Federal Court

Cour fédérale

Date: 20120926

Docket: IMM-6878-11

Citation: 2012 FC 1131

Ottawa, Ontario, September 26, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JOSE GUADALUPE HERNANDEZ FERNANDEZ and ANA CECILIA AYALA MARTINEZ

Applicants

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of a Canada Border Services Agency (CBSA) enforcement officer (the officer), dated October 5, 2011, wherein the applicants were found to not be entitled to an administrative deferral of their removal to Mexico and

El Salvador on October 10, 2011. This conclusion was based on the officer's finding that there were insufficient grounds to warrant the deferral of the applicants' removal.

[2] The applicants request that the officer's decision be set aside and the matter be remitted to a different CBSA enforcement officer for reconsideration and assessment.

Background

[3] The principal applicant, Jose Guadalupe Hernandez Fernandez, is a citizen of Mexico. The co-applicant, Ana Cecila Ayala Martinez, is the principal applicant's wife and is a citizen of El Salvador.

[4] With the help of smugglers, the co-applicant fled El Salvador to Mexico on June 13, 2004. As she never paid her smugglers, she fears retaliation from them.

[5] The co-applicant met the principal applicant in Mexico and they entered into a relationship. They worked together as street vendors. In August 2004, the principal applicant was allegedly kidnapped and held for an hour by men who wanted information about the co-applicant and the money she owed. Thereafter, they were not targeted for over two years.

[6] In February 2007, the applicants' home was robbed and vandalized. In fear of Mexican gangs, the principal applicant fled Mexico. He arrived in Canada with his Mexican passport on June 12, 2007. The co-applicant fled Mexico on May 20, 2007. She travelled through the United States,

arriving in Canada on July 17, 2007. On arrival, she filed a refugee claim. However, she was reported inadmissible under section 44(1) of the Act for failing to obtain the proper visa before entering Canada and for not having a valid passport. A conditional departure order was therefore issued against her.

[7] The principal applicant subsequently filed a refugee claim on July 31, 2007. He was reported inadmissible under section 44(1) of the Act for failing to obtain the proper visa before entering Canada and a conditional departure order was also issued against him.

[8] The applicants' refugee hearing was held on February 24 and March 9, 2009. Their claims were joined with the claim of David Esau Ayala Martinez (the co-applicant's brother). The applicants' refugee claim was denied on April 23, 2009. This decision was based on the Refugee Protection Division's (RPD) finding that the applicants had not rebutted the presumption of adequate state protection in Mexico and El Salvador. The applicants filed an application for leave and for judicial review of this decision. Leave was dismissed on November 11, 2009.

[9] In November 2010, the applicants requested and were granted additional time to prepare for removal as the co-applicant was pregnant. Their child Isaac was born on December 16, 2010.

[10] On January 30, 2010, the applicants filed a pre-removal risk assessment (PRRA). Citizenship and Immigration Canada's (CIC) PRRA office found that the determinative issue was state protection in El Salvador and Mexico. The applicants' PRRA application was denied on October 19, 2010. The applicants filed an application for leave and for judicial review of this decision. Leave was dismissed on March 15, 2011.

[11] In July 2011, the applicants allegedly submitted an application for permanent residence on humanitarian and compassionate (H&C) grounds. On August 15, 2011, the couple were advised that removal arrangements would commence. The couple advised the interviewing officer that their son would be travelling to El Salvador with the co-applicant.

[12] On September 20, 2011, CBSA issued a direction to report to the applicants for removal to Mexico and El Salvador on October 10, 2011. On September 26, 2011, the applicants filed a request for an administrative deferral of their removal. A copy of the applicants' Canadian-born son's birth certificate was filed on October 3, 2011.

[13] On October 7, 2011, on motion by the applicants, Mr. Justice Donald Rennie of this Court granted the applicants a stay of the execution of their removal order until this application is decided.

<u>Officer's Decision</u>

[14] The officer issued the decision on October 5, 2011. The officer decided that a deferral of the removal order was not appropriate in the circumstances of this case.

[15] In the notes to file that form part of the decision, the officer first summarized the applicants' immigration history. The officer then noted the statutory duty under subsection 48(2) of the Act to enforce removal orders as soon as practicably possible. Where there are no impediments to removal, this generally means as soon as a negative PRRA decision is issued. The officer noted that the applicants' negative PRRA decision was delivered to them on November 24, 2010.

[16] The officer considered three grounds for deferring removal: the applicants' outstanding H&C application, their alleged risk and their establishment in Canada.

[17] On the first ground, the officer noted that as of close of business on October 3, 2011, there was no record in the Field Operations Support System (FOSS) of the applicants' H&C application having been received by the Case Processing Centre (CPC) in Vegreville, Alberta. The applicants had also not provided any evidence of the filing of their application. As CPC Vegreville had not confirmed receipt of the application, the officer found that a decision on their application was not imminent. In addition, as there was no evidence of the submission of the application, the officer was unable to conclude that it had in fact been submitted.

[18] Nevertheless, the officer stated that submitting an H&C application is not, in and of itself, an impediment to removal and does not delay removal. The officer noted that this is explicitly stated in the application and the instruction guide. In addition, there is no provision in the Act to stay the enforcement of a removal order based on an outstanding H&C application.

[19] The officer further noted that due to the co-applicant's pregnancy, the applicants had already been granted an extension to March 11, 2011 from their initial date of removal. However, the applicants did not file their H&C application until July 2011. The officer found that this timeline of events indicated that the H&C application was not timely. Thus, the officer concluded that deferral of removal was not warranted for reason of the applicants' outstanding H&C application.

[20] Turning to the alleged risk, the officer noted the applicants' submissions that they would face risk on return to their countries of nationality. On review of these submissions and the evidence, the officer was unable to identify any significant or personalized risk. The officer noted that the alleged risk paralleled that considered and rejected by the RPD and the CIC's PRRA office; members and officers who the officer described as well trained and having expertise in risk assessment. The officer also noted that the applicants' applications for leave and judicial review of these decisions were dismissed by the Federal Court.

[21] Having reviewed the applicants' submissions, the officer found no new or significant risk that had not previously been assessed. The officer noted that a deferral request is not the appropriate venue to have the RPD and PRRA decisions reassessed. The officer therefore concluded that a deferral of removal was not warranted for reason of the applicants' alleged risk.

[22] Finally, the officer considered the applicants' establishment in Canada. The officer acknowledged the applicants' letters of support, employment letters and volunteer application forms. The officer also noted that the applicants' buyer representation agreement, which was dated February 26, 2011, was signed after they were issued their negative PRRA decision and shortly before March 11, 2011, the date by which they had been advised to confirm their departure.

[23] Although the officer acknowledged the applicants' submissions that this evidence would well support a positive H&C determination, the officer stated that it was beyond the officer's authority to perform an adjunct H&C evaluation. The officer also reiterated that there was no evidence that such an application was in processing for the applicants.

[24] The officer further noted that upon initiation of their PRRA process on December 2, 2009, the applicants were advised that a decision would be made within two to six months and they should prepare themselves within that time for either eventuality, be it a positive or negative decision. The officer noted that after March 11, 2011, the applicants attended a removal interview and still had not obtained a passport for their son. Extra time was provided to do so. In addition, the officer noted that the principal applicant's most recent work permit application was refused and the co-applicant was receiving employment insurance as she was not working. The officer thus concluded that the applicants had been granted ample time to prepare themselves for their impending removal from Canada.

[25] Based on the applicants' PRRA applications, the officer noted that the principal applicant has his parents and six siblings still residing in Mexico, while the co-applicant has her parents and five siblings still residing in El Salvador. The officer therefore found it not unreasonable to expect that their families would be able to assist them during the transitional period. In addition, although the principal applicant would be returned to Mexico and the co-applicant and their son would be returned to El Salvador, the officer found that on arrival, they could travel to each others' countries, thus, the officer was satisfied that the family would not be separated indefinitely.

[26] In summary, the officer noted that the applicants had received due legal process since arriving in Canada and had exhausted all options of remaining in Canada legally. Although they claimed that there was an outstanding H&C application, no evidence of it being submitted or received was provided. The officer acknowledged that the family separation would be difficult, but found it inherent in the removal process. The officer also found no evidence that the family would

be separated indefinitely or that they would face exceptionally difficult circumstances justifying a deferral of their removal. Thus, the officer concluded that a deferral of removal was also not warranted for reason of the applicants' establishment in Canada.

[27] For these reasons, the officer found that a deferral of the applicants' removal was not appropriate in the circumstances of this case. The applicants were therefore expected to report for removal on October 10, 2011, as scheduled.

Issues

[28] The applicants submit the following points at issue:

1. Even within the narrow scope of discretion for enforcement officers within a request for an administrative deferral of removal, the officer must conduct some assessment of the applicants' submissions and apply the proper legal test.

2. In the applicants' case, the officer failed to properly interpret the meaning of personalized risk pursuant to Canadian refugee law and further engaged in sheer speculation vis-à-vis the applicants' family members in their respective countries and what, if any, support these family members would and could provide to them upon their return.

[29] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in refusing to defer the applicants' removal?

Applicants' Written Submissions

[30] At the outset, the applicants refer to section 233 of the Immigr*ation and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), which states:

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 that the stay is justified by humanitarian and compassionate considerations, under subsection 25(1) or 25.1(1) of the Act, or by public policy considerations, under subsection 25.2(1) of the Act. The stay is effective until a decision is made to grant, or not grant, permanent resident status.	233. Si le ministre estime, aux termes des paragraphes 25(1) ou 25.1(1) de la Loi, que des considérations d'ordre humanitaire le justifient ou, aux termes du paragraphe 25.2(1) de la Loi, que l'intérêt public le justifie, il est sursis à 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.

[31] The applicants concede that the discretion of an officer in these applications is narrow; however, some sort of analysis must still be conducted. Here, the applicants submit that the officer provided no analysis for refusing to defer removal or a clear evidentiary basis to support its key findings. Rather, the officer merely recited the applicants' immigration history and their deferral request submissions. Thus, the applicants submit that the officer's critical findings amount to little more than sheer speculation.

[32] The applicants submit that it is trite law that there may be a wide variety of factors that are commensurate with H&C factors and that warrant a deferral of removal. Thus, although the officer's discretion to defer removal was narrow, the officer should have provided some sense on analysis, considerations and reasons for the ultimate refusal.

[33] The applicants also submit that the officer erred by not considering the best interests of, and impacts of removal on, their Canadian-born child. The applicants submit that the officer's reasons do not indicate that the officer was alert, alive and sensitive to the best interests of their child.

[34] The applicants note the officer's finding that the officer was unable to identify any significant personalized risk. However, the applicants submit that the officer erred by not considering the current circumstances for each applicant and those similarly situated to them in Mexico and El Salvador. By relying on the RPD and PRRA officers' decisions, the officer failed to address the forward looking nature of refugee law and give some consideration to the applicants' risk concerns, particularly those risks associated with bringing their Canadian-born child to Mexico or El Salvador.

Respondents' Written Submissions

[35] The respondents submit that the standard of review for a decision not to defer removal is reasonableness. The respondents submit that the applicants here have not demonstrated why the deferral decision was unreasonable.

[36] The respondents note that an enforcement officer has limited discretion to defer removal. Section 48 of the Act requires that a removal order "be enforced as soon as reasonably practicable". As enforcement officers only particularize when and where the deportation order is to be executed, they can only consider factors relating to making effective travel and related arrangements. The

respondents note that in this case, the applicants had already been granted a deferral when the co-applicant was pregnant.

[37] The respondents submit that the existence of an H&C application is not a bar to the execution of a valid removal order. Where applicants are successful in their H&C applications, they are entitled to readmission. In this case, the officer took specific consideration of the applicants' outstanding H&C application. However, as the applicants did not provide a copy of their H&C application and as it was not recorded on the FOSS, the officer concluded that the H&C application had not been filed in a timely manner and a decision on it was not imminent. The respondents submit that this was a reasonable conclusion, especially in light of applicants' submission that the H&C application was only filed in July 2011. The respondents highlight that the applicants were aware that they faced removal on receipt of their negative PRRA in October 2010.

[38] The respondents further submit that as the Act provides for a PRRA, the risk analysis for a deferral request is much more constrained. The sole exception to the general rules that risks are assessed at the RPD or PRRA stages is where the failure to defer will expose the applicants to a risk of death, extreme sanction or inhumane treatment. Here, the respondents submit that the officer reasonably concluded that there was insufficient evidence before the officer that a new or significant risk had arisen since the applicants received their negative refugee and PRRA decisions.

[39] Finally, the respondents submit that there is no obligation for an enforcement officer to undertake a substantive review of a child's best interests before executing a removal order, regardless of whether the child is Canadian-born or not. The respondents note that the interests of a

child in a deferral context need not be considered at all if they are not relevant to the question of the practicability of removal. Similarly, an enforcement officer does not have the duty to defer removal of a parent with a Canadian-born child. An enforcement officer is only obliged to consider the short-term interests of a child. Nevertheless, the respondents note that the applicants made little reference to their child in their deferral request, which instead focused on their pending H&C application and their alleged risks if returned.

Analysis and Decision

[40] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[41] It is well established that the appropriate standard of review of a removal officer's decision on a deferral request is reasonableness (see *Cortes v Canada (Minister of Citizenship and Immigration)*, 2007 FC 78, [2007] FCJ No 117 at paragraphs 5 and 6; appeal dismissed in 2008 FCA 8, [2008] FCJ No 22; and *Turay v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1090, [2009] FCJ No 1369 at paragraph 15).

[42] In reviewing the officer's decision on the reasonableness standard, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible

and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 59). It is not up to a reviewing Court to substitute its own view of a preferable outcome, nor is it the function of the reviewing Court to reweigh the evidence (see *Khosa* above, at paragraphs 59 and 61).

[43] **<u>Issue 2</u>**

<u>Did the Board err in refusing to defer the applicants' removal?</u>

An enforcement officer's power to defer removal arises under subsection 48(2) of the Act. As acknowledged by both parties, an enforcement officer has limited discretion to defer a removal until it is reasonably practicable (see *Baron v Minister of Public Safety and Emergency Preparedness*, 2009 FCA 81, [2009] FCJ No 314 at paragraph 49). Generally, deferral is limited to cases where there is a serious, practical impediment to the removal (see *Fabian v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 425, [2009] FCJ No 538 at paragraph 39). The co-applicant's pregnancy met this standard and therefore, the previous deferral of removal granted on that basis was warranted.

[44] The enforcement officer's discretion is further limited by the scope and adequacy of the information put forward to it (see *Griffiths v Canada (Solicitor General)*, 2006 FC 127, [2006] FCJ No 182 at paragraph 30). This is particularly important in assessing whether the failure to defer removal "[w]ill expose the applicant to the risk of death, extreme sanction or inhumane treatment"; an accepted exception to the general rule that deferral is limited to overcoming practical

impediments of removal (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] FCJ No 295 at paragraph 48).

[45] Absent special considerations, an outstanding H&C application is generally insufficient to justify delay unless there is a threat to personal safety (see *Ramada v Canada (Solicitor General)*, 2005 FC 1112, [2005] FCJ No 1384 at paragraph 3; and *Wang* above, at paragraph 45). As noted by Mr. Justice Pierre Blais in his concurring opinion in *Baron* above, "[w]here a PRRA has revealed that the applicants are not at risk if they are returned, then the applicants are intended to make future requests for permanent residence from their home country" (at paragraph 87).

[46] It is also well accepted that enforcement officers are not positioned to evaluate all the evidence that might be relevant in an H&C application (see *Ramada* above, at paragraph 7). With regards to affected children, enforcement officers should treat their immediate interests fairly and with sensitivity (see *Joarder v Canada (Minister of Citizenship and Immigration)*, 2006 FC 230, [2006] FCJ No 310 at paragraph 3). However, there is no obligation that enforcement officers "[s]ubstantially review the children's best interest before executing a removal order" (see *Baron* above, at paragraph 57).

[47] In summary, on judicial review, an enforcement officer's discretion should only be second guessed where "they have overlooked an important factor, or seriously misapprehended the circumstances of a person to be removed" (see *Ramada* above, at paragraph 7).

[48] Here, the applicants submit that the officer failed to provide an analysis for its refusal to defer removal and a clear evidentiary basis to support its key findings. Rather, the officer merely recited the applicants' immigration history and their deferral request submissions. However, a review of the officer's decision clearly indicates otherwise. This review indicates that the officer considered in depth three grounds for deferring the applicants' removal: the applicants' outstanding H&C application, their alleged risk on removal and their establishment in Canada.

[49] Although, as mentioned above, an outstanding H&C application is generally insufficient to justify delay, the officer did consider the applicants' H&C application. However, the officer found two significant problems with this application: there was no evidence of it having been filed either in the FOSS or in the evidence provided by the applicants and even if it had been filed as alleged, the H&C application was not filed in a timely manner taking into account the applicants' previous removal dates and negative PRRA decision. Hence, although the officer was not required to consider the outstanding H&C application, I find that the officer did consider it and came to reasonable findings on it based on the evidence before the officer.

[50] With regards to the alleged risk, the officer found that the alleged risk paralleled that considered and rejected in both the refugee claim and PRRA process; decisions that the Federal Court dismissed leave to judicially review. The officer also found that the applicants had not raised any new or significant risk that had not previously been assessed. A review of the applicants' request for administrative deferral of removal supports this finding.

[51] The applicants further submit that the officer erred by not considering the best interests of their Canadian-born child and by failing to address the forward looking aspect of their risk, particularly those risks associated with bringing their Canadian-born child to Mexico or El Salvador. However, as mentioned above, an enforcement officer is limited in a removal deferral request to considering the short term interests of affected children.

[52] Here, the officer considered the applicants' PRRA applications where they indicated extensive family connections in both of their countries of nationality. Based on the evidence before the officer, I find that the officer's conclusion that their families would be able to help the applicants and their young son in the transitional period was reasonable. In addition, as mentioned above, risk assessments are generally limited to the refugee claim or PRRA stage unless there is a risk of "death, extreme sanction or inhumane treatment" (see *Wang* above, at paragraph 48). Contrary to the applicants' allegations, their deferral request did not identify risks that differed substantially from those considered by the RPD and PRRA office. Admittedly, the applicants now have a child to consider, but they did not proffer any evidence indicating how the existence of that child increased their personalized risks.

[53] In summary, I find that the officer's decision was transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before the officer. The officer conducted a thorough analysis of the applicants' outstanding H&C application, their alleged risk and their establishment in Canada. However, based on the evidence before the officer, I find the officer came to a reasonable conclusion in refusing to defer removal. I would therefore dismiss this application for judicial review.

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

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

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 it must be enforced as soon as is reasonably practicable.

(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 that the stay is justified by humanitarian and compassionate considerations, under subsection 25(1) or 25.1(1) of the Act, or by public policy considerations, under subsection 25.2(1) of the Act. The stay is effective until a decision is made to grant, or not grant, permanent resident status.

233. Si le ministre estime, aux termes des paragraphes 25(1) ou 25.1(1) de la Loi, que des considérations d'ordre humanitaire le justifient ou, aux termes du paragraphe 25.2(1) de la Loi, que l'intérêt public le justifie, il est sursis à 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-6878-11
STYLE OF CAUSE:	JOSE GUADALUPE HERNANDEZ FERNANDEZ and ANA CECILIA AYALA MARTINEZ - and – THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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