMM-1098-07 *Dong Hu Li v. MCI;*
    - IMM-1026-07 *Dong Zhe Li v. MCI;* &
    - IMM-1099-07 *Dong Zhe Li v. MCI;*
- No questions will be certified.
- Without costs.

"Simon Noël"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1028-07; IMM-1098-07; IMM-1026-07 & IMM-1099-07T-1599-06
STYLE OF CAUSE:	DONG HU LI & DONG ZHE LI and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	August 30, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	NOËL J.S.
DATED:	**September 21, 2007**

APPEARANCES:

Christopher Elgin	FOR APPLICANTS
Rebecca Hunter Winesanker	FOR RESPONDENT

SOLICITORS OF RECORD:

Elgin, Cannon & Associates Vancouver, BC	FOR APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada Vancouver, BC	FOR RESPONDENT

ANNEX "A"

Relevant Statutes

1. The rights and obligations of temporary residents, such as the applicants are set out in section 29 of the Act, which provides as follows:

Right of temporary residents 29. (1) A temporary resident is, subject to the other provisions of this Act, authorized to enter and remain in Canada on a temporary basis as a visitor or as a holder of a temporary resident permit.	**Droit du résident temporaire** 29. (1) Le résident temporaire a, sous réserve des autres dispositions de la présente loi, l'autorisation d'entrer au Canada et d'y séjourner à titre temporaire comme visiteur ou titulaire d'un permis de séjour temporaire.
Obligation — temporary resident (2) A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.	**Obligation du résident temporaire** (2) Le résident temporaire est assujetti aux conditions imposées par les règlements et doit se conformer à la présente loi et avoir quitté le pays à la fin de la période de séjour autorisée. Il ne peut y rentrer que si l'autorisation le prévoit.

2. Paragraph 36(1)(c) of the Act describes the inadmissibility of a permanent resident or foreign national to Canada on the basis of serious criminality. The relevant passages state:

Serious criminality	**Grande criminalité**
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
[. . .]	[. . .]
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

3. The consequences of non compliance with the Act are provided in section 41. Subsection 41(a) deals specifically with foreign nationals and states the following:

Non-compliance with Act	**Manquement à la loi**
41. A person is inadmissible for failing to comply with this Act	41. S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.
(a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and	

4. Section 44 outlines the loss of status removal report based on inadmissibility. The section is reproduced in its entirety because it forms the lion share of the issues in the present case. As such, it provides:

Preparation of report	**Rapport d'interdiction de territoire**
44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.
Referral or removal order	**Suivi**
(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

Conditions (3) An officer or the Immigration Division may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.	**Conditions** (3) L'agent ou la Section de l'immigration peut imposer les conditions qu'il estime nécessaires, notamment la remise d'une garantie d'exécution, au résident permanent ou à l'étranger qui fait l'objet d'un rapport ou d'une enquête ou, étant au Canada, d'une mesure de renvoi.

5. Subsection 45(d) indicates when a decision is appropriate in instances where there has been a finding not only of a violation of the Act but also of inadmissibility of a foreign national, for instance to remain in Canada. It states:

Decision 45. The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions: [. . .] (d) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.	**Décision** 45. Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes : [. . .] d) prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

6. Section 55 of the Act sets out the parameters for an arrest and detention with warrant. The relevant passages provide as follows:

Arrest and detention with warrant 55. (1) An officer may issue a warrant for the arrest and detention of a permanent resident or a foreign national who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.	**Arrestation sur mandat et détention** 55. (1) L'agent peut lancer un mandat pour l'arrestation et la détention du résident permanent ou de l'étranger dont il a des motifs raisonnables de croire qu'il est interdit de territoire et qu'il constitue un danger pour la sécurité publique ou se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi.
Arrest and detention without warrant (2) An officer may, without a warrant, arrest and detain a foreign national, other than a protected person, (a) who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2); or (b) if the officer is not satisfied of the identity of the foreign national in the course of any procedure under this Act. [. . .]	**Arrestation sans mandat et détention** (2) L'agent peut, sans mandat, arrêter et détenir l'étranger qui n'est pas une personne protégée dans les cas suivants : a) il a des motifs raisonnables de croire que celui-ci est interdit de territoire et constitue un danger pour la sécurité publique ou se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2); b) l'identité de celui-ci ne lui a pas été prouvée dans le cadre d'une procédure prévue par la présente loi. [. . .]

Notice	**Notification**
(4) If a permanent resident or a foreign national is taken into detention, an officer shall without delay give notice to the Immigration Division.	(4) L'agent avise sans délai la section de la mise en détention d'un résident permanent ou d'un étranger.

7. A person against whom a removal order has been issued may not make a claim for refugee status. That is in essence what subsection 99(3) says:

Claim	**Demande**
99. (1) A claim for refugee protection may be made in or outside Canada.	99. (1) La demande d'asile peut être faite à l'étranger ou au Canada.
[. . .]	[. . .]
Claim inside Canada	**Demande faite à l'étranger**
(3) A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.	Demande faite au Canada (3) Celle de la personne se trouvant au Canada se fait à l'agent et est régie par la présente partie; toutefois la personne visée par une mesure de renvoi n'est pas admise à la faire.
[. . .]	[. . .]

8. The provisions that apply to decisions in all divisions of the Act are outlined in section 169. With respect to oral decisions, subsection 169(c) does not undermine their formality. The relevant portions of section 169 provide:

Decisions and reasons	**Décisions**
169. In the case of a decision of a Division, other than an interlocutory decision:	169. Les dispositions qui suivent s'appliquent aux décisions, autres qu'interlocutoires, des sections :
(a) the decision takes effect in accordance with the rules;	a) elles prennent effet conformément aux règles;

(b) reasons for the decision must be given;	b) elles sont motivées;
(c) the decision may be rendered orally or in writing, except a decision of the Refugee Appeal Division, which must be rendered in writing;	c) elles sont rendues oralement ou par écrit, celles de la Section d'appel des réfugiés devant toutefois être rendues par écrit;
[. . .]	[. . .]
(Emphasis of the Court)	(Souligné par la Cour)

9. Finally, section 236 of the Regulations governs the enforcement of removal orders and provides as follows:

236. A person against whom a removal order is made shall be provided with a copy of the order when it is made.	236. Dès la prise d'une mesure de renvoi, une copie du texte de celle-ci est fournie à l'intéressé.