Federal Court  Cour fédérale

Date: 2011214

Docket: IMM-2311-11

Citation: 2011 FC 1428

Ottawa, Ontario, December 14, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

REN ZHAO JIN, REN JIA HUI

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] The applicants seek an order setting aside a decision by a Canada Border Services Agency (CBSA) officer, who under section 48 of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*), refused to defer removal of the applicants to Chile pending determination by the Minister of Citizenship and Immigration of their application for humanitarian and compassionate (H&C) relief under section 25 of the *IRPA*.

[2] The applicants, husband and wife, have been living in Canada for a number of years without legal status. They became subject to removal scheduled for April 14, 2011, a stay of which was granted by a Judge of this Court pending disposition of this judicial review application.

[3] The applicants' efforts to enter and remain in Canada are long and storied. In May 2001, the applicants entered Canada at Toronto's Lester B. Pearson International Airport and were granted status for six months. In January 2002, after the expiry of their visa, the applicants made a refugee claim. In that same month, a report under section 27 of the *IRPA* was prepared because the applicants immigrated without the proper visa. Conditional departure orders were also issued. In October 2002, their refugee claims were refused. In November 2004 they submitted Pre-Removal Risk Assessment (PRRA) applications. In March 2005 negative decisions were rendered in the PRAA applications. The PRRA decisions were rendered in person and the applicants were advised to report to the Chilean Consulate to obtain emergency travel documents.

[4] Removal arrangements were scheduled for June 2005 however, the applicants failed to report to the Chilean Consulate. A call-in notice was sent to the applicants advising them of an interview scheduled for June 15, 2005. The applicants failed to attend this interview as well. A Canada-wide arrest warrant was issued for the applicants.

[5] In October 2005 the Case Processing Centre in Vegreville, Alberta received Mrs. Ren's application for permanent residency based on H&C grounds with her husband listed as a dependent. The application was placed in the queue and referred to Citizenship and Immigration Canada (CIC) in London, Ontario. Later than month, the applicants were arrested by CBSA in London, Ontario.

The applicants were released on a $10,000 cash bond, $10,000 performance bond and terms and conditions which included monthly reporting. In July 2007, Mrs. Ren's H&C application was refused.

[6] Some 30 months later, in November 2009, Mr. Ren submitted an application for permanent residency based on H&C grounds, this one listing his wife as a dependent. In February 2010 this second H&C application was placed in the queue and in May 2010, referred to CIC Scarborough, Ontario. In March 2011 the applicants attended the Greater Toronto Enforcement Center (GTEC) for an interview and were advised that they were unlawfully in Canada. After being given the option to do so the applicants advised that they would like to purchase their own tickets to effect their own removal.

Issue

[7] The issue in this case is whether the decision of the CBSA Enforcement Officer (the Officer) to refuse the applicant's deferral of removal application is reasonable per *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

Analysis

[8] Two arguments are advanced in support of setting aside the decision of the removals Officer. The first is that the decision was unreasonable in that it did not take into account the applicants' personal and business circumstances. The second is that the decision did not fairly account for their pending, second, H&C application, now some 20 months in the queue.

[9] The first issue is moot. The applicants sought a 90 day deferral in order that they could liquidate their business interests in an orderly manner. They have now had, by virtue of the operation of an order of this Court, over twice the period of time requested. The factual substratum of the argument no longer exists.

[10] The criteria set forth in *Borowski v Canada (Attorney general)*, [1989] 1 SCR 342 informs the exercise of discretion whether to hear another matter that would otherwise be moot. As noted, there would be no practical effect to a decision as the factual substance has disappeared. The removal order is spent, and the applicants have had more time than they originally requested to liquidate their assets. Nor would the interests of judicial economy be served, as the issue raises no point of jurisprudential value nor would it resolve a controversy between the parties.

Pending H&C Application

[11] The second ground on which it is said that the removal Officer's decision should be set aside, namely the pending H&C application, has no merit. The Officer observed that the factors advanced in the pending H&C application were similar to those advanced in the first. The applicants contend that the first H&C application was inadequate, prepared as it was without the benefit of counsel, and further, because it failed to acknowledge the presence in Canada of the applicants' cousin and aunt. I agree with the observations of Justice Leonard Mandamin who noted, albeit in the context of the stay application, that these arguments do not equate to a serious issue let alone a ground on which a fully reasoned decision of a removals officer can be set aside.

[12] The respondent also argues that the second H&C application was not timely, coming as it did some two years after the first negative H&C application. In this regard, the observations of Justice Russel Zinn in *Jonas v Canada (Citizenship and Immigration)*, 2010 FC 273 are directly apposite:

> In this case, the officer did consider the existence of the pending H&C application and it was open to the officer to consider the imminence of a decision in the pending H&C application. In many cases, the imminence of a decision may be a reflection of whether the application had been filed in a timely manner. In this case, the officer does not indicate whether, in his view, the H&C application was filed in a timely manner; however, it is of note that the applicant did not file it until almost five years after the rejection of his refugee claim by the RPD. The officer concluded that a decision was not imminent even though the application had been transferred to the local CIC Office. The officer's determination that the pending H&C application did not warrant his exercise of discretion was reasonable.

[13] The case law is clear that the existence of a pending H&C application does not, absent special circumstances, warrant a deferral. Where it is apparent that the enforcement officer is aware of the H&C application, the weight to be assigned to it is a matter of discretion: *Khamis v Canada (Citizenship and Immigration)*, 2010 FC 437 at para 29. Moreover, the Federal Court of Appeal made it clear, in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311, that the boundaries of an enforcement officer's discretion are narrow and circumscribed. The Court of Appeal notes that if applicants are successful in their H&C application, they can be made whole by readmission. Absent special considerations, a pending H&C application will not warrant a stay of removal unless a threat to personal safety is made out in the evidence.

[14] In this case, given the applicants' lengthy immigration history, and the delay between the refusal of the first H&C (July 2007) and the initiation of the second (November 2009), the decision of the Officer not to defer by reason of the pending H&C is justifiable.

[15] The application for judicial review is dismissed.

[16] No question for certification has been proposed and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2311-11
STYLE OF CAUSE:	REN ZHAO JIN, REN JIA HUI v. MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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