

Federal Court



Cour fédérale

Date: 20101208

Docket: IMM-7088-10

Citation: 2010 FC 1256

BETWEEN:

GUO QUNYING

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR ORDER

LEMIEUX J.

I. Facts

[1] On December 6th, 2010, I issued a stay of Mr. Guo's removal to China scheduled for yesterday. Here are my reasons for doing so;

[2] The underlying issue to which this application is grafted is a decision of an Enforcement Officer dated December 1st, 2010 supplemented by additional reasons dated December 2nd, 2010 when she considered additional materials submitted by the applicant.

[3] The crux of this matter is the following. Mr. Guo, a citizen of China, married Lu Chen, also a citizen of China in December 2005, Ms. Chen had been a permanent resident in Canada since February 19, 2004 after being sponsored by her first husband Luan Tu, a Canadian citizen, whom she married on March 11, 2003 but from whom she separated on June 21, 2004 and divorced effective December 2, 2005. Mr. Guo and Ms. Chen are parents of a three year old child born in Canada.

[4] Mr. Guo came to Canada in 1999 on a student visa; he went back to China after completing his studies but returned to Canada in January, 2003 making a refugee claim. Mr. Guo's claim was refused as well as leave from that decision. He was offered a PRRA application in August, 2006 which was denied on December 14, 2006. After Mr. Guo married Ms. Chen, she sponsored his application for permanent residence in Canada under the Spouse or Common law Partner in Canada class on February 14th, 2006.

[5] On January 11, 2007, a Section 44 report was issued on Ms. Chen for misrepresentation in respect of her first marriage. An investigation was conducted whether Ms Chen had entered in a marriage of convenience. It was determined that her marriage to Mr. Guo was a legitimate one but her first marriage to Mr. Tu was for immigration purposes. On April 22nd, 2008, after an inadmissibility hearing was held, Ms. Chen was issued an exclusion order by a member of the Immigration Division and the appeal from that exclusion was dismissed by the Immigration and Appeal Division (IAD) on May 17, 2010.

[6] It was the IAD's decision which had the effect of Ms. Chen losing her permanent residence status in Canada and her ability to sponsor Mr. Guo. That sponsorship application was refused on June 2nd, 2010 as a consequence.

[7] Ms. Chen filed on June 10th, 2010, an application for leave and judicial review in this Court challenging the IAD's decision. Leave was granted by a Judge of this Court on November 3rd, 2010. The hearing before a judge of this Court is set for February 1st, 2011.

[8] On November 18, 2010, the applicant sought a deferral of his removal "until the decision of the Federal Court whether Ms. Chen was inadmissible and no longer a permanent resident of Canada". It was pointed out that Mr. Guo's sponsored application for permanent residence in Canada was dependant on Mr. Chen's status. It was stressed that if his judicial review application is successful and she regains her permanent status, Mr. Guo's application for permanent residence should be processed from within Canada. Submissions were also made on the impact Mr. Guo's removal would have on his child and on his employment in Canada; he has been with the same company for 5 years on temporary work permits. He is the sole financial resource to the family with Ms. Chen and their daughter dependant on him. Ms. Chen's English is very poor and it was submitted his removal will cause irreparable harm.

II. The Enforcement Officer's decision

[9] I need not detail the Enforcement Officer's reasons for refusing to defer because in my view only one error justifies the grant of a stay.

[10] In her notes to file, the Enforcement Officer wrote:

“It is important to note that Mr. Guo’s application, namely the spousal sponsorship, was refused on 02 June 2010 due to Ms. Chen’s loss of her permanent residence status. That being said, I note that should Ms. Chen regain her Permanent Residence status, a new spousal application would need to be submitted and processed.

And further noted:

...I also note that it has not been demonstrated in the deferral request that Ms. Chen would be unable to sponsor Mr. Guo from overseas, should she regain her Permanent resident status after his removal from Canada. (my emphasis)

III. Conclusion

[11] The law is clear that to obtain a stay from a decision of an Enforcement Officer not to defer, the applicant must establish the existence of:

1. A serious issue to be tried.

[12] The Federal Court of Appeal teaches us in *Baron v. Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 that the test for making out a serious issue in the case of a refusal to defer is the demonstration of a strong case. The single serious issue in this case was that the Enforcement Officer has misunderstood the fundamental reason the applicant was seeking a stay.

[13] His argument is simple. His wife has a strong case against the IAD’s decision causing the loss of her permanent resident status and consequent inability to sponsor him. In these circumstances, his deportation should be stayed until her case is heard and determined by the Federal Court which is in the matter of a few months. If she is successful, her ability to regain her

permanent resident status is enhanced and her ability to continue his sponsorship within Canada can continue. The Enforcement Officer did not appreciate that if she was successful on her judicial review and the applicant was deported, her sponsorship within Canada becomes moot; he would have to be sponsored from outside Canada which adds a significant length of time to the sponsorship process.

2. Irreparable Harm

[14] Irreparable harm is made out because the family separation is not a matter of months but years.

3. Balance of Convenience

[15] Having made out serious issue and irreparable harm, the balance of convenience favours the applicant.

[16] As I explained at the hearing however, I cannot stay his deportation until the Federal Court decides Ms. Chen's case. The stay of deportation here must be related to his leave and judicial review application against the Enforcement Officer's decision. I can only order his stay until leave is decided on his application to review the Enforcement Officer's decision not to defer and if leave is granted until then judicial review is decided. I have so ordered.

“François Lemieux”

Judge

Toronto, Ontario

December 8, 2010

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-7088-10

STYLE OF CAUSE: GUO QUNYING v. THE MINISTER OF PUBLIC
SAFETY AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 6, 2010

REASONS FOR ORDER: LEMIEUX J.

DATED: December 8, 2010

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