Federal Court  Cour fédérale

Date: 20110802

Docket: IMM-739-11

Citation: 2011 FC 971

Vancouver, British Columbia, August 2, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

WAI HUEN WONG and
SHUK YING JULIA CHAN

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On November 28, 2008, Officer Sunger, the person purportedly acting on behalf of the Minister's Delegate, Acting Chief Leger, found that the two applicants did not satisfy the residency obligations pursuant to subsection 28(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), and issued departure orders (the removal orders).

[2] The applicants contest the legality of a decision made on January 7, 2011, by the Immigration Appeal Division of the Immigration and Refugee Board of Canada (the tribunal)

dismissing their appeal and upholding the removal orders. In a nutshell, the tribunal found that the applicants were not truthful when they attempted to enter Canada as visitors in November 2008, that the removal orders were validly made, and that there were insufficient humanitarian and compassionate considerations to warrant quashing the removal orders.

[3] Today, the applicants seek judicial review of this decision on the basis that: (1) the tribunal erred in law or otherwise acted unreasonably by finding that the removal orders were validly issued; (2) the tribunal breached procedural fairness in failing to issue summons (notably to Officer Sunger); and (3) the tribunal acted unreasonably in failing to properly assess the best interests of the child. The respondent submits just the opposite and invites the Court to dismiss the present application.

[4] For the reasons below, the application must be allowed. The issue of the validity of the removal orders is determinative and the Court finds that the tribunal's conclusion in this regard is both contrary to law and unreasonable. Accordingly, it will not be necessary to examine the two other grounds of attack raised by the applicants against the impugned decision.

[5] Section 28, subsections 44(1) and (2), subsection 63(3) and section 67 of the Act are relevant and provide as follows:

28. (1) A permanent resident must comply with a residency obligation with respect to every five-year period.	**28.** (1) L'obligation de résidence est applicable à chaque période quinquennale.
(2) The following provisions govern the residency obligation under subsection (1):	(2) Les dispositions suivantes régissent l'obligation de résidence :

(a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are

a) le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :

(i) physically present in Canada,

(i) il est effectivement présent au Canada,

(ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,

(ii) il accompagne, hors du Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents,

(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,

(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or

(iv) il accompagne, hors du Canada, un résident permanent qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(v) referred to in regulations providing for other means of compliance;

(v) il se conforme au mode d'exécution prévu par règlement;

(b) it is sufficient for a permanent resident to demonstrate at examination

b) il suffit au résident permanent de prouver, lors du contrôle, qu'il se conformera à l'obligation pour la période quinquennale suivant l'acquisition de son statut, s'il est résident permanent depuis moins de cinq ans, et, dans le cas contraire, qu'il s'y est

(i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year

period immediately after they became a permanent resident;	conformé pour la période quinquennale précédant le contrôle;
(ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination; and	
(c) a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of permanent resident status overcomes any breach of the residency obligation prior to the determination.	c) le constat par l'agent que des circonstances d'ordre humanitaire relatives au résident permanent — compte tenu de l'intérêt supérieur de l'enfant directement touché — justifient le maintien du statut rend inopposable l'inobservation de l'obligation précédant le contrôle.
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.
(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	(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.

the case of a foreign national. In those cases, the Minister may make a removal order.

63. (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

63. (3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

(*a*) the decision appealed is wrong in law or fact or mixed law and fact;

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

(*b*) a principle of natural justice has not been observed; or

b) il y a eu manquement à un principe de justice naturelle;

(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for

(2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente. [Je souligne.]

reconsideration.
[Emphasis added.]

[6] At the outset, it is important to note that while the wording of subsection 44(1) of the Act seems to allow an officer to choose at will whether to write a report setting the relevant facts, the discretion not to report is extremely limited and rare, as otherwise officers would have a level of discretion not enjoyed by even the Minister responsible (*Correia v Canada (Minister of Citizenship and Immigration)*, 2004 FC 782 at para 20). Moreover, subsection 44(1) of the Act clearly states that an officer prepares the report, and if the Minister is of the opinion that the report is well-founded, subsection 44(2) provides that he can take further action, including making a removal order against a permanent resident who has failed to meet his or her residency obligations under subsection 28(2) of the Act.

[7] As the expression goes, the Legislator does not speak to say nothing. The distinct use of the words “officer” and “Minister” in subsections 44(1) and (2) of the Act means that two distinct tasks must be accomplished by two separate people. Furthermore, the provision clearly establishes a chronology for the events: the report must be reviewed prior to issuing the removal order. Where the Minister has duly delegated his authority under subsection 44(2), the Minister’s delegate must review the report prepared by the officer under subsection 44(1), which must take into account the fact that paragraph 28(2)(*c*) specifically calls for a determination of whether humanitarian and compassionate considerations overcome any breach of the residency obligation prior to the determination.

[8] The relevant facts are not seriously disputed in this case.

[9] The applicants, Wai Huen Wong and Shuk Ying Julia Chan, are a husband and wife from Hong Kong. Ms. Chan acquired permanent residence status in 1994. She then sponsored her husband, who acquired permanent residence status in 1997. Their son was born in Canada in 1996, and is a Canadian citizen. The family as a whole returned to Hong Kong in 2000. Apparently, Mr. Wong had purchased high-priced property in Hong Kong and when the real estate bubble burst in 1998-1999, they were unable to afford living in Canada.

[10] The family attempted to return to Canada in November 2008, initially claiming to be visitors. Upon discovering that the applicants were, in fact, permanent residents who had failed to comply with their legislative obligation to reside in Canada for at least 730 days per five-year period (subsection 28(2) of the Act), (departure) removal orders were made against them and signed on November 28, 2008. The signature on the removal orders is that of Officer Sonia Sunger, on behalf of Acting Chief J. Leger, the Minister's Delegate. Also, on November 28, 2008, Officer Julie Théberge prepared and signed the report under subsection 44(1) of the Act against the applicants.

[11] Three months later, on February 26, 2009, Officer Théberge completed the "SUBSECTION A44(1) HIGHLIGHTS PORT OF ENTRY CASES (Short)" (the Highlights), both on her behalf, as the officer, and on behalf of Acting Chief Leger, as the Minister's Delegate. In the column for "Minister's Review and Determination", it states "Report valid. Departure Order issued. Appeal rights given. Insufficient H & Cs". In the field "To the Minister/Delegate", Officer Sunger's name is crossed out and replaced by the name of Acting Chief Leger.

[12] The Highlights referred to above is the mandatory review which must precede the issuance of a removal order. The Minister's manual ENF 5 at page 13 states:

> **Referral of a report to the Minister's delegate**
>
> All A44(1) reports concerning permanent residents must be referred to the Minister's delegate making the final decision about whether or not to refer the matter to the Immigration Division, and must be accompanied by either a detailed memorandum or an A44(1) case highlights form (IMM 5084B) which must include:
>
> - the person's identity, with name, aliases, date and place of birth, citizenship, marital status, present immigration status, and details of passports and travel documents;
>
> - details of the violations, and the first possible parole or release date if the person is serving a sentence;
>
> - the officer's opinion based on the assessment of the criteria outlined in ENF 6, section 19.2, and the recommendation(s); any submissions received from the person or notes taken at the interview; and, if applicable, the reasons for any delay in submitting the report. [Emphasis added.]

[13] It is to be noted that a Report made under subsection 44(1) of the Act must be accompanied by a "detailed" memorandum or the Highlights. This instruction makes it clear that the Report should be in writing. Also, the Report must include sufficient "details" because the Minister's delegate's scope of discretion under subsection 44(2) to consider various factors is quite broad. H&C factors must be included in a Report for a permanent resident, pursuant to paragraph 28(2)(*c*) of the Act.

[14] Indeed, in *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, Madam Justice Judith Snider held that the Minister's delegate's discretion under subsection 44(2) is quite broad, allowing consideration of H&C factors:

> [42] While acknowledging this concern, I conclude that the scope of the discretion of an immigration officer under subsection 44(1) and of the Minister's delegate under subsection 44(2) is broad enough for them to consider the factors outlined in the relevant sections of the CIC procedural Manual. To the extent that some of these factors may touch upon humanitarian and compassionate considerations, I see no issue.

[15] With respect to the legal validity of the removal orders, the applicants have questioned the authority of Officer Sunger to sign the removal orders, and asserted that the proper procedure was not followed in issuing the removal orders.

[16] The respondent, on the other hand, claimed that Officer Sunger had the power to sign the removal orders, as did Acting Chief Leger; it was therefore of no consequence whether Officer Sunger signed the removal orders in her own capacity or on behalf of Acting Chief Leger.

[17] The tribunal sided with the respondent and found that both Officer Sunger and Acting Chief Leger were authorized to issue removal orders, so the uncertainty as to who actually signed them was not fatal. Consequently, the applicants had failed to prove on the balance of probabilities that the removal orders were not valid in law.

[18] Overall, after a close examination of the applicable legal provisions, the tribunal's reasons, and the totality of the evidence, the Court finds that the reasoning of the tribunal is flawed for a number of reasons. Its conclusion that the removal orders were valid in law is simply contrary to law, and furthermore, does not constitute a defensible and acceptable outcome in light of the law and the relevant facts of this case.

[19] It is not challenged that the applicants were found not to be credible in relation to the amount of time that they resided in Canada, from November 28, 2003 to November 28, 2008. However, as my colleague Justice Michael Phelan has eloquently written, "[i]t is a central tenet of the rule of law that everyone is required to obey the law and all are entitled to the protections of the law, even those litigants who may be deserving of little sympathy" (*Murphy v Minister of National Revenue*, 2009 FC 1226, at para 2), and in the context of a breach of residency obligation review, the Minister's delegate is not conducting a simple routine administrative task as explained above.

[20] The applicants had an obligation to exhaust all appeal mechanisms before resorting to seek to have this Court declare the removal orders illegal (*Huang v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ No 284, 2003 FCT 196. If the validity of the removal orders and determination made at the time by the officer and Minister's delegate was raised in the first place by the applicants through an appeal made to the tribunal, it is because a right of appeal is granted to the applicants as permanent residents under subsection 63(3) of the Act.

[21] In the case at bar, the tribunal, as a quasi-judicial body, had the duty to ensure that the Minister acted lawfully, and simply missed an opportunity to uphold the rule of law. In this case, the Court has found that strong doubts existed and continue to exist today as to whether a Minister's delegate really reviewed and validated, at the time of making the removal order as required by section 44 of the Act, the report prepared by an immigration officer describing the circumstances of the breach and factors taken into consideration.

[22] The following comments made by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9, at para 29 are enlightening:

> Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. **A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law** (emphasis in original). Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v Attorney General of Quebec*, [1981] 2 SCR 220, at p 234; also *Dr. Q v College of Physicians and Surgeons of British Columbia*, [2003] 1 SCR 226, 2003 SCC 19, at para 21.

[23] An officer, here Officer Théberge, did prepare a report under subsection 44(1) in this instance. The controversy concerns what occurred afterwards, a point which might have been cleared up if the respondent had chosen to have all the persons involved in the decision-making process testify before the tribunal. Considering the serious doubts raised by the applicants, and having notably refused to permit the applicants to call Officer Sunger as a witness, it was not open to the tribunal to state that the applicants had not met their burden of proof. Having concluded that it could not "determine on the evidence […] which of those two persons [officer Sunger or acting chief Leger] performed [the] function [of Minister's delegate on November 28, 2008]", the tribunal was not allowed to conclude that the removal orders against the applicants were valid, and its conclusion is unreasonable (*Liang v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 541, at para 40).

[24] Here, the applicants had discharged their onus of proving that the removal orders were not valid by adducing documentary evidence establishing that the review was conducted after the removal orders. The tribunal did not question this evidence. As a further challenge, the applicants impugned Officer Sunger's authority based on the record. In light of these challenges, the Minister had the onus to rebut. The Minister failed to do so despite having the ability.

[25] Justice Michel Shore in *Ma v Canada (Minister of Citizenship and Immigration)*, 2010 FC 509, at paras 1 to 3, articulated the principles of law on adverse inference:

> [1] The principles of law on adverse inference are well-established. The leading statement is to be found in *Wigmore*, "Evidence in Trials at Common Law", 1979 (Chadbourn Rev) at vol. 2, 285, page 192:
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> > … The failure to bring before the tribunal some circumstance, documents, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted. [Emphasis in original]
>
> [2] Reasonableness dictates that in the case of the Immigration and Refugee Board (and all its divisions), although the rules of evidence in its regard are relaxed, nevertheless, when evidence is available, or could be made available but not produced, or when a person can testify, is given the opportunity to testify, but does not testify, then an adverse inference can be drawn.
>
> [3] The adverse inference is drawn not merely from the failure to produce, "but from non-production when it would be natural for the

> party to produce" such evidence: *Wigmore*, vol. 2 at 199; reference is also made to *Barnes v Union Steamships Ltd.*, reflex, (1954), 13 WWR 72, aff'd, 14 WWR 673 (BCCA) adopting and citing *Wigmore*:
>
> > It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

[26] But instead of drawing a negative inference from the absence of direct and relevant testimonial evidence from the officers who had apparently signed and reviewed the section 44 report (there are no contemporary CAIPS notes in the tribunal record), the tribunal simply notes that "it is perplexing that the Minister chose not to clear up the uncertainty by calling evidence from either officer Sunger or acting chief Leger." Having earlier observed in its decision that "[t]here are a number of possible scenarios that would explain why the documents appear the way they do", but that "it would be speculation" on the part of the tribunal "to choose one of the possibilities", the tribunal could not give any weight to the content of the documents in question, in the absence of corroborative evidence. This is not a case where the presumption of validity of documents is of any help to the Minister (*Branigan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 245).

[27] Again, the evidence clearly reveals that the report was written and signed by Officer Théberge on November 28, 2008, which was, in fact, the same day that the removal orders were issued by Officer Sunger; but it wasn't until three months later that the report was verified and even then, this task was also performed by Officer Théberge, again on behalf of Acting Chief Leger, the Minister's Delegate. In the impugned decision, the tribunal noted that the "Subsection A44(1)

Highlights" document, dated February 26, 2009, and which "appears to have been signed on behalf of acting chief Leger", is "evidence [which] supports a finding that a review took place substantially after the removal orders were issued". The tribunal member glossed over this fundamental error of process in his decision by concluding simply, and unreasonably, that such evidence "does not assist in determining the validity of the orders that were issued on November 28, 2008."

[28] Counsel for the respondent suggested to this Court at the hearing that despite the possible illegality of the making of the removal orders, the application for judicial review should nevertheless be dismissed, because the result would be the same. On the other hand, applicants' counsel asks the Court to allow the application and simply make a declaration of illegality; it would make no sense to return the matter to the tribunal, since the net effect is that the removal orders were invalidly issued.

[29] It is very rare that non-compliance of a condition to the exercise of jurisdiction (or a breach of procedural fairness) does not lead to a quashing of the decision, and in this case, the Court is not satisfied that the result would be automatically the same in the future. Moreover, in the Court's opinion, the removal order was null and void from the beginning; thus, everything which flowed from it was also null and void (*Bancheri v Minister of National Revenue*, [1999] TCJ No 22, at para 59).

[30] It is clear that if the decisions to make removal orders against the applicants are invalid in law, then there is no need for another member of the Immigration Appeal Division to decide whether, taking into account the best interests of a child directly affected by the decision, there exist

sufficient humanitarian and compassionate considerations warranting special relief in light of all the circumstances of the case.

[31] While the tribunal should have allowed the appeal, according to subsection 67(2) of the Act, its only power in this regard would have been to refer the matter back to the appropriate decision-maker for reconsideration. Thus, the matter would have to be referred in any event by the tribunal to the officer and Minister's delegate for reconsideration, since the November 28, 2008 decision was null and void and invalid in law.

[32] In practice, the two-step process mentioned in section 44 of the Act will have to start again, this time before a different officer and a different Minister's delegate. The decision-makers, if they choose to start the examination again, will have to render their decision based on new calculations, taking into account that some two years and eight months have elapsed since November 2008. The whole process may take months before the issue of whether either or both of the two applicants comply with the residency obligation set out in subsection 28(2) of the Act is finally decided again. Thus, it is impossible to predict the result at this point in time.

[33] Consequently, the Court fails to see what useful purpose would be served by referring the matter for redetermination by another member of the Immigration Appeal Division, and this is a case where it is proper to make a declaration that the removal orders are null and void.

[34] For the above reasons, in the exercise of the Court’s discretion, the judicial review application shall be allowed, the decision of the tribunal shall be set aside and there shall be a declaration made by the Court that the removal orders are illegal and thus null and void.

[35] Counsel all agree that this proceeding does not raise a serious question of general importance. Accordingly, no question of general importance shall be certified by the Court.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The decision made on January 7, 2011, by the Tribunal is set aside;

3. The removal orders issued on November 28, 2008, are illegal and are null and void; and

4. No question is certified.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-739-11**
STYLE OF CAUSE:	**WAI HUEN WONG and SHUK YING JULIA CHAN v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	**Vancouver, BC**
DATE OF HEARING:	**July 25, 2011**
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