Federal Court  Cour fédérale

Date: 20180123

Docket: IMM-3165-17

Citation: 2018 FC 65

Ottawa, Ontario, January 23, 2018

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

XIN TIAN

Respondent

JUDGMENT AND REASONS

[1] This application is brought by the Minister of Citizenship and Immigration seeking to set aside a decision of the Immigration Appeal Division of the Immigration and Refugee Board [Board]. The decision under review set aside a removal order issued against the Respondent, Xin Tian, for his failure to comply with the residency obligation required by section 28 of the *Immigration and Refugee Protection Act* [*IRPA*].

[2] It is undisputed that Mr. Tian is a Chinese citizen and, since 2011, a permanent resident of Canada. It is also not a matter of controversy that when Mr. Tian re-entered Canada from China on November 18, 2014, his period of Canadian residency fell well short of the term required by law. When he was confronted at the Vancouver airport by Canada Border and Service Agency [CBSA] officers, he freely admitted that he had spent much of the previous three (3) years in China attending to the needs of his grandfather and father—both of whom had health issues. Under section 41(b) of the *IRPA*, Mr. Tian was, accordingly, *prima facie* inadmissible and subject to removal from Canada.

[3] Mr. Tian was initially interviewed by CBSA Officer Sagarbarria. Officer Sagarbarria prepared a subsection 44(1) Highlights Report outlining her initial inadmissibility findings and recommending that a Departure Order be issued. As required, that recommendation was subject to review and an independent determination by a Minister's Delegate.

[4] In this case, it appears the Minister's Delegate was CBSA Officer Nair. Officer Nair signed the Departure Order issued against Mr. Tian along with an Interpreter's Declaration and Mr. Tian's Declaration concerning a right of appeal. However, Officer Nair failed to prepare any notes of his ostensible interview with Mr. Tian. Officer Nair also neglected to sign the subsection 44(1) Highlights Report initiated by Officer Sagarbarria and he provided no reasons on the face of that report (or anywhere else) to support his decision to issue a Departure Order.

[5] Before the Board, the Minister sought to overcome the absence of supporting evidence by tendering Officer Nair's Statutory Declaration about his standard course of conduct in

subsection 44(1) cases. That was as far as Officer Nair could go because he had no recollection of his interactions with Mr. Tian and no notes (contemporaneous or otherwise) with which to refresh his memory. According to that declaration, Officer Nair always conducted an interview and posed a series of relevant questions to a person in Mr. Tian's situation. This would include matters of a humanitarian nature which can be taken into account to overcome a residency shortfall.

[6] Before the Board, a considerable amount of attention was paid to the identity of the Minister's Delegate. However, there is nothing in the decision to suggest that it was not Officer Nair who acted in that capacity. The Board's concern, rather, was the absence of evidence bearing on the sufficiency of Officer Nair's supposed inadmissibility assessment. This concern is reflected in the Board's cryptic concluding analysis:

> [22] While I note that the e-mail found on page 6 of Exhibit R1 does not contemporaneously identify Mr. Nair as the MD, the narrative does not, in my view, sufficiently establish that a fulsome analysis of any relevant humanitarian and compassionate factors was undertaken.
>
> [23] I too have strong doubts about whether, to use Mr. Nair's description of the obligation of a Minister's delegate, ". . . a review [was] conducted by, in this case, an impartial third party who . . . doesn't have a direct link to the file to review the allegation presented by the officer and the evidence to review any mitigating and aggravating factors and to render a decision with regards to that admissibility or to refer the case to a higher jurisdiction"
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> [24] When the evidence in this case is analyzed, and the jurisprudence is taken into account, I find it more likely than not that the removal order made against the applicant on November 18, 2014 is legally invalid. Having so found, it is not necessary for me to assess any procedural fairness or humanitarian and compassionate factors to decide this case and I do not do so in this decision.

> [25] The only matter decided herein is the legal validity of the impugned removal order. In my view, *res judicata* would not apply should the Minister decide in the future to pursue the two-step process mentioned in s. 44 of the *Act*.

[7] Much of the Minister's written argument on this application is directed at whether the Board ignored or failed to adequately assess evidence about whether Officer Nair, in fact, acted as the Minister's Delegate in the performance of the required subsection 44(1) duties. In my view, this is not a live issue in this case because the Board made no determinative finding to the contrary. What was of concern to the Board was whether an appropriate humanitarian and compassionate assessment was carried out. This determination, it concluded, could not be made in the face of Officer Nair's failed memory and in the absence of any written notes or reasons.

[8] The Minister contends that the Board should have taken into account Officer Nair's evidence about his standard practices in subsection 44(1) cases. It is argued that this ought to have been sufficient to overcome the evidentiary gap about what actually took place in Mr. Tian's case.

[9] While is true that the Board did not refer to the evidence of Officer Nair's usual practices in its concluding analysis, it is implicit that this evidence was found to be insufficient. This was not an unreasonable conclusion where, by his own admission, Officer Nair failed to follow the required procedure. Officer Nair admitted that he did not take notes of his interview with Mr. Tian despite being aware that important rights of appeal were at stake and that the subsection 44(1) Highlights Report was a document of some consequence (see p 98 and p 110 of the CTR). Indeed, his usual practice was not to take notes in such cases (see p 100 of the CTR).

He also admitted that he failed to follow the required protocol for completing the part of the subsection 44(1) Highlights Report where reasons and a signature are required (see p 108 of the CTR).

[10] In the face of these breaches of protocol, it should hardly surprise the Minister that the Board was not willing to accept that, in all other respects, Officer Nair must have followed his usual procedure. This is also a case where it is appropriate to independently review the record and pay respectful attention to the reasons offered or which could be offered in support of the decision (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 12, [2011] 3 SCR 708 [*Newfoundland Nurses*]; *Delta Air Lines Inc v Lukács*, 2018 SCC 2 at para 10.

[11] It was not unreasonable for the Board to conclude on this record that the conduct of a proper subsection 44(1) review had not been established. Indeed, any other outcome would have been surprising. A finding of inadmissibility is profoundly significant to a permanent resident like Mr. Tian. The Minister Delegate's performance of the statutory duties required by subsection 44(1) is not to be done in a perfunctory way. Without exception, it requires careful consideration and documentation of the permanent resident's explanations, most notably those bearing on the potential to grant humanitarian and compassionate relief. The decision must also be supported with adequate reasons. To the extent that the practices followed in this case may be common at the Vancouver airport, they should in no circumstances continue to be followed.

[12] The Minister also complains that the Board erred by not referring Mr. Tian's case back for a redetermination or, alternatively, by failing to conduct its own humanitarian and compassionate review. While I agree that it was an available option, the Board did have the discretion to do what it did. If under the broad authority conferred by subsection 77(2) of the *IRPA* the Board has the authority to issue a removal order, it must have the reciprocal authority to quash one. In setting aside Mr. Tian's Departure Order, the Board was clearly sending a message to the Minister that the practices applied to Mr. Tian's case were deficient and not to be encouraged. The effect of the order was blunt but not legally untenable.

[13] For the foregoing reasons, this application is dismissed.

[14] Neither party proposed a certified question and no issue of importance arises on this record.

[15] Counsel for Mr. Tian is seeking costs. I agree, however, with counsel for the Minister that there are no special circumstances in this case which would justify an award of costs.

JUDGMENT in IMM-3165-17

THIS COURT'S JUDGMENT is that the judicial review application is dismissed;

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3165-17
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v XIN TIAN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 10, 2018
JUDGMENT AND REASONS:	BARNES J.
DATED:	JANUARY 23, 2018

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