Federal Court		Cour fédérale

Date: 20101125

Docket: IMM-232-10

Citation: 2010 FC 1187

Ottawa, Ontario, November 25, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

RICARDO NUCUM, TERESITA NUCUM,
JENILIMAI NUCUM

Applicants

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision by an Inland

Enforcement Officer (the officer), dated January 8, 2010 and January 13, 2010, wherein the officer refused to defer the execution of a removal order against the applicants.

[2] The applicants request an order setting aside the decision of the officer and referring the matter back for redetermination by a different officer in accordance with such direction as the Court may consider appropriate.

Background

[3] Ricardo Nucum, Teresita Nucum, Jenilimai Nucum (the applicants) are citizens of the Philippines. They arrived in Canada on October 16, 2002 on a single-entry visa granted in Abu Dhabi. They applied for refugee status in Canada and were denied on August 13, 2004. Their pre-removal risk assessment (PRRA) was also denied on June 1, 2006.

[4] In 2005, Mr. Nucum was involved in a serious motor vehicle accident. He sustained several injuries including a fracture puncture to his lungs, kidney and liver lacerations and a right shoulder injury, from which he has never recovered. He suffered a stroke in January 2009 and continues to have moderate vertigo, right shoulder pain and a moderately severe kidney disease for which he may require dialysis in the future.

[5] The applicants have been scheduled to be removed from Canada three times; on June 22, 2006, February 14, 2007 and March 11, 2008. Each time they received a deferral due to Mr. Nucum's medical condition.

[6] In May 2008, the applicants filed a humanitarian and compassionate (H&C) application requesting exemption from the requirement of having to apply for a visa from outside of Canada, pursuant to section 25 of the Act.

[7] The applicants were scheduled to be removed on January 18, 2010. They applied for a deferral of removal until their H&C application is determined. The denial of the request to defer removal is the subject of this judicial review.

Officer's Decision

[8] The officer found that, provided there are no impediments to removal, he had a duty under subsection 48(2) of the Act to enforce removal orders as soon as practicably possible.

[9] The officer found that submitting an H&C application is not in itself an impediment to removal as there is no statutory stay where a pending H&C application has not been approved in principle. The officer found that the applicants' H&C application which was sent to the Case Processing Centre Vegreville (CPC Vegreville) on May 13, 2008 could have been approved at that time. However, CPC Vegreville referred the H&C application to Citizenship and Immigration Canada, Mississauga for a more detailed examination. The officer found that the H&C application would continue to be processed if the applicants were removed.

[10] The officer acknowledged Mr. Nucum's serious medical condition and the injuries that he sustained in the car accident. The officer found that Mr. Nucum's removal has been deferred since 2006 and that he has been able to treat his injuries. The officer found that the applicants provided inadequate information about whether Mr. Nucum would be able to receive adequate medical care in the Philippines. The officer did not consider the medical condition sufficient to warrant deferral of removal.

[11] The officer noted that Jenilimai Nucum is attending the University of Guelph-Humber. The officer found that there was inadequate information to show that Jenilimai Nucum could not receive education in the Philippines. He further found that enrolment in education in Canada does not constitute a stay of removal. The officer also noted that Jenilimai Nucum is involved in a serious same-sex relationship. The officer found that Jenilimai Nucum's partner could sponsor her as a member of the family class if Jenilimai Nucum was returned to the Philippines. The officer also found that the situation of gays and lesbians in the Philippines did not warrant a deferral of removal.

[12] In conclusion, the officer refused to defer the execution of the removal order based on the above findings.

Issues

[13] The applicants submit the following issues for consideration:

1. Did the officer err in fact and in law by failing to consider whether there were special circumstances that justified the deferral requested based on the outstanding H&C application?

[14] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer err in refusing to defer the applicants' removal from Canada pending a determination of their outstanding H&C application?

<u>Applicants' Written Submissions</u>

[15] The applicants submit that the officer erred by failing to consider the issues of timeliness of the H&C application and the delay in receiving a decision. The applicants submit that these issues constitute special circumstances in which an officer could exercise discretion to defer removal.

[16] The applicants submit that the case at bar is indistinguishable from *Lisitsa v. Canada (The Minister of Citizenship and Immigration)*, 2009 FC 599, 86 Imm. L.R. (3d) 20.

<u>Respondents' Written Submissions</u>

[17] The respondents submit that the officer's decision to refuse to defer the applicants' removal must be reviewed on the standard of reasonableness.

[18] The respondents submit that a pending H&C application is not alone, a basis warranting a deferral of removal, although it may be considered by an enforcement officer. Deferral should be reserved for cases where the failure to defer removal will expose an applicant to death, extreme sanction or inhumane treatment.

[19] The respondents submit that *Lisitsa* above, is distinguishable from the case at bar primarily because the applicants in that case filed an H&C application immediately upon learning of the possibility of removal and because the applicants faced separation for an indeterminate period of time as the husband could not be removed due to lack of travel documentation. The respondents further submit that *Lisitsa* above, recognized that an H&C application is not an impediment to removal. In addition, in *Lisitsa* above, there was a reviewable error in the enforcement officer's consideration of the H&C application because the officer stated that he would never allow a timely H&C application to be the basis for a deferral.

[20] The respondents submit that in the case at bar, no special circumstances existed because the applicants did not file an H&C application in a timely manner.

[21] In addition, the respondents submit that there was no error because the officer was aware of the H&C application and considered the fact that it was outstanding in assessing whether to defer removal. The officer did not state that an H&C application could never be the basis to grant a deferral

Analysis and Decision

[22] **Issue 1**

What is the appropriate standard of review?

The Supreme Court of Canada held in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 that a standard of review analysis need not be conducted in every case. Where the standard of review applicable to a particular issue before the court is determined in a satisfactory manner by previous jurisprudence, the reviewing court may adopt that standard of review (at paragraph 57).

[23] As I held in *Lisitsa* above, previous jurisprudence has established that the standard of review of an enforcement officer's refusal to defer a removal from Canada is reasonableness (see *Lisitsa* above, at paragraph 27; *Baron v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2009 FCA 81, [2010] 2 F.C.R. 311 at paragraph 25). This standard is based on the statutory discretion, albeit limited, that an enforcement officer exercises in refusing to defer a removal and the deference owed to decision makers exercising such discretion (see *Ramirez v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 706 at paragraph 10).

[24] **Issue 2**

Did the officer err in refusing to defer the applicant's removal from Canada pending a determination of their outstanding H&C application?

It has been recognized that an enforcement officer has discretion to defer removal. This discretion is limited to when the removal order will be executed (see *Simoes v. Canada (Minister of Citizenship & Immigration)* (2000)*,* 7 Imm. L.R. (3d) 141, [2000] F.C.J. No. 936 (QL) (F.C.T.D.) at

paragraph 12). Similarly, the enforcement officer is under a duty to execute the removal as soon as practicably possible under subsection 48(2) of the Act

[25] As I noted in *Lisitsa* above, it is settled law that the mere existence of a pending H&C application does not result in the requirement to defer removal (at paragraph 31; see also *Baron* above, at paragraph 50; *Simoes* above, at paragraph 13). The existence of a timely filed H&C application, however, may be a special factor that an enforcement officer considers in determining when it is reasonably practicable for the removal order to be executed (see *Lisitsa* above, at paragraph 31; *Simoes* above, at paragraph 12). An officer may also look at special considerations such as illness and other impediments to travelling (see *Simoes* above, at paragraph 12).

[26] In the present case, the applicants filed an H&C application in May 2008 which was referred to a local office in July 2008. The application is still outstanding.

[27] In *Lisitsa* above, I stated at paragraph 34:

> 34 In *Simoes* above, the Court spoke of H&C applications brought on a timely basis which were caught in the system for a long time and *Wang* above, stated, "With respect to H&C applications, absent special circumstances will not justify deferral unless based upon a threat to personal safety". I do not view the adoption of the statements from *Wang* above as taking away from the factors listed in *Simoes* above if "special circumstances exist". In the present case, the application has been filed since June 2007 and is still outstanding. This could be considered a special circumstance however, the approach taken by the officer in the above quoted portion of his reasons would never allow a timely H&C application to be the basis to grant a deferral. In my view, this conclusion makes the officer's decision unreasonable. I do not know what the officer's decision would be if he considered the request in light of the law stated in *Simoes* above and *Baron* above, hence the decision must be set aside and the matter referred to a different officer for redetermination.

[28] In this case, the H&C application was filed in May 2008. The application has been in the system more than two years.

[29] I have reviewed the officer's decision and I have come to the conclusion that he failed to address whether the fact that the H&C application has been outstanding would constitute a "special circumstance" as I outlined in paragraph 34 of *Lisitsa* above. The failure to address this issue constitutes a reviewable error. I do not know what the officer's decision would have been had he addressed this matter. The application for judicial review must be allowed and the matter is referred to a different officer for redetermination.

[30] I need not deal with the other submissions of the applicants.

[31] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[32] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27

48.(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.	48.(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.
. . .	. . .
72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Immigration and Refugee Protection Regulations, SOR/2002-227

233. A removal order made against a foreign national, and any family member of the foreign national, is stayed if the Minister is of the opinion under subsection 25(1) of the Act that there exist humanitarian and compassionate considerations, or public policy considerations, and the stay is effective until a decision is made to grant, or not grant, permanent resident status.	233. La décision du ministre prise au titre du paragraphe 25(1) de la Loi selon laquelle il estime que des circonstances d'ordre humanitaire existent ou que l'intérêt public le justifie emporte sursis de la mesure de renvoi visant l'étranger et les membres de sa famille jusqu'à ce qu'il soit statué sur sa demande de résidence permanente.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-232-10
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