Federal Court  Cour fédérale

**Date: 20180504**

**Docket: IMM-4048-17**

**Citation: 2018 FC 479**

**Toronto, Ontario, May 04, 2018**

**PRESENT: The Honourable Mr. Justice Diner**

**BETWEEN:**

**OLAKUNLE TESLIM FATOLA**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

## JUDGMENT AND REASONS

## I. Overview

[1] On September 12, 2017, the Applicant's request for a deferral of his removal from Canada was refused. The Applicant now challenges the reasonableness of that refusal, arguing that the officer fettered her discretion and gave inadequate reasons for her decision. For the reasons that follow, I do not agree with the Applicant's arguments, and am dismissing this application.

## II. Background

[2] The Applicant, who was born in Nigeria, entered Canada in 2010 using a fraudulent passport. He then married a Canadian permanent resident and applied for permanent residence under the family class. However, he was reported under section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 17 [IRPA]. His permanent residence application was refused. The Applicant sought judicial review of the refusal, but leave was denied. An exclusion order was then issued against him in June 2015, as a result of the Applicant being inadmissible under section 40(1)(a) of IRPA for misrepresentation.

[3] The Applicant submitted a Pre-Removal Risk Assessment [PRRA] application in September 2015. He alleged that, while living in Nigeria, he had dated the daughter [Ms. X] of a senior member of the local police. The Applicant alleged that he and Ms. X had engaged in consensual anal sex, which is an offence in Nigeria, and also that she became pregnant after their relationship and had an abortion. The Applicant claimed that Ms. X's father wanted to use his power and influence to punish him for the emotional pain caused to his daughter.

[4] The PRRA application was refused in December 2015, following which the Applicant sought judicial review. Leave was granted. A consent judgment issued by this Court in August 2016 set aside the PRRA decision and remitted the matter for redetermination.

[5] In January 2017, the Applicant's PRRA was again refused. The PRRA officer found that the Applicant had not established that he was in a relationship with Ms. X as alleged, or that any

senior law enforcement official was using his influence to arrest and prosecute the Applicant. Again, the Applicant sought judicial review, but leave was denied by this Court in June 2017. As a result of this negative PRRA, the Applicant was subject to a one year bar before being eligible to submit another PRRA application.

[6] In July 2017, the Applicant attended a removal interview and advised that he was unable to pay for his own return ticket. The Applicant agreed that his removal would be scheduled for mid-September2017.

[7] On September 12, 2017, however, the Applicant submitted an urgent request to defer his removal. He alleged that Ms. X, who had since married, had died of pregnancy complications in April 2017, and that her father believed her death was the consequence of the abortion she underwent following her relationship with the Applicant.

[8] In support of his deferral request, the Applicant submitted an affidavit sworn May 12, 2017, by his brother [B1], which stated that people had come to their mother's home at Ms. X's father's instruction on April 29, 2017, and had beaten her, resulting in hospitalization. The affidavit further stated that B1 and his family were moving to either Ghana or the Benin Republic for their safety, and that the Applicant's other brother [B2], had taken their mother to the United States [US] for treatment.

[9] The Applicant also submitted a notarized letter from B2 dated September 5, 2017, which stated that Ms. X had died in April 2017 and that her father was "retaliating" against the

Applicant's family in Nigeria. B2 indicated that he and his mother had "relocated" to the US, and that B1 now lived in Ghana as he feared attack in Nigeria.

[10] Finally, the Applicant provided country condition documentation as evidence of corruption in the Nigerian police force and poor conditions in Nigerian jails.

[11] The Applicant's request for deferral was refused on September 12, 2017, the same day it was submitted. A Canada Border Services Agency Enforcement Officer [Officer] concluded that a deferral of removal was not warranted in the circumstances of the Applicant's case. She indicated in her decision [Decision] that the Applicant had requested a deferral "due to his apprehension for his safety in Nigeria", but had failed to provide an end date for the request. In the Decision, the Officer also excerpted as follows from this Court's decision in *Perez v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 627 [*Perez*]:

> [34] A removals officer cannot defer removal for just any proceeding in the IRPA, for which he/she is not the mandated decision-maker. The removals officer does not have the jurisdiction to make a renewed refugee assessment, nor a PRRA, nor a decision on H&C grounds, nor, is he mandated to determine judicial reviews or appeals of any of the preceding or other procedures. A removals officer is solely mandated with the discretion to defer removal for reasons associated with the challenges of arranging international travel…

## III. Issues and Standard of Review

[12] The Applicant raises three main issues in this application: fettering of discretion, insufficient reasons, and unreasonable findings.

[13] First, the Applicant argues that the Officer fettered her discretion. With respect to the standard of review on this point, the Applicant relies on *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 [*Shpati*], in which the Federal Court of Appeal held that "any question of law on which [an enforcement] officer based his decision (such as the scope of the statutory authority to defer) is reviewable on a standard of correctness" (at para 27).

[14] The standard of review to be applied to fettered discretion is a somewhat unsettled area of law (see *Gordon v Canada (Attorney General)*, 2016 FC 643 at paras 25-27 [*Gordon*]). Traditionally, this issue was reviewable on a correctness standard. However, in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299, the Federal Court of Appeal held that a decision that is the product of a fettered discretion must *per se* be unreasonable (at para 24; see also *Calandrini v Canada (Attorney General)*, 2018 FC 52 at paras 100-101). For the purposes of this application, I adopt the approach taken in *Gordon*, where Justice Mactavish held that under either standard, the fettering of discretion is a reviewable error and will result in the decision being quashed (at para 28).

[15] Second, the Applicant submits that the Officer's reasons were inadequate. He argues that this raises an issue of procedural fairness reviewable on a standard of correctness. I disagree. *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*]instructs that "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (at para 14; see also *Demiri v Canada (Citizenship and Immigration)*, 2014 FC 1104 at para 8).

[16] Therefore, I will consider the adequacy of the Officer's reasons within the context of an overall reasonableness review, which in light of *Newfoundland Nurses* requires the Decision to have been transparent, justified, and intelligible, and to have fallen within a range of acceptable outcomes, defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[17] Finally, at the hearing of this application the Applicant challenged the reasonableness of the Officer's findings. In that respect, the Decision is subject to review on the *Dunsmuir* standard.

## IV. Analysis

### *Preliminary Issue*

[18] In this case, the strength of the Applicant's arguments hinges on whether the reasons for the Officer's Decision are contained solely in her letter dated September 12, 2017, or whether the Officer's file notes also form part of her reasons for the purposes of judicial review.

[19] The Applicant argues that the file notes are not part of the reasons for the Decision. He does not submit any authority in support of this position. The Applicant argues that, if the matters detailed in the Officer's file notes formed part of her thought process in arriving at the Decision, they should have been communicated in the Decision letter, in order to "complete" the Officer's task as a decision-maker.

[20] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (SCC), the Supreme Court of Canada held that the notes of a subordinate reviewing officer were to be taken as the reasons for the decision under review, because accepting such documents "as sufficient reasons is part of the flexibility that is necessary" in light of the "day-to-day realities of administrative agencies" (at para 44). In subsequent cases, *Baker* has been relied on in holding that supplementary materials may form part of the reasons for a decision for the purpose of judicial review (see, for instance, *Canada (Information Commissioner of Canada) v Canada (Minister of Industry Canada)*, 2001 FCA 254 at paras 108-109; *Smirnov v Canada (Citizenship and Immigration)*, 2013 FC 554 at para 27; *Boniowski v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1161 at para 12 [*Boniowski*]).

[21] Consistent with these principles, this Court routinely treats file notes as forming part of an enforcement officer's reasons for refusing to defer removal (see, for instance, *Ezquivel v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 995 at para 25 [*Ezquivel*]; *Gonzalez Gonzales v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 153 at para 15; *Urbina Ortiz v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 18 at para 13; *Dhurmu v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 511 at para 31).

[22] It is to be remembered that deferral decisions are often rendered on an urgent basis, as was the case in the Decision underlying this judicial review: the removal was imminent, and the Applicant's counsel marked the opening page of his request with the words "URGENT URGENT" in large, bold font. Given such exigencies, enforcement officers' decisions are often sparse or not as well written as one might wish. They must therefore be read in their totality

(*Adomako v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1100 at para 18).

[23] Consequently, I find that the Officer's file notes form part of her reasons, particularly as the Applicant has provided no authority for the contrary position.

*Issues Raised by the Applicant*

(i) Fettering of Discretion

[24] The Applicant argues that the Officer's excerpt from *Perez* (which indicates, in part, that a removals officer is "solely" mandated to defer removal for "reasons associated with the challenges of arranging international travel") reflects a fettering of discretion. He submits that the Officer did not recognize that she also had discretion to defer removal where failure to do so would expose the applicant to the risk of "death, extreme sanction or inhumane treatment", relying on *Simoes v Canada (Minister of Citizenship and Immigration)*, 2000 FCJ No 936 (Federal Court of Canada – Trial Division) (QL) [*Simoes*], *Baron v Canada (Public Safety and Emergency Preparedness*, 2009 FCA 81 [*Baron*], and *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 [*Wang*].

[25] The Applicant has not persuaded me that the Decision was the product of a fettered discretion. I have reached this conclusion for two reasons. First, the Officer's reliance on *Perez* was understandable in light of the indefinite nature of the Applicant's request, and does not in and of itself indicate that she fettered her discretion. Second, and more importantly, the Officer

ultimately considered in detail the Applicant's evidence of risk and found that it did not warrant a deferral in his circumstances.

[26] To explain my conclusion, it is useful to revisit the principles that guide an enforcement officer's discretion. First, section 48(1) of IRPA provides that a removal order must be enforced "as soon as possible":

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|---|---|
| **Enforcement of Removal Orders** | **Exécution des mesures de renvoi** |
| **Enforceable removal order** | **Mesure de renvoi** |
| **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. |
| **Effect** | **Conséquence** |
| **(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. |

[27] I note that the language of section 48(2) was amended in 2012, prior to which it stipulated that a removal order was to be enforced as soon as was "reasonably practicable".

[28] A removal order is not a mere administrative arrangement. Rather, it is an order with the force of law that an enforcement officer has a statutory duty to execute (*Wang* at para 17). Therefore, I agree with the Respondent that an enforcement officer's discretion to defer removal

is restricted to "when" a removal order will be enforced, not "whether" it will be enforced at all (see *Baron* at para 49, citing *Simoes* at para 12; *Wang* at para 32).

[29] Sometimes, deferring the timing of removal is warranted as a result of special or compelling circumstances, such as an applicant's illness or the interruption of a school year of an affected child (see *Van Heest v Canada (Citizenship and Immigration)*, 2017 FC 263 at para 15; *Simoes* at para 12; *Perez* at para 34). However, a deferral can also be granted to give precedence to some collateral process that might affect the enforceability of the removal order itself. Justice Pelletier explained this distinction in *Wang* as follows:

> [31] … To defer means "to put over to another time". But one does not defer merely for the sake of delay. If the act of deferring is to be legally justifiable, it must be because, as a result of that deferral, some lawful reason for not executing the removal order may arise.
>
> [32] Aside from questions of travel arrangements and fitness to travel, the execution of the order can only be affected by some other process occurring within the framework of the *Act* since the Minister has no authority to refuse to execute the order. Accordingly, a request for deferral can only be made in the context of some collateral process which might impinge upon the enforceability of the removal order. To put it another way, if the order must be executed regardless of the outcome of the collateral process, what rationale is there for deferral? As a result, it seems to me that the appropriate inquiry is whether the process in question could result in a situation in which the execution of the removal order was no longer mandatory.
>
> [33] Consequently, the expression "to defer" refers to two different concepts. It is used in the sense of a temporal displacement: the execution of the removal order will be deferred until tomorrow. But it is also used in the sense of granting precedence to, or yielding to, some other process. The two senses are related, yet distinct.

[30] I stress that the mere existence of a pending collateral application does not, by itself, bar the enforcement of a removal order — otherwise, an applicant could always unilaterally defer their removal simply by filing an application (*Simoes* at para 13). Rather, if an applicant requests a deferral to give precedence to a collateral process, deferral is only warranted in certain situations, such as where a failure to defer removal will expose the applicant to the likely risk of death, extreme sanction or inhumane treatment (*Wang* at para 48, aff'd in *Baron* at 51).

[31] In this case, the Applicant sought a deferral on the basis of risks he said he would face in Nigeria. Therefore, it is important to pause and remember the limited nature of an enforcement officer's task when risk is alleged. When an enforcement officer considers whether to defer removal based on alleged risks to the applicant, she does not step into the shoes of, for instance, a PRRA officer. Rather, the enforcement officer's discretion is to defer removal to allow an appropriate decision-maker, in a collateral risk-assessment process, to fully determine the risk alleged, as recently summarized by the Federal Court of Appeal in *Savunthararasa v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 51 [*Savunthararasa*]:

> [7] It is common ground that, based upon jurisprudence of this Court, when evidence of some new risk is put forward, an enforcement officer may defer removal when the failure to defer will expose the person seeking deferral to a risk of serious personal harm. More specifically, an enforcement officer may defer removal where an applicant establishes a risk of death, extreme sanction or inhumane treatment that has arisen since the last assessment of risk (*Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 F.C.R. 311, at paragraph 51; *Canada (Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286, [2012] 2 F.C.R. 133, at paragraphs 41-43). Enforcement officers are not to conduct a full assessment of the alleged risks, nor come to a conclusion as to whether the person is at risk. Rather, officers are to consider and assess the risk-related evidence in order to decide whether deferring removal is warranted in order to allow a full assessment of risk.

[Emphasis added.]

[32] Thus, the Officer's role in this case was to assess the sufficiency of the Applicant's evidence to determine whether deferral was warranted to allow for a full assessment of risk by a different decision-maker (see *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 774 at para 99). Further, because the Applicant had already had the benefit of a PRRA, the Applicant's allegations had to be sufficiently new or different from those dismissed in his prior risk assessment (*Shpati* at para 44).

[33] But here we arrive at the difficulty of the Applicant's case. In his request to the Officer, the Applicant did not have any pending applications to defer to, and he did not identify that the purpose of the deferral would be to allow a full assessment of risk on any future application. On its face, his request was either a request for an indefinite deferral — something that the Officer correctly noted she did not have the discretion to grant — or a request for the Officer to fully assess the risks alleged, which the Officer similarly did not have the power to do.

[34] Understood in this context, the Officer's excerpt from *Perez* does not demonstrate a fettering of discretion: *Perez* only confirms that an enforcement officer has no discretion to conduct a PRRA or H&C and is limited to particularizing the timing of removal (at paras 31, 34). I also note that, in *Perez*, within the very paragraph excerpted in part by the Officer, Justice Shore went on to cite *Wang* and the relevant principles pertaining to an enforcement officer's discretion to consider the likelihood of risk. Certainly, at paragraph 34 of *Perez*, excerpted in the Decision, Justice Shore did not unduly limit the enforcement officer's powers or role.

[35] I also do not agree with the Applicant's argument that in requesting a deferral, it was implicit that the deferral was for the purpose of submitting a further risk application when the Applicant became PRRA-eligible. It was the Applicant's burden to put forward any necessary evidence or justification for his requested deferral (*Omidsorkhabi v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 954 at para 15 [*Omidsorkhabi*]). Further, in *Omidsorkhabi* Justice de Montigny held that there was no authority for the applicant's argument that the enforcement officer should have deferred removal "based on an unfiled, nonexistent application" for H&C relief (at para 19).

[36] In any event, I need not decide whether an enforcement officer can ground a refusal to defer solely on the basis that an applicant has failed to provide an end date or specify a pending or anticipated collateral application: the Officer did not do so in this case. Rather, it is clear from the Officer's file notes that the Officer in fact considered the Applicant's evidence of risk and found it wanting. Therefore, I agree with the Respondent that the Officer's file notes conclusively refute the Applicant's position that the Officer fettered her discretion.

(ii) Inadequate Reasons

[37] In those file notes, the Officer provided a detailed summary of the Applicant's immigration history in Canada, and an explanation of her limited discretion in granting a deferral. In addition, the Officer considered and assessed the third party evidence tendered by the Applicant, finding the affidavit and letter to be insufficient and of limited probative value. The Officer further noted that the Applicant had failed to mention his new alleged risks at his removal interview in July 2017, although the critical events were alleged to have occurred in

April of that year — i.e., they would have taken place well before the removal interview, when the Applicant could have raised his concerns. The Officer concluded that she had "carefully consider[ed] the facts relevant to the requested deferral", but had declined to defer the Applicant's removal.

[38] The reasons are both adequate and intelligible. After all, the Officer had only a limited obligation to provide reasons (*Boniowski* at para 11, cited in *Ezquivel* at para 24). *Newfoundland Nurses*, which binds our Court in the area of sufficiency of reasons, instructs that if the Officer's reasons permit me to (i) understand why the Officer made her decision, and (ii) determine whether her conclusion fell within the range of acceptable outcomes, then the *Dunsmuir* criteria are met (at para 16). This standard was clearly met by the Officer.

(iii) Reasonableness of the Decision

[39] At the hearing of this application, the Applicant's counsel conceded that, should this Court find that the Officer's file notes formed part of her reasons, it would be difficult to maintain his arguments. That has indeed turned out to be the case. In view of this possibility, at the hearing the Applicant's counsel made brief submissions impugning the reasonableness of the Officer's treatment of the Applicant's new evidence. Suffice it to say that I have not been persuaded by those arguments. Rather, I find that the Officer thoroughly considered the materials before her, and that her conclusions fell within the range of acceptable and defensible outcomes.

[40] Lastly, the Applicant argued that the Officer failed to address country condition documentation relating to police corruption and jails in Nigeria. This was reasonable, as the

Applicant had not established any of the underlying factual basis that would make such materials relevant to the Officer's analysis (see, by analogy, *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at para 26). Such circumstances are distinguishable from those where the country condition evidence submitted is relevant to one or more of an applicant's immutable characteristics (see *Vilvarajah v Canada (Citizenship and Immigration)*, 2018 FC 349 at para 21).

## V. Conclusion

[41] This application for judicial review is dismissed. No questions for certification were argued, and none arose.

**JUDGMENT in IMM-4048-17**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is dismissed.

2. No questions for certification were argued, and none arose.

3. There is no award as to costs.

"Alan S. Diner"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-4048-17 |
| **STYLE OF CAUSE:** | OLAKUNLE TESLIM FATOLA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | APRIL 30, 2018 |
| **JUDGMENT AND REASONS:** | DINER J. |
| **DATED:** | MAY 4, 2018 |

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