Federal Court  Cour fédérale

Date: 20111018

Docket: IMM-1718-11

Citation: 2011 FC 1174

Ottawa, Ontario, October 18, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

ERIC TOWA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision made by an Inland Enforcement Officer (the Officer), dated March 15, 2011, refusing to defer the applicant's removal from Canada. The Officer concluded that there were no special circumstances that warranted a deferral of the applicant's removal to Cameroon.

I. Background

[2] The applicant's immigration history is lengthy. He was first admitted to Canada as a student in 2000. In March 2001, he filed a first application for permanent residence from Canada on humanitarian and compassionate grounds (H&C application). This application was refused in April 2005. At some point after March 2001, he left Canada and, in 2002, he re-entered without a visa; an inadmissibility report against him was issued on December 4, 2002. The same day, the applicant filed a claim for refugee protection. This claim was declared abandoned in February 2005 and Leave to File an Application for Judicial Review of that decision was denied in February 2005 (File No. IMM-9273-04).

[3] In January of 2005, the applicant filed a first Pre-Removal Risk Assessment (PRRA) application that led to a negative decision in July 2006. In October 2006, an Application for Leave and Judicial Review of that decision was denied (File No. IMM-4031-06).

[4] In January 2007, the applicant filed a second PRRA application. A negative decision was rendered in April 2007 and an Application for Leave and Judicial Review of that decision was denied in September 2007 (File No. IMM-2278-07).

[5] In February 2007, the applicant filed a Leave application to challenge a decision made in that month refusing to defer his removal. Leave was denied (File No. IMM-597-07). In February 2007, he also tried to challenge a direction to report for removal and Leave was once again denied (File No. IMM-861-07).

[6] In June 2007, he filed a second H&C application. This application was received at CPC Vegreville on June 20, 2007 and is still pending.

[7] On February 18, 2011, the applicant was notified that he would be removed from Canada on March 18, 2011. On March 11, 2011, he submitted a request to defer his removal. On March 13, 2011, his counsel sent submissions to the Officer in support of the request for deferral. These submissions substantiated the grounds for requesting the deferral. The request was based on three principal grounds: the applicant's pending H&C application, the risk to his life that he would face if he was returned to Cameroun and his establishment in Canada.

[8] The applicant's risk allegation was based on the following: In 2002, he was employed as an accountant in Cameroun on a contract to conduct an internal audit of the Cameroonian Ministry of Defence. During the internal audit, he uncovered corrupt accounting practices by officers of the Ministry of Defence. He tried to expose these practices but he was threatened, ambushed by soldiers blocking his way home and his house and office were ransacked. He believed that he had no choice but to flee the country. He obtained a false passport and flew to Canada through Paris. He arrived in Canada on November 28, 2002, without a visa.

[9] On March 15, 2011, the Officer refused to defer the applicant's removal. This is the decision under review.

II. The impugned decision

[10] The Officer dealt with the three main allegations submitted by the applicant.

[11] First, the Officer concluded that the applicant's outstanding H&C application was not a factor that warranted a deferral. He noted that, according to the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA] and the *Immigration and Refugee Protection Regulations*, SOR/2002-227, there is no stay of removal where an H&C application that has not been approved in principle by the Minister is pending. He also considered the applicant's immigration history and concluded that his H&C application had not been submitted in a timely manner. On that matter, he highlighted the following elements:

a. It was the applicant's second H&C application and the first one had been refused in April 2005;
b. On December 4 2002, a departure Order had been written for the applicant's removal from Canada;
c. The applicant was determined ready for removal from Canada when he attended his PRRA initiation interview in December 2004;
d. The applicant's H&C application was received after he was deemed ready for removal;
e. The applicant's second H&C application was received two years after his first H&C application was refused;
f. The applicant's second H&C application was referred to the Toronto PRRA Office because it contained risk allegations. Yet, the applicant had his risk assessed twice in two negative PRRA decisions.

[12] The Officer also assessed the applicant's alleged risk to his life. He noted that the risks alleged by the applicant had been assessed on two occasions by PRRA Officers. He further cited an excerpt of the second PRRA decision in which the Officer discussed country conditions evidence. He concluded the following:

> In addition, I note that as an Enforcement Officer, my discretion is extremely limited. I may assess whether removal at this time would expose the applicants to risk of death, extreme sanction, or inhumane treatment, and based on the information provided I have been unable to identify any new risks that were not already considered in Mr. Njine Towa's PRRA applications.

[13] The Officer also considered the applicant's establishment in Canada and the hardship that he would suffer if he was returned to Cameroun. He noted that the applicant had lived in Canada since November 2002, that he was an active and respected member of his community and that he had no criminal record. He further noted that the applicant has been a member of the Certified Management Accountants of Ontario since 2005. He indicated that there was no evidence that the applicant would not be able to secure employment in Cameroun given the accounting skills he obtained in Canada. The Officer also outlined that the applicant had not purchased property in Canada or invested a substantial amount of money in Canada. Based on all the abovementioned elements, he concluded that the applicant did not have "immense establishment in Canada."

[14] The Officer also considered the hardship that the applicant would face if returned to Cameroun and concluded that, while being sensitive to the difficulties stemming from removal, the applicant's reintegration into his country of nationality should be "relatively easy."

III. Issues

[15] The applicant raises two main arguments against the Officer's decision but they boil down to one issue:

> Was the Officer's decision not to defer removal reasonable?

IV. Standard of review

[16] It is well established that the standard of review applicable to an enforcement officer's decision to defer or to refuse to defer removal is that of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25, [2010] 2 FCR 311 [*Baron*].

[17] The Court's role when reviewing a decision against the reasonableness standard is enunciated in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190:

> . . . A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

V. Analysis

[18] The applicant contends that the Officer did not seem to be cognizant of his discretion to defer his removal based on the fact that the applicant had an H&C application pending due to backlogs.

[19] The applicant argues that the respondent's diligence in dealing with his H&C application is more than lacking. The applicant's H&C file has been shuffled around for more than four years and is still awaiting outcome. The respondent provided no explanation for this delay. In this case, the applicant is facing unusual, underserved or disproportionate hardship and the negative consequences facing the applicant cannot be remedied if he is able to return after a positive H&C decision because he faces death or detention in a state that abuses human rights. The applicant relied on *Babolim v Canada (Minister of Citizenship and Immigration)*, 2007 FC 909, 160 ACWS (3d) 679 [*Babolim*] for the proposition that a deferral should be granted when an outstanding H&C application has not been processed due to backlogs.

[20] The applicant also contends that the Officer failed to carry out his duty, which is to properly consider the Court's guidance on exigent personal circumstances, (*Ramada v Canada (Solicitor General*), 2005 FC 1112 at para 3, 141 ACWS (3d) 1016) and that the Officer ignored, misconstrued, or misapprehended cogent and important evidence. On that regard, the applicant contends that the Officer failed to consider that he had his final exam for becoming a Certified Management Accountants in Ontario scheduled on May 11, 2011 and that he would miss it if a deferral was not granted.

[21] The applicant further emphasises that the Officer should have considered the fact that the H&C application was based on risks and that a refusal to defer the removal would expose him to those risks. He relied on *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682, to argue that deferring removal is especially justified in situations where there is a

very dated H&C application pending and where there are significant risks to the applicant if removed to his or her country of nationality.

[22] Finally, the applicant contends that the Officer did not adequately weigh the factors relating to his establishment in Canada or the hardship the removal will cause him and his relatives that depend on him for support.

[23] The arguments raised by the applicant cannot succeed.

[24] I do not agree that the Officer was not cognizant of his discretion to defer the applicant's removal based on the pending H&C application. While it is true that the Officer noted that the IRPA did not provide for a stay of a removal due to an outstanding H&C application, this passage needs to be put in context. It is apparent from the Officer's decision that he was referring to the fact that the IRPA does not provide for an automatic stay. It is also clear that the Officer was well aware of the discretion that he had to defer the removal; he exercised this discretion and determined that the circumstances did not warrant deferral.

[25] In *Baron*, the Federal Court of Appeal made it clear that section 48 of the IRPA gives the Officer a limited discretion to defer removal orders. The Court indicated that the mere existence of a pending H&C application was not sufficient to warrant deferral, absent special considerations. Justice Nadon, writing for the Court, cited, with approval, at paragraph 51 of the decision, the following excerpt of Justice Pelletier's reasons in *Simoes v Canada (Minister of Citizenship and Immigration)* (2000) 187 FTR 219, 98 ACWS (3d) 422:

> i. 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.
>
> ii. 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.
>
> [Emphasis added]

[26] The applicant relied on *Babolim* but it is worth citing the entire relevant passage where the Court stated the following at paragraph 20:

> In sum, even if the officer's discretion is limited, when factors such as illness or othern [*sic*] issues to travel exist and there is a pending H&C application, unresolved due to backlogs in the system, a deferral should be granted.
>
> [Emphasis added]

[27] In *Khamis v Canada (Minister of Citizenship and Immigration)*, 2010 FC 437 at para 29 (available on CanLII), the Court held that where it is apparent that an enforcement officer was aware of an outstanding H&C application, it was for him to decide the weight to afford to that element.

[28] In *Jonas v Canada (Minister of Citizenship and Immigration)*, 2010 FC 273 (available on CanLII), the Court expressed the following regarding the consideration to be given to a pending H&C application:

> **20** Enforcement officers may consider "pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system," but the existence of such applications does not obligate the officers to grant a deferral request in all cases: *Simoes, supra,* at para. 12.
>
> **21** In this case, the officer did consider the existence of the pending H&C application and it was open to the officer to consider the imminence of a decision in the pending H&C application. In many cases, the imminence of a decision may be a reflection of whether the application had been filed in a timely manner. In this case, the officer does not indicate whether, in his view, the H&C application was filed in a timely manner. . .

[29] I agree with the principles enunciated in the above mentioned case law. It is clear from the jurisprudence that an officer has the discretion to factor in the personal circumstances of each case and that the existence of an H&C application pending due to backlogs, absent special circumstances, does not automatically warrant a deferral.

[30] In this case, the Officer considered the pending H&C application but decided not to afford it any weight because he considered that it had not been filed in a timely manner. Despite counsel for the applicant’s able efforts to convince me otherwise, I am of the view that, in light of the applicant’s immigration history, it was reasonably open to the Officer to conclude that the application had not been filed in a timely manner.

[31] Furthermore, I consider that, with respect to the issue of the risk that the applicant would face should he be returned to Cameroon, the Officer was entitled to rely on the previous PRRA assessments to conclude that there was no imminent risk facing the applicant (*Baron*). The risk alleged by the applicant has been assessed on two occasions and the H&C application did not raise any new risk. Therefore, it was reasonable for the Officer to conclude that the applicant did not face a serious risk to his personal safety.

[32] I am also of the view that the Officer's assessment of the applicant's establishment in Canada was reasonable.

[33] The applicant finds fault in that the Officer ignored that he would miss his final exam for his certification as a Certified Management Accountant of Ontario. In the submissions to the Officer, counsel for the applicant presented this information with all the other elements regarding the applicant's establishment. The Officer is presumed to have considered all of the evidence and his failure to refer specifically to that element does not vitiate his decision.

[34] In light of all of the above, I consider that the Officer exercised his discretion reasonably and this case does not warrant the intervention of the Court.

[35] The application for judicial review will be dismissed. No questions were proposed for certification and none arise.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No question is certified.

"Marie-Josée Bédard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Dov Maivrovicz	FOR THE APPLICANT
Samantha Reynolds	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gerter, Etienne LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT