Cour fédérale Federal Court

Date: 20150915

Docket: IMM-1405-15

Citation: 2015 FC 1060

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, September 15, 2015

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

JOLLY KAMPEMANA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA], for judicial review of a decision by a Canada Border Services Agency [CBSA] Enforcement Officer [officer] dated March 18, 2015, refusing to defer the applicant's removal from Canada.

[2] For the reasons that follow, the application for judicial review is dismissed.

I. Background

[3] The applicant, Jolly Kampemana, is a citizen of Burundi. His wife and two minor children, who are also from Burundi, entered Canada on July 31, 2013, and claimed refugee protection under section 96 and subsection 97(1) of the IRPA. The applicant's wife alleged, among other things, that because of their Tutsi ethnicity, she and the applicant were persecuted in Burundi by armed men in police uniforms and by a senior army official who wanted to seize their property. The Immigration and Refugee Board of Canada's Refugee Protection Division [RPD] denied the refugee protection claim of the applicant's wife and two children on January 24, 2014, because it lacked credibility and because there was an internal flight alternative. An application for leave and judicial review [ALJR] of this decision was filed before the Federal Court, and the application for judicial review was dismissed on December 5, 2014.

[4] On May 12, 2014, the applicant's wife filed an application for permanent residence for humanitarian and compassionate considerations [H&C] on behalf of herself and her two children.

[5] The applicant arrived in Canada on August 20, 2014. He filed a refugee protection claim, in which he essentially alleged the same facts as those presented by his wife and two children. The RPD denied his refugee protection claim on October 21, 2014. Among other things, it found

that the applicant did not establish that he could not move to Gitega in Burundi without endangering his life. On February 18, 2015, the Federal Court dismissed his application for leave to file an application for judicial review.

[6] On December 18, 2014, the applicant asked to be included in the H&C application of his wife and two children.

[7] On February 19, 2015, the applicant's wife and two children filed a request for a pre-removal risk assessment [PRRA], resulting in a stay of their departure.

[8] On March 3, 2015, the applicant reported to the CBSA office in Montreal for an interview regarding departure arrangements. The officer noted that the applicant's wife was six months pregnant and that she was due to give birth on June 19, 2015. He also noted that the applicant had been added to his wife's H&C application. The applicant was informed by the officer that the H&C application did not have the effect of suspending removal and was given a notice specifying his expected date of departure of March 28, 2015, at 5 a.m.

[9] On March 13, 2015, the applicant sent the officer an application to defer his removal, on the basis of, among other things, the pending H&C application made on the ground of the best interests of the children, specifically, those of his disabled son, and it being impossible for him to

file a PRRA application before October 21, 2015, despite the worrying situation in Burundi. His application to defer the removal was rejected by the officer on March 18, 2015.

[10] On March 24, 2015, the applicant filed an ALJR against the officer's decision and a motion for a stay. In his motion for a stay, the applicant described the repercussions for the well-being of his children, and more particularly, for his disabled son; his wife's advanced pregnancy; their disabled son's need for support; and the difficulties his wife would have in taking care of three children after she gave birth. On March 26, 2015, Justice Tremblay-Lamer of this Court granted the applicant a stay of execution of the removal order.

II. Impugned decision

[11] On March 18, 2015, the officer concluded that the circumstances in this case did not justify a deferral of removal.

[12] The officer noted that he had reviewed the application for deferral of the removal and all the documents sent by counsel for the applicant. He examined three of the grounds on which the applicant's request was based: the pending decision from Citizenship and Immigration Canada [CIC] on the H&C application, the fact that the applicant had the option of filing a PRRA application and to receive a response on this application, and, lastly, the best interests of the applicant's children.

[13] On the first ground, the officer noted that an H&C application was received by CIC in May 2014, that the applicant's name was added to this application in December 2014 and that no decision had yet been made. He noted that, during an interview with the applicant on March 3, 2015, he explained to the applicant that the filing of an H&C application did not result in a legal stay of the removal order.

[14] As for the second ground raised by the applicant, having to wait until he could file a PRRA application and receive a reply on this application, the officer observed that the applicant's wife and two children had filed a PRRA application on February 19, 2015, and that the applicant could not exercise this option because the decision on his refugee protection claim was rendered on October 21, 2014, and the one-year bar on applying for a PRRA had not yet expired. The officer noted, however, that he had analyzed all the documents sent by counsel for the applicant and that a reading of these documents did not suggest that the applicant would be in danger personally if he were to return to his country. He further noted that the problems raised by the applicant in relation to the war in his country seemed to particularly affect another region of the country and that, according to the applicant's testimony before the RPD, it was possible for him to move to another city in Burundi.

[15] Lastly, regarding the third ground raised by the applicant, the best interests of the children, the officer noted the applicant's declaration that leaving his children with their mother in Canada was not an option for him and that it would be impossible for her to provide for the family's essential financial needs or for the needs of his disabled son. In reply, the officer

remarked that the applicant arrived in Canada over a year after his wife and children arrived here and that, during this year, she succeeded in providing for the family on her own. He further mentioned that there were several organizations in Quebec to help families in need. In reply to the applicant's argument that his help meant that his wife could spend more time finding a full-time job and thus provide for the family's needs, the officer pointed out that, the last time the applicant's wife came to a meeting at their office, she had stated that she was still receiving social assistance.

[16] For these reasons, and relying on subsection 48(2) of the IRPA, the officer found that the case did not warrant a deferral of the removal.

III. Issues

[17] In support of his application for judicial review, the applicant set out the following grounds:

1. The officer erred in law in making a decision or an order, whether or not the error appears on the face of the record;
2. The officer made a decision in a capricious manner or without relying on the evidence before him; and
3. The officer acted in any other way that was contrary to law.

[18] The respondent believes that the case raises only one issue:

> Did the officer err in fact or in law in denying the application for an administrative stay filed by the applicant?

IV. Relevant statutory provisions

[19] The removal order is governed by section 48 of the IRPA, which stipulates as follows:

Immigration and Refugee Protection Act, SC 2001, ch 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, c 27
48. (1) A removal order is enforceable if it has come into force and is not stayed.	48. (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

V. Position of the parties

[20] In support of the ALJR, the applicant alleges that the officer did not consider the best interests of the applicant's children and that he erred in his assessment of the evidence on the repercussions the applicant's removal would have for the children's well-being, and particularly

for his disabled son. His disabled son is profoundly deaf and has a foot deformity, which means that he has little autonomy and requires the support of his parents at all times.

[21] The applicant also alleges that after he arrived in Canada in September 2003, his wife suffered a miscarriage as a result of the stress and fatigue built up from taking care of her severely disabled son and from having to move him. When the applicant applied for the administrative stay, his wife was six months pregnant, and she would undoubtedly find it harder to take care of three children without her husband. The applicant does recognize that his wife took care of the children on her own for a year, but notes that the first time she found herself in this situation, she miscarried.

[22] The applicant submits that the officer refused to exercise discretion and that there was no rush in enforcing the applicant's removal given the exceptional and dramatic circumstances of his case. According to the applicant, if the officer had considered all the evidence, he would have had no choice but to stay the applicant's removal.

[23] The respondent made a preliminary objection regarding the admissibility of certain documents in the applicant's record which were not before the officer when he made his decision. He submits that the Court should disregard these documents since the case does not raise issues of procedural fairness or the officer's jurisdiction.

[24] On the merits, the respondent argues that the officer's refusal to defer the removal was reasonable considering that, under subsection 48(2) of the IRPA, the removal order must be enforced "as soon as possible" and that the officer's discretion in such circumstances is very limited. He submits that the officer examined the grounds raised by the applicant and the evidence adduced in support of the application to defer the removal, and that he provided clear, comprehensive reasons to explain why this evidence was insufficient.

[25] The respondent submits, moreover, that the officer was not required to perform a thorough analysis of the best interests of the child, but rather had to consider the short-term interests. In the matter at bar, the officer considered the fact that despite the applicant's son's pre-existing disabilities, the applicant's wife had nonetheless succeeded in providing for her children's needs for over a year without her husband by her side. He further noted that several organizations in Quebec assist families in need.

[26] The respondent also argues that an H&C application is not a bar to the removal of a person subject to a valid departure order and that, in the present matter, there was no evidence to suggest that a decision was imminent.

[27] Lastly, regarding the change in circumstances in Burundi since the refugee protection claim was denied, the respondent submits that even if the officer noted that the applicant would not be eligible for the PRRA program before October 21, 2015, he nonetheless examined the

evidence and the problems alleged by the applicant. He concluded that the applicant had not established that he would be in danger personally as a result of the alleged changes.

VI. Analysis

A. *Filing of new evidence*

[28] The applicant's record contains certain documents that were not before the officer when he made his decision:

1. At page 254, a physician's letter dated March 17, 2015, describing the stage of the applicant's wife's pregnancy and indicating that it would be preferable if the applicant could stay with his wife during and after the pregnancy in order to help and comfort her.

2. At pages 255-257, a letter from a social worker dated March 17, 2015, supporting the applicant's application to remain in Canada;

3. At pages 259-260, a letter to the Minister of CIC from the Communauté Burundaise et les Environs "CBM" dated March 14, 2015, in support of the H&C application of the applicant and his family;

4. At page 262, a letter from a social worker dated March 13, 2015, written to influence the removal decision.

[29] The first three documents were clearly not sent to the officer before the application to defer the removal because they postdate the March 13, 2015, application. Similarly, my review of the record the Court was provided with by the panel led me to conclude that these documents were not before the officer at the time of his decision.

[30] It is trite law that in the context of an application for judicial review, the Court must consider solely the evidence that was before the administrative decision-maker. In this respect, I share the Federal Court of Appeal's opinion in *Delios v Canada (Attorney General)*, 2015 FCA 117:

> [41] In administrative regimes such as this, Parliament has given the administrative decision-maker, not the reviewing court, the job of finding the facts. Because of this demarcation of roles, the reviewing court cannot allow itself to become a forum for fact-finding on the merits of the matter. See generally *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 at paragraph 17.
>
> [42] Accordingly, as a general rule, the evidentiary record before the Federal Court on judicial review is restricted to the evidentiary record that was before the administrative decision-maker. In other words, as a general rule, evidence that was not before the administrative decision-maker and that goes to the merits of the matter before the Board is not admissible on judicial review. As a result, most affidavits filed on judicial review only attach the record that was before the administrative decision-maker, without commentary. This is proper. See generally *Connolly v. Canada (Attorney General)*, 2014 FCA 294, 466 N.R. 44 at paragraph 7, citing *Access Copyright*, above at paragraphs 19-20.

See also *Walker v Randall*, 173 FTR 161 at paragraph 33.

[31] It is also my opinion that the additional documents adduced by the applicant are not covered by the exceptions to the general rule. They are not documents that provide general background in circumstances where that information might assist the Court in understanding the issues relevant to the judicial review, demonstrate a procedural defect or highlight the complete absence of evidence for a particular finding made by the administrative tribunal (see *Access Copyright*, above, at paragraph 20). For these reasons, I find them to be inadmissible.

B. *Standard of review*

[32] It is now settled that the applicable standard of review for a decision of an officer on an application to defer a removal is that of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paragraph 25 [*Baron*]; *Fernandez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1131 at paragraphs 40-42 [*Fernandez*]; *Gonzalez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 1178 at paragraph 26 [*Gonzalez*], and *Ally v Canada (Minister of Citizenship and Immigration)*, 2015 FC 560 at paragraph 16 [*Ally*]). I must therefore determine whether the officer's decision was justified, transparent and intelligible and whether it falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*]).

C. *The officer's discretion*

[33] The case law is clear that an officer's discretion to defer a removal is very limited, the removal order having to be enforced as soon as possible, and that an officer will only exercise his or her discretion to defer a removal in very exceptional circumstances (see, *Baron*, above, at paragraphs 49 and 51; *Fernandez*, above, at paragraphs 43-44; *Gonzalez*, above, at paragraph 23; *Ally*, above, at paragraph 18*; Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180 at paragraph 29 [*Munar*]; *Ahmedov v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 730, at paragraph 46 [*Ahmedov*]; and *Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 at paragraph 16 [*Varga*]). In this respect, the comments made by Justice Nadon, in *Baron*, when dealing with an officer's discretion in deferring a removal, are useful:

> [51] Subsequent to my decision in *Simoes*, *supra*, my colleague Pelletier J.A., then a member of the Federal Court Trial Division, had occasion in *Wang v. Canada (M.C.I.)*, [2001] 3 F.C. 682 (F.C.), in the context of a motion to stay the execution of a removal order, to address the issue of an enforcement officer's discretion to defer a removal. After a careful and thorough review of the relevant statutory provisions and jurisprudence pertaining thereto, Mr. Justice Pelletier circumscribed the boundaries of an enforcement officer's discretion to defer. In Reasons which I find myself unable to improve, he made the following points:
>
> > - There are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths.
> >
> > - The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act. In

> considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission.
>
> - In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.
>
> - Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application.
>
> I agree entirely with Mr. Justice Pelletier's statement of the law.
>
> [Emphasis in original.]

[34] It is trite law, moreover, that the mere existence of an H&C application cannot prevent the enforcement of a removal order (see *Baron*, above, at paragraphs 50 and 51; *Fernandez*, above, at paragraph 45; *Gonzalez*, above, at paragraph 23; *Munar*, above, at paragraphs 30 and 36). In addition, when the application to defer the removal is based on a humanitarian ground, the officer is not required to perform a thorough review of the humanitarian grounds raised in the H&C application. The same is true when the interests of the children affected by the removal order are raised. In such circumstances, officers must consider the immediate and short-term interests of the children and treat these fairly and with sensitivity. Officers are not required to

review the best interests of any children comprehensively before enforcing a removal order (see *Baron*, above, at paragraphs 50 and 57; *Fernandez*, above, at paragraphs 46 and 51; *Munar*, above, at paragraphs 36 and 40; *Ally*, above, at paragraphs 21, 22, 23 and 25; *Ahmedov*, above, at paragraph 49, and *Varga*, above, at paragraph 16).

[35] It is in light of these principles that the officer's decision in the matter at bar will be examined.

[36] In his application to the officer for a deferral of his removal, the applicant stated that his application was largely related to the H&C application filed by his wife. He pointed out that he asked to be joined to her application as soon it was possible for him to do so. He recognized that an H&C application does not confer the right to an automatic stay of removal. He submitted, however, that a number of factors should be considered before setting a removal date, including the best interests of the child. He asked the officer to exercise his discretion on the ground that his H&C application was based on the best interests of his children, particularly his disabled son.

[37] The applicant alleged that his family would be permanently affected by his departure to Burundi. Since he arrived in Canada in August 2014, his wife and he had mainly taken care of their two children. His son has been at daycare since March 2014, and his daughter has been going to school since September 2013. Since he joined his family, his wife's life has become much easier, and she has more time to spend on finding a full-time job to provide for her family. He also alleged that while he was still in Africa, his son was diagnosed as being profoundly deaf,

a diagnosis that was confirmed by physicians in Montréal. In addition to his hearing difficulties, his son has deformed feet, meaning that he has trouble walking and running. He submitted that because of his hearing and motor difficulties, his son had little autonomy and needed a parent to be with him at all times. If he had to leave the country, his wife would not be able to provide financially for the family's essential needs or for his son's special needs. In support of the application for a deferral, the applicant provided the officer with a file that is almost 200 pages long and that includes a number of medical reports from Africa, the McGill University Health Centre and Montréal's Shriners Hospital for Children dating to the 2013-2014 period. The applicant also sent the officer a number of letters from various organizations supporting his wife's H&C application.

[38] On a personal level, the applicant told the officer about his involvement in his children's extra-curricular activities and his efforts to find work in Canada. He added that he is a significant source of moral support for his wife, pointing out that they have been married for several years and have experienced situations of extreme violence in Burundi. According to the applicant, it would be illogical for him to leave the country while the rest of the family benefits from a stay.

[39] In the alternative, the applicant told the officer that there was reason to grant him a deferral of his removal to allow him to file a PRRA application given that the situation in Burundi had hardly improved since he left. In support of his arguments, he referred to an article by Human Rights Watch dated February 12, 2015, describing the situation in the province of Cibitoke in Burundi. He argued that the incidents reported there were new conditions, meaning

that the risks he would face had not been assessed. Since he could not file an application for a PRRA before the 12 months following the rejection of his refugee protection claim had expired, he asked to officer to stay his removal. In support, the applicant provided the officer with some documents regarding the situation in Burundi.

[40] I find that the officer's decision was reasonable in this instance and that he considered the H&C application based on the best interests of the applicant's children. The officer explains in his decision that the applicant was added to the H&C application of his wife and children, which the applicant's wife had filed in May 2014, in December 2014. He also notes that no decision had as yet been made on the H&C application. Even though he informed the applicant at their March 3, 2015, meeting that an H&C application would not stay his removal, he nonetheless considered the best interests of the applicant's children.

[41] Before the officer was a significant deal of information provided by professionals on the special needs of the applicant's son. These documents clearly show that the applicant's son was assessed in respect of his deafness and his foot deformity when he was in Montréal, without his father being present. According to the documents presented to the officer, the son saw health professionals on November 29, 2013 (applicant's record [AR], p. 216), December 18, 2013 (AR, p. 146), January 8, 2014 (AR, p. 145), March 17 and 31, 2014 (AR, p. 129) and May 15, 2014 (AR, p. 210). It also appears from a letter from the Shriner's Hospital for Sick Children dated April 2, 2014, that as part of these visits, the applicant's son was seen by an orthopedic surgeon

and a physiatrist. He was even assessed by a physiotherapist, a nurse and a social worker (AR, p. 129).

[42] The documents also reveal that, on April 23, 2014, before the applicant's arrival in Canada, the applicant's son attended an admission interview at a special school for deaf children that is part of the Commission scolaire de Montréal (AR, pp. 43-44). Since 2014, he has also been attending a drop-in daycare where the applicant's wife was a volunteer and a member (AR, p. 201).

[43] The record shows moreover that the applicant's wife received an offer of assistance from the Lasalle CLSC in February 2014 (AR, p. 164) and that she had been given support by certain members of her extended family (an aunt on her mother's side and a cousin) in the Montréal area (AR, pp. 167, 169).

[44] In light of the documentation submitted to him, it was entirely reasonable for the officer to conclude that, despite the applicant arriving in Canada over a year after his wife and children did, the applicant's wife had, in his absence, succeeded in providing for her family's needs, despite their son's existing disabilities (his deafness and his foot deformity). The record also clearly shows that a number of organizations in Quebec had helped her during the whole time she and her children were in Canada.

[45] In addition, the applicant failed to establish that the officer erred with respect to the children's short-term interests. Certainly, the applicant argued before this Court that the officer did not consider the fact that his wife was six months pregnant and that she would have trouble taking care of the children, both during and after the delivery; however, this argument was not before the officer at the time of the application for deferral of the removal, and it is a little late for the applicant to use it in my opinion (see *Varga*, above, at paragraph 17).

[46] The applicant argued that the interview notes dated March 3, 2015, show that the officer was aware that the applicant's wife was pregnant. It is true that the officer does not allude to the applicant's wife's pregnancy in his decision. However, in the absence of an application based on this ground, the applicant cannot claim that the officer's decision is therefore unreasonable. Moreover, if the applicant had succeeded in convincing me that the officer should have granted him a stay until his wife gave birth so that he could look after his children, this question is now moot given that the expected delivery date is in the past (see *Ahmedov*, above, at paragraph 47, and *Ramirez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 500 at paragraph 13).

[47] The last aspect disposed of in the officer's decision is the application to defer the removal so that the applicant could file a PRRA application. To begin with, I note that the applicant did not make any arguments on this element, be it in his written representations or his oral arguments. However, I find the officer's decision on this point to be reasonable. The officer correctly noted that this option was not available to the applicant given that the RPD's decision

to deny his refugee protection claim was rendered less than a year earlier. The officer nonetheless analyzed the documents sent to him by counsel for the applicant and found that the applicant had not established that he would be in danger personally should he return to Burundi and establish himself in another city there.

VII. Conclusion

[48] In short, considering the officer's limited discretion when it comes to deferring a removal and the wording of subsection 48(2) of the IRPA requiring the removal order to be enforced as soon as possible, and for the reasons set out above, it is my opinion that the officer's decision was reasonable. The officer applied the correct legal tests by considering all of the evidence adduced and the arguments made by the applicant. I find that the officer's decision to refuse to defer the removal falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, in accordance with *Dunsmuir*, above, at paragraph 47.

[49] The application for judicial review is dismissed. No question for certification has been proposed, and none arises.

JUDGMENT

THIS COURT'S ORDERS AND ADJUDGES THAT the application for judicial review is dismissed. No question is certified for appeal.

"Sylvie E. Roussel"

Juge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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