Federal Court  Cour fédérale

Date: 20110624

Docket: IMM-4290-10

Citation: 2011 FC 771

Ottawa, Ontario, June 24, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

CHAOHUI LIN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a citizen of China. His claim for refugee protection was twice refused by the Refugee Protection Division of the Immigration and Refugee Board. This is his application for judicial review of the decision made on July 26, 2010 by an enforcement officer of the Canada Border Services Agency ("CBSA") in Toronto, Ontario, refusing the applicant's request to defer his removal.

[2] The applicant served as a crewman on a Chinese vessel. He left the ship when it arrived in Canada and made a refugee claim based on fear of being targeted due to his involvement in an underground Christian church in China. The first panel did not believe that the applicant was a Christian. That decision was sent back by this Court for reconsideration: *Lin v. Canada (Minister of Citizenship and Immigration),* 2008 FC 558. The second panel accepted that he was a Christian but refused the claim on the basis that there were no specific reports of adherents of house churches being detained in the Fujian Province where the applicant lived. That decision was upheld on review: *Lin v. Canada (Minister of Citizenship and Immigration),* 2010 FC 108.

[3] The applicant was advised of his right to submit a Pre-Removal Risk Assessment ("PRRA") application on April 17, 2010. He says he retained Elizabeth Cheung, an immigration consultant working for Mississauga Immigration Services Corporation. It is unclear whether Ms. Cheung accepted to act for the applicant. He says she told him that she had filed the application on May 11, 2010. However, on July 5, 2010, the CBSA informed Mr. Lin that his PRRA application was not received. He says that when he asked Ms. Cheung about this, she assured him everything was filed properly.

[4] On or around July 9, 2010 the applicant was called to the CBSA in the Greater Toronto Enforcement Centre ("GTEC") where he was informed that his removal date would soon be scheduled. He was asked to meet with them again on July 19, 2010. On July 15, 2010 the applicant retained another consultant, Peter Lam, to assist him with the situation. Mr. Lam referred the applicant to his current counsel whom the applicant retained that same day.

[5] Counsel for the applicant was informed by the PRRA Office on July 20, 2010 that after a review of their record no application was found on file. A second PRRA application was faxed and couriered to the PRRA Office on July 22, 2010. That same day, the applicant submitted a request to defer his removal to China. The request was based on the PRRA and on his application for permanent residence in the Spouse or Common-Law Partner in Canada class. Mr. Lin had married Ms. Xiaomei Chen on March 21, 2010. On April 9, 2010 Ms. Chen filed an application to sponsor him for permanent residence.

[6] The officer considered that the request for deferral was not warranted by the recent PRRA application nor did she find the applicant to be eligible for an administrative deferral as someone who had submitted a spousal class application because it was submitted after he became removal-ready. Moreover, the officer found that there was insufficient evidence to support the risk allegations advanced by the applicant.

[7] A stay of removal was granted on August 3, 2010 pending the outcome of this application.

[8] The issues raised at the hearing were the scope of the officer's discretion to defer removal and whether it was exercised reasonably in these circumstances. While the effect of the spousal sponsorship was raised in the applicant's written representations, it was not pressed in oral argument.

[9] The officer was correct to note that "an Enforcement Officer has very little discretion to defer removal and an obligation under section 48 of the *Immigration and Refugee Protection Act* to enforce removal orders as soon as reasonably practicable". But, there are certain circumstances where deferral is warranted: "for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment": *Baron v. Canada (Minister of Public Safety and Emergency Preparedness),* 2009 FCA 81, [2010] 2 F.C.R. 311 at para. 51.

[10] The question here was whether this is one of those cases where the officer's failure to defer could trigger this high level of risk?

[11] The main risk identified on the PRRA application was whether the applicant would face the risk of serious human rights violations, prolonged detention and inhumane treatment for having jumped ship, for harming the "honour or interests" of China, for breaching his Labour Contract as a crew member of Guangzhou China Ocean Shipping, for violating the laws governing the use and management of Chinese public affairs passports, and any other infractions for which he may be found guilty in China. In considering this risk, the officer noted the following:

> I have also considered Mr. Lin's concerns regarding his safety if he returned to China which was submitted by counsel as an affidavit. While I acknowledge Mr. Lin's trepidation and sympathize with his situation, I nevertheless find that insufficient evidence has been submitted to corroborate these allegations of risk. The Refugee Protection Division has already assessed Mr. Lin's circumstances and found him not to be a Convention Refugee on 17 April 2007. I also note that Mr. Lin has already availed himself of the legal recourse at the Federal Court, to which his redetermination of his Refugee decision was found to be negative on 27 January 2009. Mr. Lin's Application for Leave and Judicial Review was also denied on 01 February 2010.

[12] It was not the officer's responsibility to make the risk assessment. Rather, as noted by Justice Denis Pelletier, as he then was, at paragraph 50 in *Wang v. Canada (Minister of Citizenship and Immigration),* 2001 FCT 148, 13 Imm. L.R. (3d) 289, and as cited recently by Justice Sean Harrington in his Reasons for Order and Order in the stay application of *Shpati v. Canada (Minister of Public Safety and Emergency Preparedness),* 2010 FC 367, 89 Imm. L.R. (3d) 25 (*Shpati I*) at paragraph 41:

> The discretion to be exercised is whether or not to defer to another process which may render the removal order ineffective or unenforceable, the object of that process being to determine whether removal of that person would expose him to a risk of death or other extreme sanction.

See also *Kaur v. Canada (Minister of Citizenship and Immigration),* 2001 FCT 741, 106 A.C.W.S. (3d) 1092 at para. 15 where Justice Edmond Blanchard describes a removal officer's discretion this way:

> I am also of the view that discretion to be exercised by the removal officer does not consist of assessing risk, but rather one of assessing whether there are special circumstances that would justify her deferring the removal.

[13] Although the record indicates that the ship-jumping issue was raised before the RPD, it is not clear whether the evidence which suggests that the applicant could face ill treatment and/or serious human rights violations if returned to China because of this was seriously considered. That may have been, as the applicant conceded, because it was not pressed by his counsel at the time. Nonetheless, both panel decisions and the resulting judicial review decisions dealt with the issue of religious persecution and not the risk associated with ship-jumping.

[14] It Article 4 of the "Law on the Control of the Exit and Entry of Citizens" in China, as set out in a document in the record, that "[a]fter leaving the country, Chinese citizens may not commit any act harmful to the security, honour or interests of their country". Article 14 of the same law goes on to discuss penalties for entering and exiting of the country illegally. Penalties could include: a warning, detention or for more serious crimes, criminal responsibility.

[15] In another document citing from the *Refugee Review Tribunal of Australia*, it is noted that it is an offence under article 109 of the Criminal Law for a state employee to "defect while outside China, thereby endangering state security". The boat for which the applicant worked is state-owned and, therefore, the applicant submits he would be subject to penalties as an employee of the Chinese government. The US Court of Appeals for the Seventh Circuit has also observed, in *Yi-Tu Lian v. John D. Ashcroft*, 379 F.3d 457 (7th Cir 2004), that there was uncertainty as to what would actually happen to individuals who had left China illegally but were repatriated for various reasons.

[16] The applicant submitted additional documentation to the officer regarding China's violations of human rights. It was open to the officer to consider this evidence in order to assess whether removal should be deferred until the PRRA application could be determined. In the particular circumstances of this case, I think it was unreasonable for the officer not to have exercised her discretion to do so. The question was too complex for an enforcement officer to deal with at the removal stage. It may be that a PRRA officer, properly informed, may come to the conclusion that the risk of harm does not amount to the level contemplated by *Wang* and *Baron*, above. But the enforcement officer was not equipped to make that determination.

[17] In the particular circumstances of this case, the view of Justice Harrington in *Shpati I*, above, at paragraph 45 is particularly apt. He stated that he had difficulty in accepting that "Parliament intended that it was "reasonably practicable," for an enforcement officer, who is not trained in these matters, to deprive an applicant of the very recourse Parliament has given him". The officer should have considered that removal would not be practicable until a specialized assessment of the risk had been obtained. For that reason, I will grant this application and quash the officer's decision. The applicant has filed a PRRA and is entitled, under Canadian law, to a proper risk assessment. That does not, of course, assume the outcome of that assessment.

[18] In oral argument the applicant proposed the following question for certification:

> Where an applicant has pending PRRA litigation before the Court, does this pending litigation require that he be allowed to remain in Canada until its conclusion in view of section 72 of the *IRPA*, section 31(2) of the *Interpretation Act*, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and the Respondent's Manual PP3, without the necessity to seek an application for a stay of removal?

[19] This same question was proposed for certification by the applicant in *Shpati v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1046, 93 Imm. L.R. (3d) 117 (*Shpati II*), applications for judicial review of a PRRA, H&C and an enforcement officer's refusal to defer. The applicant also referred me to *Omar v. Canada (Solicitor General)*, 2004 FC 1740, 44 Imm. L.R. (3d) 114, a decision of Justice Yvon Pinard, where counsel for the applicant sought to certify four questions relating to section 24 of the *Canadian Charter of Rights and Freedoms*, Canada's international obligations, the Convention Against Torture and the situation in the West Bank or the Occupied Territories.

[20] In *Shpati II*, Justice Harrington granted the application for the refusal to defer but chose not to certify the question noted above. Instead, he certified two alternative questions advanced by the respondent: *Shpati II*, above, at para. 55. In *Omar*, Justice Pinard found the proposed questions not to be considered of general importance within the meaning of paragraph 74(d) of the IRPA.

[21] The test for certification has been articulated as whether there a serious question of general importance which would be dispositive of an appeal: *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, 318 N.R. 365. Certification is not necessary where the question is not a live issue and the Court has consistently accepted a prior authority: *Thurasingham v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1332, 39 Imm. L.R. (3d) 74. Cognizant of the serious risks which the applicant may face if removed to China, and having determined this matter in favour of the applicant, I agree with the respondent that certification is not necessary.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4290-10
STYLE OF CAUSE:	CHAOLIN LIN and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 23, 2011
REASONS FOR JUDGMENT:	MOSLEY J.
DATED:	June 24, 2011

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