

Federal Court



Cour fédérale

**Date: 20130620**

**Docket: IMM-8486-12**

**Citation: 2013 FC 663**

Ottawa, Ontario, this 20<sup>th</sup> day of June 2013

**Present: The Honourable Mr. Justice Pinard**

**BETWEEN:**

**Wei Liang KUANG**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the “Act”). The applicant seeks a *mandamus* order compelling Citizenship and Immigration Canada [CIC] to release his permanent resident (“PR”) card to him within 15 days of the date of the granting of an order to do so.

[2] The applicant, his wife and their son became permanent residents of Canada in February 2003. The family subsequently returned to China, where the applicant was employed by a Canadian business.

[3] The applicant, his wife and their son applied for travel documents on December 16, 2008. Their applications were refused on June 7, 2009, as a visa officer found the applicant's employment with the Canadian business was not genuine and that he and his family had not satisfied their residency obligations under section 28 of the Act for the five-year period under consideration.

[4] The applicant and his family appealed this decision to the Immigration Appeal Division [IAD]. In February 2011, the IAD determined that the applicant had satisfied the section 28 residency requirements for permanent residency over the five-year period of December 23, 2003 to December 22, 2008. As such, the family maintained their permanent resident status. The Minister filed an application for judicial review with the Federal Court, but the application was discontinued.

[5] In light of the IAD decision, on July 19, 2011, the family applied for renewal of their PR cards. The applications were approved and CIC notified the applicant and his family that they were to pick up their PR cards in Vancouver on June 29, 2012. The CIC notices included the following statement:

PLEASE NOTE: All permanent residents are subject to examination for residency obligation at time of card distribution. An officer will review your documents and may request additional information to determine your eligibility for a PR card.

[6] On June 26, 2012, the applicant and his wife arrived in Vancouver. The applicant was questioned by the Canada Border Services Agency [CBSA] at the airport. The respondent states that this interview raised questions about the applicant's compliance with his residency obligation. The applicant asserts that the CBSA did not permit him to speak to his legal counsel and only allowed him to leave the airport after extended questioning.

[7] The applicant and his wife were not given their PR cards when they arrived at the CIC office for their appointments on June 29, 2012. Rather, they were required to complete additional residency questionnaires and submit additional supporting documents regarding the applicant's overseas employment by the Canadian business.

[8] The applicant's counsel wrote to CIC and objected to the request for residency obligation information, claiming it was inappropriate in light of the IAD decision. CIC did not respond to this letter. On July 31, 2012, as a "gesture of good faith" the applicant submitted some of the requested documents and completed residency questionnaires to CIC.

[9] On August 22, 2012, the applicant filed this application for judicial review. He is the only member of his family that is a party to the application.

[10] CIC issued a letter to the applicant on March 7, 2013 inviting him and his wife to an interview on March 27, 2013 for the purpose of evaluating their compliance with the residency obligation under paragraph 28(2)(a) of the Act.

[11] On March 28, 2013, CIC issued another letter indicating that it had scheduled a final interview for the applicant on April 25, 2013, for the same purpose. The letter indicated that should the applicant and his wife not attend the interview, their five-year PR cards would be sent to the Case Processing Centre in Sydney for destruction.

[12] On April 3, 2013, the applicant's lawyer indicated that an interview should not be scheduled before the Federal Court had the chance to adjudicate whether CIC's reopening of the residency issue was inappropriate and contrary to the law. In light of these concerns, CIC rescheduled the interview to June 11, 2013.

[13] According to the respondent, CIC is in the process of deciding whether to issue the applicant a five-year PR card or a one-year PR card along with a subsection 44(1) report. Ms. White, a supervisor at CIC, states in her affidavit that 6 to 18 months is a reasonable amount of time for a CIC officer to decide whether to issue a five-year or one-year PR card where the officer is investigating concerns that may give rise to a subsection 44(1) report. In the present case, the concerns leading to the investigation arose nearly 12 months ago on June 26, 2012, the date the applicant was questioned by the CBSA at the Vancouver airport.

\* \* \* \* \*

[14] The provisions of the Act that are most relevant to the present case are:

**15.** (1) An officer is authorized to proceed with an examination if a person makes an application to the officer in accordance with this Act or if an application is made under subsection 11(1.01).

**15.** (1) L'agent peut procéder à un contrôle dans le cadre de toute demande qui lui est faite au titre de la présente loi ou qui est faite au titre du paragraphe 11(1.01).

...

**28.** (1) A permanent resident must comply with a residency obligation with respect to every five-year period.

(2) The following provisions govern the residency obligation under subsection (1):

(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

...

(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,

**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.

...

[15] The relevant provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the “Regulations”) are as follows:

**54.** (1) Subject to subsection (2), a permanent resident card is valid for five years from the date of issue.

(2) A permanent resident card is valid for one year from the date of issue if, at the time of issue, the permanent resident

(a) is subject to the process set out in paragraph 46(1)(b) of the Act;

(b) is the subject of a report prepared under subsection 44(1) of the Act;

...

**28.** (1) L’obligation de résidence est applicable à chaque période quinquennale.

(2) Les dispositions suivantes régissent l’obligation de résidence :

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

...

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

**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.

...

**54.** (1) Sous réserve du paragraphe (2), la carte de résident permanent est valide pour une période de cinq ans.

(2) La carte de résident permanent est valide pour une période de un an si le résident permanent, au moment de la délivrance :

a) soit fait l’objet du processus prévu à l’alinéa 46(1)(b) de la Loi;

b) soit fait l’objet d’un rapport établi en vertu du paragraphe 44(1) de la Loi;

(c) is subject to a removal order made by the Minister under subsection 44(2) of the Act and the period for filing an appeal from the decision has not expired or, if an appeal is filed, there has been no final determination of the appeal; or

(d) is the subject of a report referred to the Immigration Division under subsection 44(2) of the Act and the period for filing an appeal from the decision of the Immigration Division has not expired or, if an appeal is filed, there has been no final determination of the appeal.

**59.** (1) An officer shall, on application, issue a new permanent resident card if

(a) the applicant has not lost permanent resident status under subsection 46(1) of the Act;

(b) the applicant has not been convicted under section 123 or 126 of the Act for an offence related to the misuse of a permanent resident card, unless a pardon has been granted and has not ceased to have effect or been revoked under the *Criminal Records Act*;

(c) the applicant complies with the requirements of sections 56 and 57 and subsection 58(4); and

(d) the applicant returns their last permanent resident card, unless the card has been lost, stolen or destroyed, in which case the applicant must produce all relevant evidence in accordance with subsection 16(1) of the Act.

...

c) soit fait l'objet d'une mesure de renvoi prise par le ministre en vertu du paragraphe 44(2) de la Loi, si le délai d'appel n'est pas expiré ou, en cas d'appel, s'il n'a pas été statué en dernier ressort sur celui-ci;

d) soit dont l'affaire est déferée à la Section de l'immigration pour enquête aux termes du paragraphe 44(2) de la Loi, si le délai d'appel de la décision de la Section n'est pas expiré ou, en cas d'appel, s'il n'a pas été statué en dernier ressort sur celui-ci.

**59.** (1) L'agent délivre, sur demande, une nouvelle carte de résident permanent si les conditions suivantes sont réunies :

a) le demandeur n'a pas perdu son statut de résident permanent aux termes du paragraphe 46(1) de la Loi;

b) sauf réhabilitation — à l'exception des cas de révocation ou de nullité — en vertu de la *Loi sur le casier judiciaire*, le demandeur n'a pas été condamné sous le régime des articles 123 ou 126 de la Loi pour une infraction liée à l'utilisation frauduleuse d'une carte de résident permanent;

c) le demandeur satisfait aux exigences prévues aux articles 56 et 57 et au paragraphe 58(4);

d) le demandeur rend sa dernière carte de résident permanent, à moins qu'il ne l'ait perdue ou qu'elle n'ait été volée ou détruite, auquel cas il doit donner tous éléments de preuve pertinents conformément au paragraphe 16(1) de la Loi.

...

\* \* \* \* \*

[16] The issue in this matter is whether the applicant has met the conditions for a *mandamus* order.

[17] While the applicant submits that he has met all of the conditions set out in *Liang v The Minister of Citizenship and Immigration*, 2012 FC 758 [*Liang*] for the granting of a *mandamus* order, the respondent argues that this is not the case and that the request for *mandamus* is premature.

\* \* \* \* \*

### Analysis

[18] The parties agree that as Mr. Justice Rennie recently affirmed in *Liang*, at paragraph 24, the test for *mandamus* in an immigration context includes the following criteria:

1. There must be a public legal duty to act.
2. The duty must be owed to the applicant.
3. There is a clear right to the performance of that duty, in particular:
  - (a) the applicant has satisfied all conditions precedent giving rise to the duty;
  - (b) there was (i) a prior demand for performance of the duty;
  - (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;
4. Where the duty sought to be enforced is discretionary, the following rules apply:
  - (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as “unfair”, “oppressive” or demonstrate “flagrant impropriety” or “bad faith”;
  - (b) *mandamus* is unavailable if the decision-maker’s discretion is characterized as being “unqualified”, “absolute”, “permissive” or “unfettered”;
  - (c) in the exercise of a “fettered” discretion, the decision-maker must act upon “relevant”, as opposed to “irrelevant”, considerations;
  - (d) *mandamus* is unavailable to compel the exercise of a “fettered discretion” in a particular way; and

(e) *mandamus* is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.

5. No other adequate remedy is available to the applicant.
6. The order sought will be of some practical value or effect.
7. The Court in the exercise of discretion finds no equitable bar to the relief sought.
8. On a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.

A. *Whether the conditions precedent for the issuance of a PR card are met*

[19] I am persuaded by the respondent's arguments that not all conditions precedent giving rise to the public legal duty for CIC to issue a PR card to the applicant have been met. For the reasons that follow, I do not agree with the applicant that "the time of issue" in subsection 54(2) of the Regulations means the time that the requirements of subsection 59(1) of the Regulations are met.

[20] First, I am convinced that what is meant by "the time of issue" in paragraph 54(2)(b) is the time CIC actually provides the card to an applicant. As Justice Zinn stated in *Khan v The Minister of Citizenship and Immigration*, 2012 FC 1471, [*Khan*] at paragraph 20:

[20] This submission turns on when a PR Card is issued and by whom. I agree with the respondent that the PR Card had been processed by CPC-S but that it had not yet been issued to Mr. Khan. The issuing of a PR Card requires the transmitting to or delivery of the card to the applicant. That did not happen at CPC-S; it was to happen at CIC GTA Central when Mr. Khan arrived to take possession of his new card. Accordingly, I reject the submission that the officer at CIC GTA Central was *functus*. This is not to suggest that there were no limitations on the officer's obligation to hand over the PR Card to Mr. Khan.

[Emphasis added]



[21] Second, I would agree with the respondent that the issue of whether an officer undertaking a 44(1) investigation will ever prepare a 44(1) report is unrelated to the question of whether paragraph 54(2)(b) could apply in the applicant's circumstances. Given that CIC has stated it intends to issue the applicant a PR card, the issue is whether the applicant is entitled to a one-year card or a five-year card.

[22] Third, I would agree with the respondent that the principles set out in *Khan*, above, do not preclude the possible application of paragraph 54(2)(b) in the present case. Justice Zinn stated the following at paragraph 40 of that decision:

[40] The respondent, however, submits that the officer at CIC GTA Central was obliged to withhold the PR Card unless satisfied that Mr. Khan met the residency obligation. That is in error because meeting the residency obligation is not a condition for issuing the PR Card set out in subsection 59(1) of the Regulations. Further, notwithstanding the statement in the form letter sent to those who are to pick up their new PR Card that "According to the *Immigration and Refugee Protection Act*, all permanent residents of Canada are subject to a residency assessment at the time of distribution of their new PR card," there is no such requirement in the Act. It is most certainly within the prerogative of the respondent to confirm at the time of pick up or at any other time that a permanent resident satisfies the residency obligation; however there is no legislated requirement that it be done at the time of the PR Card pick up and such an examination cannot impede the issuance of the PR Card.

[Emphasis added]

[23] The Court in *Khan* did not turn its mind to the question of subsection 54(2) exceptions to the issuance of a five-year PR card. Therefore, in my opinion it would not be contradictory with that decision to find that an officer may inquire into whether a paragraph 54(2)(b) exception applies before issuing a PR card.

[24] Accordingly, in my view paragraph 54(2)(b) could still apply to the applicant once the officer completes her 44(1) investigation. Thus, not all conditions precedent for the issuance of a five-year PR card are met, and the third criterion of the *Liang* test, above, is not established.

*B. Whether there has been an unreasonable delay in deciding whether to issue the applicant a five-year or one-year PR card*

[25] Given that I believe paragraph 54(2)(b) of the Regulations is not precluded from applying in the applicant's circumstances, the appropriate timeframe by which to measure the reasonableness of the delay in issuing the applicant his PR card is the time it reasonably takes for a CIC officer to decide whether to issue a five-year or one-year PR card where the officer is investigating concerns that may give rise to a subsection 44(1) report.

[26] Ms. White, a supervisor at CIC, states in her affidavit that 6 to 18 months is a reasonable amount of time for a CIC officer to decide whether to issue a five-year or one-year PR card in such circumstances.

[27] The concerns leading to the investigation in the present case arose nearly 12 months ago on June 26, 2012 (the date the applicant was questioned by the CBSA when he arrived at the Vancouver airport).

[28] Since, as noted by the respondent, the Minister and CIC are best placed to know the reasonable timeframe for the completion of the investigation (*Liang*, above, at para 41) and CIC is

still within the reasonable timeframe for making a decision of this nature, I find that a *mandamus* order would be premature in this case.

\* \* \* \* \*

[29] For the above-mentioned reasons, the request for a *mandamus* order is denied and the application for judicial review is dismissed.

[30] Upon considering the parties' submissions on the question of certification, the following question is certified:

In light of subsections 54(2) and 59(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, where an applicant is not the subject of a report prepared under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 at the time he or she is sent a letter to pick up his or her permanent resident ("PR") card at a scheduled time ("the pick up date"), but before the pick up date new concerns arise leading to an investigation under subsection 44(1), is there a legal duty to issue a five-year PR card to the applicant on the pick up date even if the investigation under subsection 44(1) is incomplete?

**JUDGMENT**

The request for a *mandamus* order is denied and the application for judicial review is dismissed. The following question is certified:

In light of subsections 54(2) and 59(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, where an applicant is not the subject of a report prepared under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 at the time he or she is sent a letter to pick up his or her permanent resident (“PR”) card at a scheduled time (“the pick up date”), but before the pick up date new concerns arise leading to an investigation under subsection 44(1), is there a legal duty to issue a five-year PR card to the applicant on the pick up date even if the investigation under subsection 44(1) is incomplete?

“Yvon Pinard”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-8486-12

**STYLE OF CAUSE:** Wei Liang KUANG v. THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** May 9, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Pinard J.

**DATED:** June 20, 2013

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