Federal Court  Cour fédérale

Date: 20091022

Docket: IMM-5411-08

Citation: 2009 FC 1083

Vancouver, British Columbia, October 22, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

LI QIN GAN and QIU LAN SHEN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to section 72 of the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27 (Act), of a decision by Citizenship and Immigration Canada (CIC) dated December 9, 2008, to refer the Applicants' application for permanent residence based on humanitarian and compassionate grounds (H&C application) to the Pre-Removal Risk Assessment (PRRA) Unit of CIC for determination.

[2] This application has nothing to do with the Applicants themselves. This application has nothing to do with the merits of their application to remain in Canada. This application concerns process and procedure and has everything to do with the situation created by their counsel who was determined that the H&C application would not be assessed by a PRRA officer.

BACKGROUND

[3] Li Qin Gan and Qui Lan Shen are citizens of China. The facts relevant to this application are best summarized by way of chronology.

March 21, 2001	The Applicants arrived in Canada.
April 2, 2001	The Applicants file claims for Convention refugee status.
March 27, 2002	The claims for refugee status are rejected. The Board found that the Applicants were not credible, that they were not Falun Gong practitioners, and that they were not Convention refugees.
May 31, 2002	The Applicants applied for consideration under the Post-Determination Refugee Claimant in Canada Class (PDRCC).
November 2005	The Applicants made an H&C application; this application is still outstanding. The application was based on establishment in Canada *and* risk upon return to China.
May 3, 2006	The Case Processing Centre of CIC in Vegreville, Alberta, informed the Applicants that their H&C application had been transferred to the CIC office in Vancouver for further assessment.
May 26, 2006	The CIC office in Vancouver, the Inland Processing Unit (IPU), advised the Applicants that their H&C application had been transferred to the Vancouver PRRA Unit for a decision.
June 24, 2008	At an in-person interview at the CBSA Enforcement Centre, the Applicants were given a letter informing them that they had 30 days to supplement their H&C application prior to a decision by a PRRA Officer.

July 11, 2008	Counsel for the Applicants submitted supplementary H&C submissions. In these submissions, counsel writes: "I repeat my request that this H&C assessment should be conducted by a CIC officer familiar with H&C cases instead of a PRRA officer. I regard a PRRA officer is someone who is in the enforcement stream of your organization" [*sic*].
July 15, 2008	Counsel for the Applicants submitted supplementary submissions on the Applicants' PDRCC. In these submissions counsel again requested that the H&C be considered by a CIC Officer.
October 7, 2008	The PRRA Coordinator, Adrienne Nash, responded to counsel's July 15, 2008 letter. She writes that "it is our policy, as set out in section 13 of IP5, that when H&C applications include allegations of personal risk, and there does not appear to be sufficient non-risk factors to approve the H&C application on the non-risk grounds, the application is referred to the PRRA unit for processing. In cases where there is an outstanding PRRA application, both applications are assessed concurrently." She requested counsel to advise in writing whether his clients wanted their H&C application to be determined without any consideration of their personalized risk by an CIC Officer *or* if they wanted their risk allegations to be considered as part of the H&C by a PRRA Officer.
October 14, 2008	Counsel for the Applicants responds: "I am still requesting you to proceed with the H&C review and PRRA review separately. [I]t is my respectful view and request that the file should go to CIC first before PRRA" [*sic*].
October 16, 2008	The PRRA Coordinator responded, reiterating the explanation about the policy found in section 13 of IP5 and stating: "If we receive specific instructions that your clients do not wish to have their personalized risk factors considered as part of their H&C application, I will forward the file to the Inland Processing Unit for consideration. Please note, this will have no impact on their PRRA applications, which will continue to be processed in the PRRA Unit (and for which they were invited to provide updated submissions … when their case was converted from the Post-Determination Refugee Claimants in Canada Class (PDRCC) to the PRRA program."

October 28, 2008	Counsel for the Applicants confirmed his "request that this file be sent to the CIC H&C unit for their separate assessment on H&C grounds". Counsel did not acknowledge in writing that this would mean a waiver of an H&C assessment on the allegations of risk.
November 6, 2008	The PRRA Coordinator informed counsel that his October 28, 2008 letter did not contain the required waiver necessary to transfer the H&C application to the H&C Unit. The PRRA Coordinator stated that the application would be processed in accordance with section 13 of IP5 and would be assigned to a PRRA Officer who would consider all aspects of the Applicant's H&C application, including both risk and non-risk factors.
November 20, 2008	The PRRA Officer summoned the Applicants to an in-person interview on December 17, 2008, with respect to their PRRA application and further indicated that "at this hearing I may also ask each of you questions about the circumstances which support your 2005 Humanitarian and Compassionate application."
December 4, 2008	Counsel for the Applicants informed the PRRA Officer that he was unable to attend the interview because of a conflict. He reiterated his request to have the CIC H&C Unit assess the H&C application stating: "If you insist on doing this PRRA hearing then my clients may have to withdraw their PRRA, without prejudice. My clients applied for H&C 3 years ago and after this long wait, he was canvassed if he wanted his H&C assessed and his answer was clearly affirmative. But somehow the officer still decided to send this case to PRRA."
December 9, 2008	The PRRA Officer responded informing counsel that the interview would proceed unless he could provide alternative dates in early January 2009 and requesting that he be informed if the Applicants were withdrawing their PRRA application. He refers to the letter dated November 6, 2008, above, and states that "in accordance with that decision the H&C application will stay in the PRRA unit and I will consider the risk and non-risk factors found in your client's [*sic*] H&C application.
December 10, 2008	This application for leave and judicial review of the PRRA Officer's refusal to transfer the H&C to the CIC H&C Unit was filed.

[4] In the application for judicial review, the Applicants sought the following relief:

> a. A declaration that the Respondent, the Minister of Citizenship and Immigration ("Minister") breached his duties to the Applicants as set out herein;
>
> b. An order in the nature of *mandamus and*, a direction compelling the Minister to cause the [CIC Humanitarian and Compassionate Unit] to immediately process the Applicants' H&C application; and
>
> c. An order setting aside the decision of Adrienne Nash and Robert North to refuse to forward the file to CIC Humanitarian and Compassionate Unit;
>
> d. Such further and other relief as this Court seems just.[*sic*]

[5] Events after the application for leave and judicial review was filed are relevant and further explain the procedural morass that has been created.

[6] The December 17, 2008 in-person interview was postponed. On March 11, 2009, the PRRA Officer faxed the Applicants' counsel with a request to schedule dates for an in-person interview in April 2009 with respect to both the outstanding H&C and the outstanding PRRA applications. No response was received. On June 1, 2009, the PRRA Officer directed the Applicants to report for an in-person interview with respect to both applications to be held on June 18, 2009.

[7] Counsel for the Applicants wrote the PRRA Officer the same day, objecting to holding the interview prior to the determination of the judicial review hearing in this matter then scheduled for August 11, 2009. Counsel further informed the PRRA Officer that he was unavailable on the proposed date. Counsel also stated that if the PRRA Officer was not going to hold matters in

abeyance, then he requested that the Applicants' H&C application be sent "to a CIC H&C Officer for assessment … without taking into account their personal risks" [emphasis added]. Counsel lastly stated that "depending on the outcome of that assessment, we reserve the right to re-file or continue with the PRRA application."

[8] The Applicants did not attend the June 18, 2009 call-in. On June 19, 2009, they were sent a final notice to attend a PRRA oral hearing. Again, it was indicated that questions may be asked concerning their H&C applications. The interview was set for July 15, 2009.

[9] Counsel for the Applicants swore an affidavit in which he attests that upon receipt of this letter he called counsel for the Respondent "and asked her how come Mr. North did not accept my offer and why he continued to set down these PRRA interviews." He swears that Ms. Park, counsel for the Respondent, told him that his "offer" as set out in his letter dated June 1, 2009, was not clear to which he replied that he "would discontinue my proceeding if Mr. North would hold off doing PRRA" and he swears that "Ms. Park then said this would be the agreement if her client confirms it."

[10] On June 22, 2009, the PRRA Officer transferred the H&C application to the CIC Inland Processing Unit for assessment by an H&C Officer and informed counsel for the Applicants of this occurrence. The PRRA Officer wrote:

> As per your request in our telephone conversation of today, I accept the offer contained in your letter of 01 June 2009 (attached) to withdraw the personalized risk elements from your clients' 2005

> H&C application. Accordingly, the application has been sent to the Inland Processing Unit of CIC Vancouver where it will be assessed by an H&C officer.

[11] On July 7, 2009, counsel for the Respondent wrote to counsel for the Applicants stating:

> Further to our telephone conversation of June 22, 2009 and the faxed transmittal from PRRA Officer North to you dated June 22, 2009, your client's [*sic*] H&C application has been sent to the CIC Inland Processing Unit for assessment by an H&C application [*sic*]. Therefore the application for judicial review is now moot. Would you kindly advise when the Notice of Discontinuance will be filed."

[12] On July 10, 2009, the Officer assessing the H&C application wrote to the Applicants requesting further submissions within 15 days from receipt of the letter. By letter of July 11, 2009, counsel for the Applicants requested that the Officer consider all of the submissions made by their former counsel. By letter dated July 15, 2009, the Officer wrote counsel for the Applicants requesting clarification as the majority of the submissions of previous counsel pertained to risk factors. Counsel was asked to be precise as to the factors the Applicants wished to have considered in their H&C application.

[13] In the interim, counsel for the Applicants wrote to Mr. North, the PRRA Officer, asking that the meeting with his clients scheduled for July 15, 2009, be postponed for the following reasons:

> My understanding was the August JR would not proceed on the basis of my agreement with Ms. Helen Park that Mr. Gan's H&C application would be assessed first. But you seem to think otherwise as you are proceeding with the PRRA. If so, there would be no point not to proceed with the JR as you still insist on taking the unilateral action to do PRRA. If you are to do PRRA first then there is no assurance that H&C would ever be done as the Gan is removable as soon as the PRRA is done [*sic*].

[14] In this letter, he makes the perceptive observation: “Somewhere along the line, there was miscommunication.”

[15] The Applicants failed to attend the July 15, 2009 meeting with the PRRA Officer. The PRRA application was declared abandoned and pursuant to section 171 of the Act was rejected.

[16] On July 31, 2009, the Respondent brought a motion to dismiss this application for judicial review as moot. The Respondent submitted that the Applicants had failed to raise a timing issue with respect to the H&C in their Notice of Application, and that since the H&C application had been transferred to an H&C Officer, the application for judicial review was now moot. By Order dated September 1, 2009, Justice Dawson dismissed the Respondent’s motion, holding that the judicial review application was not moot. Justice Dawson noted that the Applicants had raised an issue as to whether the H&C ought to have been decided prior to the PRRA and, notwithstanding the fact that the Applicants’ submissions may not be supported by the jurisprudence, raised an issue that was not moot.

[17] On August 12, 2009, the Applicants filed an application for leave and judicial review of the dismissal of their PRRA application: Court File IMM-4077-09.

ISSUES

[18] At the hearing of this application, counsel for the Applicants stated that there were two issues before the Court:

a. Whether the Applicants' H&C application should have been processed prior to their PRRA application; and
b. Whether the H&C application should be processed with or without risk factors.

ANALYSIS

[19] In my view, the history of these Applicants with the immigration authorities as set out above does not reflect a failure to communicate; it reflects a failure to understand the fundamental elements of the H&C and PRRA processes. It is unclear whether that failure is innocent or wilful on the part of counsel.

Whether the Applicants' H&C application should have been processed prior to their PRRA application

[20] The Applicants acknowledge that there is no legal requirement that the H&C application be assessed prior to the PRRA application. It is their submission that the Respondent offered them the option of having the H&C application determined first by way of an "undertaking" or "agreement" (the Applicants used both terms in oral argument), which was subsequently breached by the Respondent. They further submit that the Respondent failed to follow its own processes established by section 13 of IP5 in that it failed to make a preliminary assessment of the H&C application before sending it to the PRRA Officer. I find no merit in either submission.

[21] First, if there was any understanding or agreement as alleged, it most certainly occurred after the decision under review. The only reference to postponing the PRRA assessment until after the

H&C determination is to be found in the letter from Applicants' counsel dated October 14, 2008, in which he writes:

> [I]t is my respectful view and request that the file should go to CIC before PRRA" [emphasis added]. As is evident from the history set out previously, the Applicants were specifically advised that if they wished the H&C application assessed within the Inland Processing Unit then they would have to specifically instruct CIC that they did not wish to have their personalized risk factors considered as part of their H&C application. If that was to occur, they were also specifically told that "this will have no impact on their PRRA applications, which will continue to be processed in the PRRA Unit [emphasis added]. Nowhere is there any evidence prior to the decision under review of any agreement to postpone the PRRA determination.

[22] It was suggested at the hearing that there was an agreement between counsel to this effect. If so, it occurred after the date of the decision at issue and forms no part of this application. No motion was made to amend this application to raise as an issue the alleged settlement agreement and I will say no more about it as it is raised in the IMM-4077-09 leave application which is outstanding.

[23] The Applicants further submitted that section 13 of IP5 was not observed by the Respondent. They point to section 13.2 entitled 'Role of H&C Units: Preliminary screening without formal H&C assessment' which reads: "If there is a claim for personalized risk, but there does not appear to be sufficient other non-risk H&C grounds for accepting the application, the application is referred to the PRRA unit."

[24] The Applicants submit that the response received to their H&C application in the letter dated May 26, 2006, indicates that no assessment that was required by section 13.2 was done as no reason is given for referring the application to a PRRA Officer. They submit that the writer failed to do the proper analysis to reach a conclusion that insufficient H&C grounds exist to accept the application without the risk factors.

[25] I agree with the submissions of the Respondent that the letter in question cannot support that conclusion. First, the letter was not the first response received by the Applicants to their H&C application. The first response is a letter dated May 3, 2006, from Case Processing Centre in Vegreville in which the Officer writes: "This is to advise that your application has been transferred to the Canada Immigration Centre located in Vancouver for further assessment" [emphasis added]. The May 26, 2006 letter was sent after that further assessment, namely, after the preliminary screening referenced in section 13.2 of IP5.

[26] Further, the preliminary screening is a simple administrative review of the application and, as stated in section 13 of IP5, is not a formal H&C assessment. It is a review of the application to determine into which of the two streams it will fall. If that was a decision subject to review by this Court, then I note that no application was brought in a timely manner by these Applicants for leave to judicially review it.

Whether the H&C application should be processed with or without risk factors

[27] Quite simply, this is not an issue for the Court; this is an issue within the full and complete control of the Applicants.

[28] At the hearing, the Court was informed that as of two weeks ago the Applicants had advised CIC that they now wished the H&C application to be assessed including the risk factors. The Respondent will do so. As was stated by its counsel, the Respondent has never refused to process the H&C application either with or without the risk factors. However, whether the risk factors are included is a decision within the sole prerogative of the Applicants.

[29] I suspect that the real issue for the Applicants is that they wish the H&C application to be assessed including the risk factors, but not by a PRRA Officer. Frankly, they have no right to dictate whether an officer from the Inland Processing Unit or one from the PRRA Unit is to make the determination. Both have authority from the Minister to make such an assessment. The Minister's policy as set out in IP5 is that it is to be a PRRA Officer when the H&C factors alone appear insufficient to grant the application. I expect, given that the Applicants again wish to have the risk factors considered, that their H&C application will be assessed by a PRRA Officer. If so, that is unobjectionable.

[30] For these reasons this application is dismissed. Neither party, when asked, proposed any question for certification and there is none on these facts.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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