Federal Court  Cour fédérale

Date: 20180509

Dockets: IMM-4026-17
IMM-4079-17

Citation: 2018 FC 496

Ottawa, Ontario, May 9, 2018

PRESENT: The Honourable Madam Justice Strickland

Docket: IMM-4026-17

BETWEEN:

AI YANG

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

Docket: IMM-4079-17

AND BETWEEN:

AI YANG

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] These are the judicial reviews of two decisions concerning the Applicant. The first is a negative pre-removal risk assessment ("PRRA") of a senior immigration officer ("PRRA Officer"), made pursuant to s 112(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"). The second is a refusal of an inland enforcement officer ("Enforcement Officer") of Canada Border Services Agency ("CBSA") to grant the Applicant's request, made pursuant to s 238(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("IRP Regulations"), to voluntarily remove herself to Antigua and Barbuda ("Antigua").

Background

[2] The Applicant is a citizen of Antigua. She also holds a passport of the People's Republic of China ("PRC"), however, she asserts that she is no longer a Chinese citizen. On March 6, 2016, the Applicant entered Canada and learned there was an Interpol Red Notice issued against her in connection with an allegation of contract fraud in China. Fearing removal to China, she claimed refugee protection the same day.

[3] On March 13, 2016 her refugee claim was suspended pending a determination as to whether she was inadmissible on the basis of serious criminality pursuant to s 36(1)(c) of the IRPA. On March 31, 2016 the Applicant withdrew her refugee claim on the basis that she had no fear of return to Antigua and, on April 16, 2016, the Immigration Division ("ID") of the

Immigration and Refugee Board of Canada ("IRB") advised that it would not be proceeding with an inadmissibility hearing.

[4] CBSA continued to seek the Applicant's removal from Canada on the basis of a removal order issued against her on March 18, 2016, which related to another ground of inadmissibility, failure to comply with the IRPA. Specifically, entering Canada without the required permanent resident visa (IRPA, s 41(a), s 20(1)(a); IRP Regulations, s 6).

[5] The Applicant purchased a plane ticket to return to Antigua on May 18, 2016 and requested that CBSA return her passport and allow her to travel. CBSA denied this request, citing ss 238(2)(b) and (c) of the IRP Regulations. Instead, it decided to return the Applicant to China. The Applicant requested a PRRA on June 7, 2016, but this was denied as she had withdrawn her refugee claim. Following a request for the deferral of her removal, CBSA cancelled the Applicant's removal and, pursuant to s 25.1 of the IRPA, granted her a waiver of the 12 month PRRA bar. Her PRRA was refused on July 7, 2017 ("PRRA Decision").

[6] On September 21, 2017 the Applicant again requested that CBSA allow her to voluntarily comply with the removal order issued against her by returning to Antigua, but by email of September 25, 2017, this was refused on the basis of s 238(2)(c) of the IRP Regulations ("Voluntary Removal Decision"). Prior to the scheduled removal date of October 6, 2017, the Applicant filed applications for leave and judicial review of both the PRRA Decision (IMM-4026-17) and the Voluntary Removal Decision (IMM-4079-17). She also sought stays of

removal pending the outcome of both those applications. By a decision dated October 5, 2017, this Court granted stays in both matters.

[7] These are the judicial reviews of the PRRA Decision and the Voluntary Removal Decision, which were heard together on March 29, 2018.

PRRA (IMM-4026-17)

Decision Under Review

[8] The PRRA Officer considered two letters, dated July 11 and November 21, 2016, from Ms. Jiarui Ye, a criminal lawyer in China, which the Applicant filed in support of her PRRA. However, due to identified omissions and inconsistencies, the PRRA Officer gave them little weight.

[9] The PRRA Officer noted the Applicant's claim that she will be at risk of improper judicial prosecution if returned to China, based on the prosecution being pursued in a province that lacks jurisdiction over the alleged crimes. The PRRA Officer also noted the Applicant's submission that one of the companies acting against the Applicant has close ties to the government in Jiangxi and that it may have influenced the prosecuting bureau to pursue the case against her, but found this statement to be purely speculative. With respect to the Applicant's claim that China's criminal justice system is marred with corruption and would violate her right to a fair trial, the PRRA Officer acknowledged the documentary evidence establishing that deficiencies and problems exist in China's judicial system and with the rule of law in that

country. However, the PRRA Officer found that this information was generalized in nature and did not establish a direct link to the Applicant's personal circumstances, and that, on balance, China's courts are independent and follow established legal procedures. The PRRA Officer concluded there was insufficient evidence to establish that the Applicant could be the victim of a predetermined verdict issued by a corrupt judiciary.

[10] As to the Applicant's alleged risk of being detained without charge and exposed to mistreatment, abuse, and torture in detention while the investigation proceeds, the PRRA Officer observed that of the four individuals implicated in the same case as the Applicant, three were detained and released on bail pending trial. The fourth individual was placed in detention on July 3, 2015 but there was insufficient evidence to establish that this detention was indefinite. The PRRA Officer found that the evidence adduced did not suggest that the Applicant's co-conspirators were not afforded due process or had been treated in an unfair or abusive manner while under investigation, or that the Applicant would be treated differently or would be detained indefinitely.

[11] Concerning the Applicant's alleged risk of cruel and unusual treatment by being detained in overcrowded and inadequate conditions during the investigation, the PRRA Officer acknowledged that the country conditions documents submitted by the Applicant established that conditions in Chinese detention facilities are harsh and that ill-treatment, including the use of torture to extract confessions, had been reported. However, the PRRA Officer noted that the Applicant was 40 years old, well-educated, previously employed as an executive, and thus likely to have the means to retain counsel to ensure due process. Further, upon review of the

prosecutor's recommendation for prosecution and the accompanying indictment, it was apparent that the evidence against the Applicant was varied, voluminous, and highly complex. Accordingly, the case against the Applicant by Chinese prosecutors would not be based on fabricated evidence obtained under duress during any type of administrative detention. There was also insufficient evidence to establish that the Applicant's two co-conspirators who made confessions had been coerced into doing so.

[12] The PRRA Officer concluded that the Applicant would not face more than a mere possibility of persecution and that it was more likely than not that she would not face a danger of torture, risk to life, or risk of cruel and unusual treatment or punishment if returned to China.

Issues and Standard of Review

[13] In my view, the sole issue arising in this matter is whether the PRRA Officer's decision was reasonable. More specifically:

(i) Was the PRRA Officer's treatment of the Chinese lawyer's letters reasonable?

(ii) Did the PRRA Officer reasonably assess the Applicant's risk of indefinite detention and of cruel and unusual treatment while being detained?

[14] The reasonableness standard of review applies to PRRA applications as these are fact-driven inquiries that involve weighing evidence and which engage an officer's expertise in risk assessment (*Mohamed v Canada (Citizenship and Immigration)*, 2016 FC 619 at para 12; *Korkmaz v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1124 at para 9; *Adetunji v Canada (Citizenship and Immigration)*, 2012 FC 708 at para 22; *Raza v Canada (Citizenship and Immigration)*, 2006 FC 1385 at para 10). Under this standard, the Court will

only interfere if the decision lacks justification, transparency, or intelligibility, and falls outside the range of possible, acceptable outcomes, defensible in fact and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 ("*Dunsmuir*"); *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 ("*Khosa*")).

i) Was the PRRA Officer's treatment of the Chinese lawyer's letters reasonable?

[15] The PRRA Officer considered two letters from Ms. Jiarui Ye, a criminal lawyer in China, dated July 11, 2016 ("July Letter"), and November 21, 2016 ("November Letter"), respectively. The PRRA Officer noted that in the November Letter Ms. Ye explained that she is the attorney for one of the companies the Applicant operated in China but that there was no mention of this in the July Letter. The PRRA Officer stated that it was unclear how Ms. Ye came to know about the Applicant's case in July 2016, what evidence she reviewed, or how she obtained this evidence. The PRRA Officer also noted formatting differences between the two letters. Specifically, in contrast to the July Letter, the November Letter lacked a letterhead which the PRRA Officer stated would have reasonably been expected to appear on a document prepared by a legal professional. Further, the July Letter was not accompanied by a certified translation while the November Letter was supplied bilingually. Due to these "omissions and inconsistencies", the PRRA Officer gave the letters little weight.

[16] The Applicant submits that the basis for her s 97 claim was that she was at risk of improper judicial prosecution, which could result in an indefinite detention without charge and exposure to abuse and torture while an investigation proceeds. The letters provide an expert opinion on Chinese law and the functioning of the Chinese judicial system. They are critical to

the Applicant's claim as they set out the facts upon which her fear is based. The letters also establish a link between the Applicant's personal circumstances and the documentary evidence concerning deficiencies in the Chinese legal system. While officers may question expert evidence, their assessments must be reasonable and cavalierly dismissing these opinions is an error. The Applicant submits that the PRRA Officer's reasons for rejecting this core evidence demonstrates a cavalier and unreasonable dismissal of a professional opinion.

[17] In this regard I note that this Court has held that where expert evidence is put forward and considered by the decision-maker it deserves thoughtful and comprehensive analysis (*Shariaty v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 986 at para 38 ("*Shariaty*"), citing *Naeem v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1375 at para 24 ("*Naeem*")). However, unlike *Shariaty*, where the report was generated by a university professor whose publications, experience, and expertise were known and whose qualifications had previously been recognized by the Court, here the evidence is comprised of two brief letters from an author whose credentials are unknown, other than her statement that she has practiced criminal law in China since 2010. No curriculum vitae or other information was provided as to her background. Nor is she an independent third party as she identifies herself in the November Letter as counsel to a company related to the Applicant. In my view, while the letters are evidence provided in support of the Applicant's claim, they cannot be characterized as "substantive expert evidence" (*Naeem* at para 24) and need not have been treated as such.

[18] As to the content of the letters, the July Letter indicates that the Public Security Bureaus in three other Chinese provinces, where the alleged criminal offences occurred, had not

proceeded with the case although they had jurisdiction to do so. And while Jiangxi province did not have jurisdiction at law, the charges were pursued there. Ms. Ye states "I would conjecture that in not proceeding in their jurisdictions, the Bureaus in those cities would likely not have found the case to be strong enough". She adds that the penalty for the charges, if the Applicant were convicted, would be life imprisonment. The November Letter states that the Applicant has not been formally charged but is a suspect in the case. Suspected individuals like her are jailed, without charge, while they are being investigated. They can be held for an indefinite period until the investigation is complete. If charged, given the Applicant's level of control over the related companies, she would likely be jailed until a verdict is issued. Ms. Ye states that another individual implicated in the proceedings, Fei Yang, has been in jail since July 3, 2015 and there is currently no date set for trial. In this letter Ms. Ye states that, if convicted, the Applicant's sentence could be between ten years and life imprisonment.

[19] The PRRA Officer was concerned with Ms. Ye's connection to the matters addressed in her letters. While it is true that the July Letter does not identify Ms. Ye's relationship with the Applicant, Ms. Ye did identify her relationship with the Applicant in the November Letter. In the July Letter she states that she has practiced as a criminal lawyer in China since 2010 and had reviewed the details of the prosecutor's case against Hangzhou Hanxiang Industrial Limited ("HHIL") and the Applicant as its controller and operator, and that this was how she had knowledge of the matters to which she deposed. The *Public Security Bureau, Jiangxi Province, Written Recommendation for Prosecution* ("Recommendation for Prosecution"), dated August 31, 2015, which is found in the record and is relied upon by the PRRA Officer in his or her reasons, identifies HHIL as one of the criminal suspects therein and identifies the company's

controllers and operators as the Applicant and Debao Liang. In the November Letter, Ms. Ye states that she is the attorney for Hangzhou Tengxiang Supplies Limited ("HTSL"). The Recommendation for Prosecution also identifies HTSL as a criminal suspect, its two shareholders as the Applicant and Daoquan Shen, and its controllers and operators as the Applicant and Debao Liang. As counsel to HTSL, and as the Applicant was a named shareholder and controller/operator of HTSL as well as a named controller/operator of HHIL, it is not farfetched that Ms. Ye would have knowledge of and access to the details of the prosecutor's case as she states. In these circumstances, it is not clear to me that Ms. Ye's failure to identify herself as counsel in the July Letter or to explain why she was in possession of the prosecutor's case amount to "omissions and inconsistencies" which would affect the probative value of the information provided in the letters.

[20] As to the use of a letterhead, the July Letter is on letterhead which includes the name "JiangSu Contemporary & Peace Law Firm" and phone numbers. The letterhead appears to be in both English and Chinese. The November Letter has no letterhead. The Applicant concedes that a lawyer's letter would usually be written on letterhead but submits that this is not required, its contents are still presumed to be true and the PRRA Officer did not explain why the lack of a letterhead would give the letter less weight. However, I note that the PRRA Officer did explain that it was because of omissions and inconsistencies, of which the letterhead was specified as one, that she or he afforded the letter little weight. Further, the presumption of truth is concerned only with sworn evidence, usually of an applicant, which presumption applies unless there is evidence which contradicts it (*Maldonado v Canada*, [1980] 2 FC 302 (FCA) at para 5). Ms. Ye's letters are not sworn evidence.

[21] That said, the PRRA Officer's concern appears to be with the form of the letters rather than their substance. If the absence of letterhead on one of the two letters suggested to the PRRA Officer that the letters were not from the same person, or that one or both of the letters were not actually from a lawyer and, therefore, that the evidence was not authentic, then the PRRA Officer should have made a clear finding in that regard (see *Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082 at para 20; *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at para 27).

[22] As to translation, the PRRA Officer stated that the July Letter was not accompanied by a certified translation and, in contrast, the November Letter was provided bilingually. In fact, neither letter was accompanied by a certified translation and both were provided bilingually. The July Letter appears to be one letter written in two languages, first in English and, at the end of the English version, halfway down that same page, the Chinese version starts. There is no official or other separate translation as such. The November Letter is also provided bilingually, this time on two separate pages, one in English and one in Chinese. The last line of the English version of the letter states "This letter was supplied bilingually. If there are any conflicts between the two versions, Chinese would prevail". In my view, while the presentation of the two letters varies slightly, it is difficult to see how this would amount to either an omission or a material inconsistency that would negatively impact the weight of the letters.

[23] The Respondent, however, submits that the contents of the letters are also inconsistent and, therefore, they warranted little weight for that reason. Specifically, the July Letter states the Applicant had been criminally charged but the November Letter states that the Applicant had not

yet been formally charged. Further, the Recommendation for Prosecution states that the Applicant was charged with serial contract fraud along with the other conspirators, which the Respondent submits establishes that the November Letter is inaccurate and thus unreliable. The Applicant takes the view that the Respondent is attempting to buttress the PRRA Officer's reasons, as this argument can be found nowhere in the PRRA Officer's decision, and, in any event, the alleged inconsistency is simply a clarification as the case was developing.

[24] In my view, it is unclear from the evidence in the record whether or not the Applicant has been charged. The July Letter references charges against HTSL, HHIL, Greenest Group Company Limited ("GGCL") and their controller and operator, the Applicant. It concludes "With regard to penalty for those charges […], if convicted, Ai Yang would be sentenced to life imprisonment". The November Letter states there are currently criminal charges against HTSL, HHIL, GGCL, and four individuals and that the Applicant is a suspect in the case and wanted for questioning but has not yet been formally charged. The Recommendation for Prosecution does not list the Applicant as one of the named criminal suspects. However, it states that the HTSL and related companies' "swindle case" was reported to the Economic Investigations Squadron by another company and that the Jiangxi Public Security Bureau "decided to charge Ai YANG and his [*sic*] conspirators with serial contract fraud and commenced investigations" after the initial review of the report. It goes on to state that the "Ai YANG Group Serial Contract Fraud investigation" has been completed and sets out the findings. The *Jiang xi Province Nachang People's Procuratorate Indictment* ("Indictment"), also found in the record, does not list the Applicant as a person indicted. It does make reference to "Contract Fraud Crime" stating that "Since 214 [*sic*] Dabaoe LIANG, Ai YANG (Prosecuted in other case) was the Factual

controllers…" of the listed companies. In her affidavit filed in support of the judicial reviews, the Applicant states that the status of her case in China is very confusing. She originally believed that she had been charged *in absentia*, but now understands from the company lawyers that she is wanted for questioning and has not been formally charged.

[25] In my view, it is unclear from the evidence in the record whether the Applicant individually has been charged or is simply under investigation. And, in any event, I agree with the Applicant that the PRRA Officer did not identify this alleged inconsistency as a basis for why he or she afforded the letters little weight.

[26] For the reasons above, I find that the PRRA Officer's analysis and weighing of the letters is not intelligible on the basis of the identified omissions or inconsistencies.

ii) Did the PRRA Officer reasonably assess the Applicant's risk of indefinite detention and of cruel and unusual treatment while being detained?

Applicant's Position

[27] The Applicant submits the PRRA Officer's conclusions do not adequately respond to the risk being raised under s 97 of the IRPA. Specifically, the PRRA Officer found that s 97 was not engaged because the Applicant had the means to retain counsel to ensure due process and the government has enough evidence to make a case without fabricating evidence or obtaining a confession by torture. The PRRA Officer failed to address whether the Applicant will be held in detention without charge and, if so, if she is likely to face acts of torture or cruel and unusual treatment. The fact that she can afford a lawyer will not prevent her from being detained

indefinitely and Ms. Ye's opinion stated that individuals like the Applicant are jailed while being investigated. Further, this is not an issue of due process as even the proper application of judicial process can still result in detention. Similarly, the PRRA Officer failed to address the core risk that the Applicant will face, cruel and unusual treatment in detention, and instead seems to suggest that, because the authorities have already built a case against the Applicant, they have no need to use torture to elicit a confession. However, even if the Applicant is not tortured, there is still the risk that conditions in the jail arise to the level of cruel and unusual punishment. The PRRA Officer acknowledged conditions are harsh, but does not consider whether they require s 97 protection. Further, the PRRA Officer's findings are purely presumptive and not based on any evidence. The only evidence the PRRA Officer cites notes torture is common place and no other evidence is cited to refute this.

Respondent's Position

[28] The Respondent submits the documentary evidence the Applicant provided indicated that three of the Applicant's co-conspirators in the criminal investigation were arrested, detained for a short period of time and then released on bail pending trial. Assuming she will be treated like the co-conspirators, this fully answered the question as to whether she would be held in detention without charge. Regarding the risk of being tortured, the PRRA Officer noted the evidence against the Applicant was already proffered, and the PRRA Officer's finding on this issue was reasonable.

Analysis

[29] As a starting point, I note that with respect to the Applicant's submission that China's criminal justice system is marred with corruption which would severely violate her right to a fair trial, the PRRA Officer acknowledged the documentary evidence cited by the Applicant which described issues with established trial procedures, due legal process, and judicial fairness. The PRRA Officer acknowledged that deficiencies and problems exist in China's judicial system and the rule of law, but found this information was generalized in nature and did not establish a direct link to the Applicant's personal circumstances. The PRRA Officer was satisfied, on balance, that China's courts are usually concerned with applying independent judicial authority in accordance with established legal procedures and, further, that there was insufficient evidence to establish the Applicant could be the victim of a predetermined verdict issued by a corrupt judiciary.

[30] Based on the content of the record before me, it is difficult to see how the PRRA Officer was satisfied, on balance, that China's courts are usually concerned with applying independent judicial authority in accordance with established legal procedures. For example, the United Kingdom Home Office document entitled *Country Information and Guidance, China: Background Information, including actors of protections and internal relocation* (version 1.0 September 2015) ("Home Office Report"), referencing *Freedom House 2015, Freedom in the World Report*, states that the Chinese Communists Party ("CCP") controls the judiciary. Party political-legal committees supervise the operation of courts at all levels, and allow party officials to influence verdicts and sentences. CCP oversight is especially evident in politically sensitive

cases. And, citing an article from the Economist, the Home Office Report notes that judges are generally beholden to local interests. They are hired and promoted at the will of the jurisdiction's party secretary (or people who report to him), they have less power in their localities than do the police or prosecutors or even politically connected local businessmen. And, quoting from the US Department of State, *2014 Human Rights Practices Reports* (June 26, 2015), the Home Office Report notes that:

> Although the law states that the courts shall exercise judicial power independently, without interference from administrative organs, social organizations, and individuals, the judiciary did not in fact exercise judicial power independently. Judges regularly received political guidance on pending cases, including instructions on how to rule, from both the government and the CCP, particularly in politically sensitive cases. The CCP Law and Politics Committee has the authority to review and influence court operations at all levels of the judiciary.
>
> Corruption often influenced court decisions, since safeguards against judicial corruption were vague and poorly enforced. Local governments appoint and pay local court judges and, as a result, often exerted influence over the rulings of those judges.
>
> A CCP-controlled committee decides most major cases, and the duty of trial and appellate court judges is to craft a legal justification for the committee's decision.

[31] A document from the US Department of State, *The Country Reports on Human Rights Practices for 2015* ("Country Reports"), similarly states that judges regularly received political guidance on pending cases, including instructions on how to rule, from both the government and the CCP, particularly in politically sensitive cases. The CCP Politics and Law Committee has the authority to review and influence court operations at all levels of the judiciary. Further, the Country Reports note that corruption often influenced court decisions. And while the amended criminal procedure law reaffirms the presumption of innocence, the criminal justice system

remained biased towards a presumption of guilt, especially in high profile or politically sensitive cases. According to one report cited, almost 1.2 million individuals were convicted in 2014 and only 778 acquitted. This low acquittal rate of less than 1% has persisted for many years. Courts often punished defendants who refused to acknowledge guilt with harsher sentences than those who confessed and the appeals process rarely reversed convictions and failed to provide sufficient avenues for review.

[32] Further, as the Applicant points out, Ms. Ye's letter described an allegation of improper prosecution, based on apparent disregard for the law on jurisdiction, which linked the Applicant's personal circumstances to the documentary evidence. The PRRA Officer afforded that letter little weight and found that there was insufficient evidence that the Applicant would be the victim of a predetermined verdict issued by a corrupt and partial judiciary. Thus, the PRRA Officer's treatment of the November Letter may have had an impact on this finding.

[33] As to whether the Applicant would be detained indefinitely and subjected to torture or cruel and unusual punishment, the PRRA Officer stated that the evidence was that three of the four individuals implicated in the same case as the Applicant had been detained and released on bail pending trial and that there was no suggestion that they were not afforded due process or were treated in an unfair or abusive manner while under investigation. As to the fourth individual, while he was placed in detention on July 3, 2015, there was insufficient objective evidence to establish that his detention had continued indefinitely.

[34] However, the evidence that was before the PRRA Officer was the November Letter which stated that Fei Yang was arrested on July 3, 2015, he remained in detention, and no trial date had been set. The Recommendation for Prosecution confirmed that Fei Yang was arrested on July 3, 2015 and was held in prison while the three other suspects had been released on bail pending trial. There was no evidence before the PRRA Officer that Fei Yang had been released from prison. Further, the November Letter stated that because of the Applicant's level of control of the companies it was likely that she would be jailed until a verdict was issued. This factor, which potentially distinguishes the treatment of the three released individuals from the manner in which the Applicant would be treated, does not seem to have been considered, presumably because the PRRA Officer afforded the November Letter little weight. That is to say, the PRRA Officer failed to consider the Applicant's specific circumstances as a shareholder and director of the companies implicated in the alleged fraud. Based on the evidence before him or her, including documentary evidence that indicates that indefinite detention prior to trial is common place, in my view, it was unreasonable for the PRRA Officer to conclude that the detention of the fourth accused has not continued indefinitely and, accordingly, that the Applicant would not face an indefinite period of detention while the investigation proceeds.

[35] More significantly, the PRRA Officer considered the risk of cruel and unusual punishment stemming from the Applicant being detained in a Chinese jail and acknowledged that conditions there are harsh and that ill-treatment, including the use of torture to extract confessions, has been reported. In fact, the documentary evidence indicates that police torture and ill-treatment of suspects in pre-trial detention remains a serious concern and is routine. However, the PRRA Officer found that "[t]he [A]pplicant, 40, is a well-educated, astute

individual previously employed in an executive capacity within a major urban centre who will likely have the means to retain counsel to ensure due process". Upon review of the documentary evidence it is not at all apparent to me how those criteria, and being able to afford counsel, mean that the Applicant will be afforded due process.

[36] And while the PRRA Officer found that there was no evidence that the confessions made by two of the Applicant's co-conspirators were obtained by coercion, it seems unlikely that there would be evidence to that effect, even if it were true. The evidence in the record suggests that even the two alleged co-conspirators who confessed still awaited trial (it is unclear why, if confessions were given, a trial would be necessary), Fei Yang remained in detention at the time of the PRRA submissions, and the third alleged co-conspirator had been released on bail pending trial. Common sense would suggest that the Applicant's co-conspirators would be unlikely to criticize their treatment by the PRC in such circumstances. There is also no foundation for the PRRA Officer's finding that the strength of the prosecutor's case negates the risk of torture.

[37] In conclusion, for the reasons above, the PRRA Decision is not reasonable.

Voluntary Removal Decision (IMM-4079-17)

[38] The Enforcement Officer refused the Applicant's September 21, 2017 request to voluntarily remove herself to Antigua by email dated September 25, 2017. This states:

> Good Morning Ms. Long,
>
> Upon reviewing your request, CBSA will adhering [*sic*] to our application of IRPA/IRPR in regards to 238(2)(C) of the act. Your submissions were incomplete in regard to quoting IRPR 238(2)(C) "*seeking to evade or frustrate the cause of justice in Canada or*

another country". Also, Ms. Yang was detained and released on conditions therefore the application of IRPR 239 will be in effect.

Voluntary compliance

238 (1) A foreign national who wants to voluntarily comply with a removal order must appear before an officer who shall determine if

- **(a)** the foreign national has sufficient means to effect their departure to a country that they will be authorized to enter; and
- **(b)** the foreign national intends to voluntarily comply with the requirements set out in paragraphs 240(1)(a) to (c) and will be able to act on that intention.

Choice of country

(2) Following the appearance referred to in subsection (1), the foreign national must submit their choice of destination to the officer who shall approve the choice unless the foreign national is

- **(a)** a danger to the public;
- **(b)** a fugitive from justice in Canada or another country; or
- **(c)** seeking to evade or frustrate the cause of justice in Canada or another country.

Removal by Minister

239 If a foreign national does not voluntarily comply with a removal order, a negative determination is made under subsection 238(1) or the foreign national's choice of destination is not approved under subsection 238(2), the removal order shall be enforced by the Minister.

Issues

[39] I would frame the issues in this matter as being:

(i) What was the content of the duty of fairness owed to the Applicant and was that duty breached?

(ii) Was the decision reasonable?

[40] Although the Applicant also raised a preliminary issue seeking to strike the affidavit of Stephanie Miller, Legal Assistant, Department of Justice, affirmed on November 24, 2017, attaching as Exhibit A the Recommendation for Prosecution filed by the Applicant in the PRRA ("Miller Affidavit"), at the hearing before me the Applicant advised that this issue was not being pursued.

[41] The Respondent raised as a preliminary issue the question of whether the Applicant comes before the Court with unclean hands. This position is based on the fact that the September 21, 2017 written submissions made to the Enforcement Officer in support of the s 238(1) request state that the Applicant's affidavit, along with all relevant documents, were provided. However, the Respondent asserts that the Applicant, in fact, withheld documents filed in the PRRA which confirmed that she had been charged with serial contract fraud in China. Further, the Applicant submitted before this Court that there was no evidentiary record before the Enforcement Officer on which the s 238(2)(c) decision could have been based and sought to strike out the Miller Affidavit. The Respondent asserted that it would be unreasonable for the Court to exercise its discretion in favour of the Applicant when she deliberately attempted to mislead the Court.

[42] First, I note that when appearing before me the Applicant abandoned her position that the PRRA materials, including the Recommendation for Prosecution, which are also found in the Certified Tribunal Record ("CTR") in this matter, could not be relied upon by the Enforcement Officer. Second, while the September 21, 2017 written submissions may have been disingenuous in stating that the Applicant's affidavit included all relevant documentation, the omitted

information was before the Enforcement Officer as it was found in the CTR. Thus, the process was not undermined by this omission. In fact, the record contains an email of July 25, 2016 in which the Applicant made prior submissions to CBSA requesting to be voluntarily removed to Antigua pursuant to s 238(1) including the July 11, 2016 affidavit of the Applicant, Exhibit E of which was the Recommendation for Prosecution. Given the circumstances of this matter and considering the factors set out in *Thanabalasingham v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 14 at para 10, I am not persuaded that the complained of conduct is such that the Court should exercise its discretion and dismiss the application on the basis of unclean hands without determination on the merits.

Standard of Review

[43] The Applicant submits that the issues of who bears the onus (i.e. if it is the Applicant who must demonstrate that s 238(2)(c) does not apply, or if the Minister must show that it does) and what duty of procedural fairness is required in relation to participatory rights under s 238(2) of the IRP Regulations are both reviewable on the correctness standard because they are pure questions of law, fall outside the knowledge and expertise of removal officers, and have wide implications across the legal system (*Dunsmuir*).

[44] The Respondent submits that the Enforcement Officer's conclusion that the Applicant was evading the cause of justice involved questions of mixed fact and law and is subject to the reasonableness standard while questions of procedural fairness are reviewable on the standard of correctness (*Khosa*).

[45] It is well established that the standard of review for issues of procedural fairness is correctness (*Dunsmuir* at para 50; *Khosa* at para 43; *Mission Institute v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 34 ("*Canadian Pacific*")) and that deference is not owed under that standard. In this matter, the role of this Court is to determine the content of the duty of fairness that is owed and then whether the decision-maker has fulfilled or breached that duty. That is, whether the procedure was fair having regard to all of the circumstances. Correctness in the context of procedural fairness means that the reviewing court must be satisfied that the right to procedural fairness has been met (*Canadian Pacific* at paras 49-54).

[46] It is also well established that the reasonableness standard of review applies to decisions that raise questions of mixed fact and law. Under that standard the Court is concerned with the existence of justification, transparency and intelligibility within the decision-making process and also with whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir* at para 47).

i) What was the content of the duty of fairness owed to the Applicant and was that duty breached?

Applicant's Position

[47] The Applicant submits that the wording of s 238 of the IRP Regulations clearly contemplates that if an applicant meets the requirements of s 238(1)(a) and (b) then the officer "shall" approve the choice of destination submitted by the Applicant unless one of the three factors listed in s 238(2)(a), (b) or (c) is demonstrated. The onus was on the Minister to provide

evidence and make the case to support the decision to refuse voluntary compliance based on s 238(2), which the Minister failed to do.

[48] In that regard, the Applicant submits that the basic tenants of procedural fairness require that, if the Minister is to refuse a request for voluntary removal, he must present the evidence he is relying on under s 238(2), afford the applicant an opportunity to respond, and then clearly set out the legal reasoning on which the request is being refused along with the evidence to support that decision. In most circumstances of this type an applicant would have had his or her inadmissibility by reason of criminality determined by the ID, pursuant to s 36(b) or (c) of the IRPA which affords a high level of participatory rights, prior to an enforcement officer determining removal arrangements. Here, however, no admissibility hearing was held. As a result, the Minister has not presented any case to support the s 238(2) decision and the Applicant has not had any opportunity to respond to that case.

[49] Considering s 238(2) in the context of the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 ("*Baker*") leads to the conclusion that a high level of participatory rights must be afforded, specifically an oral hearing in which the Minister makes his full case and provides the applicant with an opportunity to respond. Instead, and based only on the Interpol Red Notice, it was summarily determined that the Applicant is evading justice or is a fugitive. However, an Interpol Red Notice, in and of itself, does not make an individual a fugitive from justice, nor was the Applicant provided with an opportunity to challenge the basis of that report.

[50] Further, the affidavit of Janet Lewicki, Paralegal, Department of Justice, sworn on September 29, 2017, and filed in response to the Applicant's motions to stay her removal ("Lewicki Affidavit") states that "[t]he CBSA did not proceed with her admissibility hearing, as there was no evidence which could be disclosed to support the criminal admissibility allegation". This is contrary to the s 238(2) Voluntary Removal Decision. The Minister's decision not to pursue an ID hearing stripped the Applicant of an opportunity to present her case and the Minister now attempts to benefit from that decision, suggesting that the Applicant can be returned to China without any due process protections.

[51] The Applicant further submits that Interpol Red Notices are not vetted and simply contain the allegations of the country submitting them. A full determination must be made that, had the crime been committed in Canada, it would constitute an offense under an Act of Parliament. Failure to do so would create a situation in which individuals are returned to oppressive regimes to stand trial for acts that are not illegal in Canada, or for which there is no evidentiary basis to legitimately support such a charge. Here the documentary evidence establishes that the PRC's justice system is not fair or impartial and the Applicant's position is that she is a target of corrupt litigation. Accordingly, she is not evading or frustrating the cause of justice.

Respondent's Position

[52] The Respondent submits that the IRPA does not reflect the determination process, with respect to voluntary compliance with removal orders, as outlined by the Applicant. Instead, the process for s 238(2) of the IRP Regulations is very informal and straightforward. The foreign national who wants to voluntarily comply with a removal order must submit their choice of

destination to the enforcement officer, who approves that choice unless the foreign national is a danger to the public, a fugitive from justice in Canada or another country, or is seeking to evade or frustrate the cause of justice in Canada or another country. If the enforcement officer does not approve the destination request, s 239 of the IRP Regulations triggers and the enforcement officer determines the country of removal.

[53] Here, both parties followed the decision-making process outlined in the IRP Regulations. The Applicant submitted a written request regarding where she wanted to go and provided written submissions as to why none of the s 238(2) exceptions applied. The Enforcement Officer considered her request and submissions but was not persuaded. Consequently, he or she was obliged to refuse the request for removal to Antigua. Contrary to the Applicant's submissions, the Enforcement Officer was neither required to conduct an oral hearing nor was he or she obliged the find the Applicant criminally inadmissible in order to apply s 238(2) of the IRP Regulations.

[54] Further, s 238(2) of the IRP Regulations can only be implemented once there is a valid removal order in place and, in this matter, the Applicant already had a valid removal order from Canada issued against her. A criminally inadmissible determination, on the other hand, is typically used by the ID to acquire a removal order. That tribunal has a procedural scheme akin to what the Applicant suggests. In this matter the Applicant was afforded procedural fairness through requesting voluntary removal and making submissions on why she felt she did not fall into the listed exceptions. The Enforcement Officer in turn found the Applicant did not meet the criteria set out in s 238(2)(c) of the IRP Regulations, noting that her submissions on this point

were incomplete. The judicial review process is the forum to dispute the Enforcement Officer's rationale for rejecting the voluntary removal request.

[55] The Respondent further submits that the onus of proving a valid deportation order is a sham or not *bona fide* rests with the party alleging this, it is not the ID who decides what country a foreign national will be returned to but the Minister, and the individual being removed is stripped of their choice of country when they are a fugitive from justice in Canada or another country (*Khalife v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1145 at paras 25, 27-28 ("*Khalife*")).

[56] The Respondent submits the Enforcement Officer considered the documentary evidence and the Applicant's submissions regarding s 238(2)(c) and found these were not persuasive in that she did not adequately explain how she was not seeking to evade or frustrate the cause of justice in Canada or another country. Aside from the Interpol Red Notice that Chinese authorities wanted to take the Applicant into custody, the Applicant provided the Recommendation for Prosecution to support her PRRA. This document notes the Applicant and several others have been criminally charged for serial contract fraud. Thus, there was *prima facie* documentary evidence that the Applicant was evading the cause of justice in China. The Recommendation for Prosecution coupled with the Interpol Red Notice was sufficient evidence for the Enforcement Officer to make a finding under s 238(2)(c) of the IRP Regulations and the Applicant was aware of the existence of both documents.

Analysis

[57] In my view, the first question to be addressed by this Court is what was the content of the duty of fairness owed to the Applicant in these circumstances. Once that has been determined the Court must then assess whether the duty was fulfilled or, as put in *Canadian Pacific*, the ultimate question of whether the applicant knew the case to be met and had a full and fair chance to respond (at para 56). Here, the IRP Regulations do not prescribe specific procedural fairness requirements for decisions relating to voluntary requests for removal, other than that an applicant must appear before the officer with respect to their intent and means to voluntarily comply with the removal order (s 238(1)) and then submit their choice of destination to the officer (s 238(2)).

[58] It is well established that the concept of procedural fairness is variable, its content is to be decided in the specific context of each case and that all of the circumstances of the case must be considered in determining the context of the duty owed (*Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at page 682; *Baker* at paras 20-22; *Canadian Pacific* at para 40).

[59] The content of the duty of fairness is informed by the *Baker* factors, which are not exhaustive (paras 21-22, 28). The first of these is the nature of the decision being made and the process followed in making it. The closer the administrative process is to the judicial process, the greater the procedural protections required. Here the administrative process adopted by CBSA does not resemble a judicial process. Accordingly, this factor does not point to a high level of procedural fairness.

[60] The next *Baker* factor is the nature of the statutory scheme and the terms of the statute under which the decision-maker operates. The role of s 238, within the relevant statutory scheme, is to facilitate voluntary compliance with a removal order that has become enforceable (*Revich v Canada (Citizenship and Immigration)*, 2005 FC 852 at para 22), subject to the s 238(2) exceptions. The decision is determinative of the country to which the Applicant will be removed. There is no right of appeal, although the Applicant can seek judicial review of the Enforcement Officer's decision. In my view, this factor affords a mid-range level of procedural protection.

[61] The third factor is the importance of the decision to the person affected. The Supreme Court of Canada in *Baker* held that the more important the decision is to the lives of those affected and the greater its impact on that person or persons, the more stringent the procedural protections that will be required. In this case the importance of the decision to the Applicant is very significant. Given my finding that the PRRA decision was unreasonable, if her voluntary removal to Antigua is not approved and she is removed to China at the Minister's choosing, she will be returning to a country where she believes she is at risk of improper judicial prosecution, indefinite detention, and mistreatment, abuse, and torture. This factor weighs strongly in favour of a high degree of procedural fairness.

[62] *Baker* next discussed the legitimate expectations of the person challenging the decision. However, there is no indication that the Applicant had a legitimate expectation that any particular process would be followed in this case. The final factor is the choices of procedure made by the agency itself and the respect owed to those choices. This is particularly so where

the statute leaves the decision-maker the ability to choose its own procedures or where the agency had an expertise in determining what processes are appropriate in the circumstances. However, as noted in *Canadian Pacific*, the deference that may be shown to a tribunal's choice of procedure is only one factor that assists in calibrating the degree of procedural fairness required. Here, the IRPA and IRP Regulations are largely silent as to procedure and CBSA appears to have chosen the procedure it deemed appropriate, being the acceptance of submissions by the Applicant.

[63] In this matter, some of the *Baker* factors suggest a high level of procedural fairness while others suggest protections at the lower end of the scale. Viewed in whole, in my view, the Applicant was to be afforded at least the right to know the case against her and to have an opportunity to respond to it. As will be discussed below, she was not afforded these protections.

[64] The Applicant requested that she be permitted to voluntarily comply with the removal order and be permitted to return to Antigua. In accordance with s 238(2), she submitted her choice of destination to the Enforcement Officer. The Enforcement Officer was required to approve that choice *unless* the Applicant fell within one of the three exceptions stated in s 238(2)(a), (b), or (c). The Applicant made written submissions dated September 21, 2017 (the parties confirmed to the Court that these were omitted from the CTR by inadvertence, they were contained in the Applicant's Record). In these, she put forward her view that the onus was on the Minister to demonstrate that she fell within the s 238(2) exceptions and that such evidence had not been provided. She submitted that procedural fairness required the Minister to provide her with the information he was relying on to make the s 238(2) decision, allow her an

opportunity to respond to it, and provide reasons for the refusal based on the evidence. The Applicant also addressed each of s 238(a), (b), and (c).

[65] As noted above, the Applicant's September 21, 2017 written submissions to the Enforcement Officer stated that, in support of her request she had included her affidavit, also dated September 21, 2017, with all relevant documents. She requested that prior to any decision being made that any documents relied upon by CBSA be provided and that counsel be allowed a response. Reasons, in the event of a negative decision, were also requested. The correspondence in the CTR indicates that a similar request was included in the Applicant's July 25, 2016 submissions and that the Applicant made several prior requests for disclosure.

[66] The CTR contains no documentation relating to the alleged criminal charges other than that provided by the Applicant herself. Specifically, the information attached to the Applicant's prior submissions seeking voluntary removal dated July 25, 2016 which attached the July 11, 2016 affidavit of the Applicant. Exhibit D of that affidavit appears to be a print out from Interpol's website. This states only that the Applicant is wanted by the judicial authorities of China for prosecution and to serve a sentence, no further detail is provided. Exhibit E is the Recommendation for Prosecution, Exhibit F is the July and November Letters from Ms. Ye, and Exhibit C contains counsel's request for document disclosure by CBSA.

[67] Other than the Recommendation for Prosecution, which her counsel obtained and does not name the Applicant as an individual criminal suspect, the Applicant does not know the case she has to meet as CBSA disclosed no information in that regard. She has therefore also been

deprived of an opportunity to address that case. Indeed, the Lewicki Affidavit filed by the Respondent when opposing the Applicant's stay applications states that the admissibility hearing was not proceeded with "as there was no evidence which could disclosed to support the criminal admissibility allegation". It is possible that Interpol requires that participating states not disclose the evidentiary basis given for issuing a Red Notice, however, there is no evidence concerning this in the record. And, in that event, one would expect CBSA to at least provide the Applicant with a summary or outline of the evidence that was available to and reviewed by the Enforcement Officer.

[68] However, the Enforcement Officer did not respond in any way to the Applicant's request for document disclosure. No reason or explanation was given and, as noted above, the CTR contains no information, other than that provided by the Applicant, upon which the Enforcement Officer could have relied upon in reaching his or her decision.

[69] While the Respondent submits that the Recommendation for Prosecution provides *prima facie* evidence and was sufficient to base the Enforcement Officer's decision, the Enforcement Officer makes no reference to this evidence or of its sufficiency to support his or her finding. The decision states only that the Applicant's submissions were "incomplete in regards to quoting IRPA 238(2)(c)". It is not possible to determine from the record or these reasons how the submissions were incomplete and if, as the Respondent submits, the Enforcement Officer relied on the documents submitted by the Applicant in reaching that decision, was satisfied that only a *prima facie* case need be met, and that those documents met that requirement.

[70] Nor does *Khalife*, relied upon by the Respondent, assist in this matter. There the applicant sought to stay an inadmissibility hearing on the basis of bias, that he would be compelled to testify against his interests, and that the admissibility hearing was a disguised extradition hearing. On that latter point, the applicant argued that the IRB's refusal to accept his offer to voluntarily be removed to Lebanon was really disguised extradition. The Court reviewed the six principles that apply to cases where disguised extradition is alleged. These included the purpose of the deportation. If the government's purpose was to surrender a fugitive criminal because a foreign government asked for him then this was not a legitimate exercise of the power of deportation, however, the onus is on the applicant alleging the unlawful exercise of power to establish this. The Court found that the applicant had not met that onus. Further, *Khalife* stated that the ID does not determine where an individual is sent upon removal, rather that the Minister decides this after the applicant is found to be inadmissible. An individual is stripped of his or her choice of country if they are a fugitive from justice under s 238(2)(b).

[71] Thus, if a hearing as to inadmissibility were held and a person were found to be inadmissible for criminality, then the inquiry under that provision, including the evidentiary disclosure, would address s 238(2)(b) as any convictions would have been confirmed and it would be known if sentences had been served. If they had not, then this would speak to the applicant being a fugitive from justice.

[72] Here, however, the Applicant did not argue that this is a case of disguised extradition. Thus, there is no question of meeting an onus of establishing a wrongful purpose by government. Further, the refusal did not follow an inadmissibility hearing and the procedural steps which it

would have entailed. Rather, it is based on s 238(2)(c), that the Applicant seeks to evade or frustrate the cause of justice in China. In my view, to reach the conclusion that s 238(2)(c) applied required an evidentiary basis. The Applicant was entitled to disclosure of that evidence or at least an explanation for why it could not be disclosed, if that was the case, together with some confirmation that the Enforcement Officer had reviewed the supporting evidence available to him or her, and an outline of its content. This would afford the Applicant an opportunity to know the case against her and to respond to it.

[73] While I do not agree with the Applicant that an admissibility hearing or similar process was required, including an oral hearing, the content of procedural fairness required in this matter included the Applicant being advised of the case against her, being able to respond to it and having those submissions considered fully and fairly. That did not happen and accordingly, the decision was procedurally unfair and cannot stand.

ii) Was the decision reasonable?

[74] Given my finding that the decision was reached in a procedurally unfair manner, I need not address its reasonableness. However, and in any event, the Voluntary Removal Decision was not reasonable because it lacks justification, transparency, and intelligibility. The extremely brief reasons do not allow this Court on review to understand why the Enforcement Officer decided that the Applicant was seeking to evade or frustrate the cause of justice, why the Enforcement Officer decided that the Applicant's submissions on this point were "incomplete", or how the Enforcement Officer dealt with the Applicant's evidence that the charges were being pursued despite a lack of jurisdiction. The Enforcement Officer makes no reference to any

evidence establishing how the Applicant is seeking to evade or frustrate the cause of justice or the Applicant's submissions which specifically addressed all three s 238(2) factors. While adequacy of reasons is not a stand-alone basis for quashing a decision, here the reasons do not allow me to understand why the Enforcement Officer made his or her decision and whether the conclusion falls within the range of acceptable outcomes. Accordingly, is it not reasonable (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-16; *Dunsmuir*).

Certified Question

[75] The Applicant proposes the following question for certification pursuant to s 74(d) of the IRPA:

> What is the duty of fairness, in relation to participatory rights, that is required by Officers making decisions under Section 238(2) of the Regulations?

[76] The Applicant submits that the question is one of general importance as it applies to all requests for voluntary removals made pursuant to s 238(2) of the IRP Regulations. Such determinations have extreme consequences for applicants and, as current jurisprudence as to the duty of fairness owed in making such decisions is sparse, officers are uninformed of the duty that is owed. An established process would ensure all such applicants are afforded the same procedural protections. The question is also dispositive as the level of participation rights afforded in this case would not even meet the minimum *Baker* requirements.

[77] The Respondent opposes the proposed question as it is not dispositive of the case, the question as to participatory rights is theoretical in nature and not relevant to the factual circumstances of this case.

[78] The Federal Court of Appeal in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, recently revisited the criteria that must be met for certification of a proposed question:

> [46] This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para. 36, the criteria for certification. The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, 29 Imm. L.R. (4th) 211 at para. 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186 at paras. 15, 35).
>
> [47] Despite these requirements, this Court has considered that it is not constrained by the precise language of the certified question, and may reformulate the question to capture the real legal issue presented (*Tretsetsang v. Canada (Citizenship and Immigration)*, 2016 FCA 175, 398 D.L.R. (4th) 685 at para. 5 per Rennie J.A. (dissenting, but not on this point); *Canada (Citizenship and Immigration) v. Ekanza Ezokola*, 2011 FCA 224, [2011] 3 F.C.R. 417 at paras. 40-44, affirmed without comment on the point, *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678). Any reformulated question must, of course, also meet the criteria for a properly certified question.

[79] In my view, while the circumstances of this matter are somewhat unique given that the related PRRA was found to be unreasonable and there was no inadmissibility hearing, the

question proposed by the Applicant is appropriate for certification. Accordingly, I will certify the question, slightly reworded, as follows:

> What is the content of the duty of procedural fairness owed by officers of Canada Border Services Agency when making decisions, pursuant to s 238(2)(a), (b) or (c), of the *Immigration and Refugee Protection Regulations*, refusing to approve an applicant's choice of country of destination when voluntarily complying with a removal order?

JUDGMENT IN IMM-4026-17 AND IMM-4079-17

THIS COURT'S JUDGMENT is that

IMM-4026-17 (PRRA)

1. The application for judicial review is granted. The decision of the PRRA Officer is set aside and the matter is remitted for re-determination by a different officer;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

IMM-4079-17 (Voluntary Removal Decision)

1. The application for judicial review is granted. The decision of the Enforcement Officer is set aside and the matter is remitted for re-determination by a different officer;
2. There will be no order as to costs.
3. The following question is certified:

> What is the content of the duty of procedural fairness owed by officers of Canada Border Services Agency when making decisions, pursuant to s 238(2)(a), (b) or (c), of the *Immigration and Refugee Protection Regulations*, refusing to approve an applicant's choice of country of destination when voluntarily complying with a removal order?

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4026-17
STYLE OF CAUSE:	AI YANG v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
AND DOCKET:	IMM-4079-17
STYLE OF CAUSE:	AI YANG v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 29, 2018
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	MAY 9, 2018

APPEARANCES:

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