Federal Court

Cour fédérale

Date: 20191118

Docket: IMM-5315-18

Citation: 2019 FC 1443

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, November 18, 2019

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

MAMADOU SALIOU MARIAME DIALLO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by an enforcement officer not to grant the applicant an administrative stay of removal.

[2] The applicant is a citizen of Guinea. He came to Canada on September 11, 2011, and made a claim for refugee protection. His claim was rejected on April 24, 2015, and his

application for judicial review of that decision was later dismissed by this Court. The applicant then filed an application for permanent residence on humanitarian and compassionate (H&C) grounds on May 2, 2017, and an application for a pre-removal risk assessment (PRRA) on June 21, 2017. On October 9, 2018, he received the negative decisions on his H&C and PRRA applications, and the officer gave him a document setting November 12, 2018, as the date of his removal.

[3] In the meantime, on December 9, 2017, the applicant married a permanent resident in Canada and then applied for permanent residence as a spouse on April 5, 2018. He obtained the Selection Certificate from Immigration Québec, passed his medical examinations for immigration and paid the fees for the application.

[4] On October 11, 2018, the applicant applied for an administrative deferral of removal on two important grounds, namely (i) his sponsorship application in the Spouse in Canada class is still being considered giving rise to the application of the Public Policy to Facilitate Processing in accordance with the Regulations of the Spouse or Common-law Partner in Canada Class [the Policy], established under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]; and (ii) his spouse is pregnant and expecting a baby in the coming months, and he must stay with her during her pregnancy because she is on leave from work. The applicant indicated that he is the main breadwinner for his family.

[5] On October 16, 2018, the officer denied his application. The applicant applied for judicial review of that decision. However, on October 13, 2018, the applicant was granted a stay of removal from this Court pending the outcome of the judicial review. The applicant is therefore still in Canada and is awaiting the outcome of this application for judicial review.

[6] The applicant claims that the officer's decision is unreasonable because the officer did not explicitly deal with the sponsorship application at issue in his decision, and the officer did not mention the best interests of the unborn child.

[7] The reasonableness standard of review applies in the circumstances of the case at bar: *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 FCR 229 at para 43 [*Lewis*]. The law is clear: the officer has discretion to defer removal, but that discretion is very limited: see subsection 48(1) of the IRPA as well as *Lewis* at paras 54–61, and *Toney v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1018 at para 50.

[8] Regarding the first argument, the applicant claims that the officer did not take into account the sponsorship application at issue, and that the administrative deferral provided for in the Policy should have applied to his application. The applicant filed his sponsorship application on April 5, 2018, and produced his Quebec Selection Certificate and the results of his immigration medical exams. He also paid his residence fees. In his application to defer removal, he stated that his removal from Canada [TRANSLATION] "would be fatal to him because he would no longer meet the criteria for his application for permanent residence, which was certain to fail even though its processing is close to being finished".

[9] The officer rejected this argument, stating the following:

> [TRANSLATION]
>
> Concerning the application for permanent residence, after verifying the status of the application, it appears that the application has not reached approval in principle. Your client filed that application well after the removal order had become enforceable and after

> submitting his PRRA application. Thus, the Public Interest Policy under subsection 25(1) of the IRPA does not apply in this case.

[10] I am not satisfied that this is an unreasonable conclusion, given the circumstances. I agree with the respondent that this reference clearly indicates that the officer took into account the sponsorship application since the applicant's permanent residence application is indeed a sponsorship application made by his spouse. The officer checked the status of the application and noted that the application had not received approval in principle. This is exactly what the case law expects from the officer in such circumstances, and given the circumstances of the case at bar, this is a reasonable determination.

[11] The applicant refers to this Court's decision in *Shase v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 418 [*Shase*], regarding the relevance of a sponsorship application in the context of an application to defer removal. I note that this decision deals with an application for a stay to the Court, not for an administrative deferral and that the analysis was conducted based on the tripartite test that applies in such cases: see *Toth v Canada (Employment and Immigration)* (1988), 86 NR 302 (FCA), and *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311.

[12] In addition, the decision in *Shase* is based on very different facts from those in the case at bar. I note that in *Crawford v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 743 [*Crawford*], Mr. Justice LeBlanc noted the limits of the scope of *Shase*:

> [33] In *Shase v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1257 [*Shase*]) the Court held that the officer's denial of deferral pending the H&C application was unreasonable as the officer had failed to consider that the applicant's removal would result in his spouse, who was deemed unstable and suicidal, caring for their young children on her own.

> While there is evidence that caring for Benjamin alone might require some adjustments for Mr. Poshtchaman, there is nothing in the record indicating that he is unstable and unable to care for his son.

[13] I am of the view that the same distinctions apply here; there is no evidence that the applicant's spouse is unstable or otherwise incapable of caring for the child.

[14] The applicant alleges that the officer should have used the administrative deferral provided for in the Policy because of his sponsorship application. The Policy specifies that a stay applies after a positive "step one" or "approval in principle" decision has been made under the regular procedures for the Spouse or Common-law Partner class. The applicant submits that he has met the conditions that apply to an initial application in the province of Quebec, referring to the *Canada–Québec Accord relating to Immigration and Temporary Admission of Aliens* (1991). The officer erred in dealing with this case without referring to the applicant's approval by Immigration Québec, under that agreement.

[15] I am not convinced. The officer expressly dealt with the issue in the decision in concluding that [TRANSLATION] "the application [for permanent residence] has not reached approval in principle". The officer noted that the application had been filed after the removal order had become enforceable, and [TRANSLATION] "[t]hus, the Public Interest Policy under subsection 25(1) of the IRPA [did] not apply in this case". This conclusion is reasonable based on the law and the facts.

[16] With respect to the applicant's second argument, he alleges that the officer did not take into account the best interests of the unborn child, despite the statement that his spouse was

pregnant in his letter requesting an administrative deferral of his removal. The letter states the following:

> [TRANSLATION]
>
> In addition, the spouse of Mr. Diallo Mamadou Saliou Mariame is pregnant and expecting a baby in the coming months; our client's departure would be very prejudicial to this young family, for which he is the principal breadwinner, given that his wife is now on leave from work and the little unborn baby will be deprived of a parent, which may have an impact on his or her development.

[17] The officer's decision on this point reads as follows:

> [TRANSLATION]
>
> Concerning the pregnancy of the subject's spouse, although I understand that this is a trying period for the couple, family separation is a natural consequence of removal. In addition, regarding the fact that the female spouse is allegedly on leave from work, based on the information provided, she went back to work on September 11, 2018.

[18] The applicant submits that the case law is consistent and that officers must consider the short-term best interests of a child if there are children affected by their decision: *Munar v Canada (Citizenship and Immigration)*, 2005 FC 1180, [2006] 2 FCR 664, and *Lewis*. This obligation includes situations where there is an unborn child: *Hamzai v Canada (Citizenship and Immigration)*, 2006 FC 1108 at para 33; *Ismail v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 845 [*Ismail*]. The officer's decision is unreasonable because there is no mention of the words [TRANSLATION] "best interests of the child" or any analysis of how the applicant's removal would affect his spouse and their unborn child: *Boncil Acevedo v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 401.

[19] However, the respondent submits that the officer's decision is reasonable, given the lack of evidence on the family's situation and on the impact of removal on the family. The officer cannot be criticized for not taking into account evidence that was not submitted to him since the onus was on the applicant.

[20] I agree with the respondent. In the case at bar, the officer took into account the fact that the applicant's spouse was pregnant and that she had received a medical certificate granting her leave from work from August 20 to September 10, 2018. The medical certificate indicated that there was a follow-up appointment scheduled for September 10, 2018, but there was no other evidence regarding this appointment or regarding whether her leave was extended. Based on the documents submitted to this Court, it would seem as though the applicant's spouse did not return to work, but the applicant submitted no evidence to that effect to the officer.

[21] The only other evidence concerning the pregnancy is found in the applicant's removal interview notes, indicating that the parents of the applicant's spouse are in Africa, that she is five months pregnant and that she has three children in Africa, but none here with her in Canada. Neither the applicant nor his spouse filed an affidavit explaining their situation, the alleged difficulties related to the pregnancy or future difficulties if the removal were not deferred.

[22] The Court brought to counsel's attention a very recent decision of this Court dealing with an application for judicial review of a decision denying an application to defer removal (*Ismail*), so that counsel for both parties could read it.

[23] In *Ismail*, it is apparent that the officer received an affidavit from the applicant's spouse (see para 12) and that the evidence shows that the applicant's spouse was 19 years old, that she

just arrived in Canada as a refugee, that she spoke no English and that the applicant was the only breadwinner for the family. The officer's decision denying a deferral of removal was set aside by Justice Ann Marie McDonald because the officer failed to analyze the evidence relating to the short-term best interests of the unborn child despite the evidence before him regarding this.

[24] The respondent submits that the decision in *Ismail* should be distinguished because the facts are completely different from those in this case. The respondent also submits that the facts in this case are actually similar to those in *Ren v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1345 [*Ren*].

[25] I agree with this argument. Given that section 48 of the IRPA grants little latitude to enforcement officers to defer a removal order and that officers must consider only the short-term interests of the child, the lack of specific evidence regarding this issue in this case is fatal to that argument. The words of Mr. Justice Russell in *Ren* are appropriate and fitting in the case at bar:

> [40] Given the nature of the deferral request, the sparcity [sic] of the evidence submitted by the Applicant (there were no affidavits from him or his wife explaining their personal situation), and the ambivalence and the lack of explanation in Dr. Ou's letter, it cannot be said that the Decision was unreasonable on this ground. Other conclusions may have been possible, but the Decision falls within the *Dunsmuir* range. In my view, this is the principal issue on the merits and the Applicant has not established unreasonableness.
>
> **Faiture [sic] to Consider the Unborn Child**
>
> [41] The deferral request simply asked for a deferral until June 2012. Nothing was said in the request about the interests of the unborn child. It is not within a deferral officer's jurisdiction to undertake a full H&C analysis involving the best interests of a child. The jurisprudence of this Court is clear that the Officer need only consider "short-term" interests. See *Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, 277 DLR (4th) 762 at paragraph 16; and *Baron v Canada (Minister*

> *of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paragraph 57. In this case, no short-term interests were identified by the Applicant in the deferral request. They still have not been identified before me.

[26] The essential issue in an application for judicial review applying the reasonableness standard of review is whether the decision falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). In other words, in a judicial review where the standard of review is reasonableness, the basic issue is as follows: is there an indication that the decision-maker examined the relevant facts in light of the applicable law? If so, the decision is reasonable. Perfection in the way decisions are written is not required; it is rather a matter of whether a reviewing court can follow the decision-maker's reasoning (see *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11).

[27] In sum, in this case, I am of the view that the law enforcement officer's analytical process is clear and transparent and that the decision falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". In conclusion, I understand that the applicant is not satisfied with the decision not to defer removal and that that decision will create difficulties for him and his spouse. However, that in itself is not a reason to set aside the officer's decision. I adopt the words of LeBlanc J. in *Crawford*, at paragraph 30:

> However, as the Federal Court of Appeal and this Court have stated on many occasions, family separation, how [sic] unfortunate and disruptive it may be, is part of the inherent consequences of deportation (*Baron*, at para 69; *Ghanaseharan v Canada (Citizenship and Immigration)*, 2004 FCA 261, at para 13; *Atwal v Canada (Citizenship and Immigration)*, 2004 FCA 427, at para 17; *Wang v Canada (Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682, at para 48).

[28] For all of these reasons, I dismiss the application for judicial review. There is no question of general interest to certify.

JUDGMENT in Docket IMM-5315-18

THIS COURT'S JUDGMENT IS that

1. The application for judicial review is dismissed.

2. There is no question of general importance to certify.

"William F. Pentney"
Judge

Certified true translation
This 27th day of November 2019

Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5315-18
STYLE OF CAUSE:	MAMADOU SALIOU MARIAME DIALLO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION & MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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