Federal Court Cour fédérale

Date: 20130528

Docket: IMM-3742-12

Citation: 2013 FC 562

Ottawa, Ontario, May 28, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JOANNA JOSEPH,
MERISSA RUTH RUBEN

Applicants

and

MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

Respondent

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 by an inland enforcement officer of the Canada Border Services Agency (the officer) on April 23, 2012, denying the applicants' request for removal from Canada to be deferred.

[2] The applicants request that the officer's decision be set aside and the application be referred back to the Canada Border Services Agency (CBSA) for redetermination.

Background

[3] The principal applicant, Joanna Joseph and her daughter, Merissa Ruth Ruben, are citizens of St. Lucia. The principal applicant's common law spouse began abusing her in September 1998. He sexually assaulted her after the birth of her daughter in May 2000. The abuse continued and in February 2002, the principal applicant's abuser hit her with a piece of wood and broke her finger. On March 23, 2002, the principal applicant fought with her spouse and he attempted to kill her with a knife. The principal applicant then escaped to Canada. Since her arrival in Canada, her abuser was charged with sexually assaulting a young woman, but is now out of jail and has threatened to kill the principal applicant and her daughter.

[4] The applicants made a claim for refugee protection which was denied on January 11, 2011. The applicants made a pre-removal risk assessment (PRRA) application on October 28, 2011 which was denied on March 9, 2012.

[5] On April 3, 2012, the principal applicant made a verbal request for deferral in order for the applicant's daughter to complete the school year. The removal officer refused on the basis that the daughter would not be graduating that year.

[6] On April 18, 2012, the applicants made a written request for deferral.

Officer's Decision

[7] The officer refused the deferral request on April 23, 2012. The officer's reasons began with a summary of the applicants' immigration history. The officer noted the applicants were under an enforceable removal order and that the CBSA had an obligation to enforce removal orders as soon as reasonably practicable. The officer excerpted the Refugee Protection Division (RPD) decision rejecting the applicants' claim on the basis of state protection, as well as the PRRA decision. The officer noted the applicants were seeking a judicial review of the PRRA decision but that there was no stay of removal in such situation.

[8] The officer noted the applicants' counsel had identified the basis for the request to defer as allowing the principal applicant's daughter to complete school and for the principal applicant to seek counselling for the anxiety and stress associated with her impending deportation. In support of these reasons, the applicants submitted a report card and a psychological report.

[9] The officer noted a previous deferral request had already been made on the basis of the principal applicant's daughter finishing the school year. The officer concluded deferral was not warranted as the daughter would not be graduating in that school year and that it is reasonable to expect that she will be able to successfully integrate into the St. Lucian school system.

[10] The officer noted that the applicants had developed a degree of establishment in Canada and acknowledged that the report indicated that their impending removal caused the principal applicant great anxiety. The officer was sympathetic to the principal applicant, but noted that feelings of

distress are an inherent part of the removal process. The officer noted that the applicants' counsel had requested a 90-day deferment for counselling, but that counsel had not demonstrated that the applicants would be accepting of removal if granted a deferral and had not demonstrated the applicants would be unable to apply for permanent residence outside of Canada. The officer was not satisfied that a deferral was warranted.

Issues

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

1. Did the officer fail to consider the evidence and assess factors relating to the applicant child's best interests?

2. Did the officer fail to assess the applicant child's need for counselling?

3. Did the officer fail to assess whether the applicant child would be able to transition into the St. Lucian education system without loss of her current's year educational attainment?

4. Did the officer fail to consider the time the applicants would need to marshal their resources in preparation for removal?

[12] I would rephrase the issues as follows:

1. Is the application now moot?

2. Should this Court exercise its discretion to decide the issue?

3. What is the standard of review?

4. Did the officer err in refusing the request to defer?

Applicants' Written Submissions

[13] The applicants argue this case is not moot, since there continues to be an issue of contention between the parties as the CBSA continues to fail to accept that the grounds advanced by the applicants warrant deferral. The applicants adopt Mr. Justice Leonard Mandamin's reasons from the stay motion as an accurate reflection of the law and facts of the case.

[14] The applicants' request to defer was based on the school year of the child, the need for the child to have counselling and the need for the applicant to marshal resources to resettle in St. Lucia. The officer failed to properly address these exigent circumstances.

[15] While the officer took note of the psychotherapist's report, he did not assess the applicant child's reported need for counselling. The officer did not assess whether the applicant child would be able to transition to the St. Lucia school system without losing a year of educational attainment. Given that the applicant child was several weeks away from completing her grade level, the officer had an obligation to assess this evidence.

[16] Finally, the psychological report indicated the principal applicant would need to get her Canadian business in order and prepare to provide for her child in St. Lucia. Case law indicates the officer had a duty to consider this factor.

Respondent's Written Submissions

[17] The respondent submits this case is now moot, as the applicants sought a 90 day deferral and those 90-days have now passed. The applicants have had the requested time to receive counselling and facilitate transition.

[18] Alternatively, the respondent argues the officer considered all the issues raised by the applicants. It is clear from the request that it was based on the principal applicant's psychological condition. Insofar as the applicants raise other issues on this judicial review, they were not before the officer. The applicants' submissions were five pages in length and devoted almost entirely to discussing the failed PRRA. There was no reference to the loss of a school year or time necessary to sell a business.

[19] The officer was not under a duty to consider humanitarian and compassionate (H&C) factors and is not required to undertake a substantive review of the best interests of the child. The applicants' submissions did not raise the issue of the interests of the child. A removal officer's obligation to consider the best interests of the child is limited to circumstances where there is no practical alternative to deferring removal. This was not the case here as the child would be relocating with her mother.

[20] There was no evidence provided by the principal applicant of her claim that the parents of her abuser's other victim were seeking retribution against her. This single sentence did not put an obligation on the officer to consider that risk.

[21] The need for counselling for the applicant child was not raised as part of the deferral request. While the report notes that both the principal applicant and the child would be open to therapy, the issue that the applicant child needed counselling was not raised for consideration. Therefore, the officer did not err in failing to consider this issue.

[22] On the issue of the school year, the principal applicant provided no evidence the child would not able to transition into the St. Lucian school system so it was reasonable for the officer to conclude this did not warrant deferral.

[23] The time necessary to transition back to St. Lucia was not raised as a factor for consideration in the deferral request. The applicants have been in Canada since 2002 and it is arguable that since that time, the applicants have had sufficient notice to make preparations for relocating.

Analysis and Decision

[24] **Issue 1**

Is the application now moot?

In *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353, Mr. Justice John Sopinka set out the basic principles underlying the doctrine of mootness:

> The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the

> relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice.

[25] In *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2009] FCJ No 314, the Court of Appeal held that in the context of a request to defer, where the events identified by the applicant as justify the deferral have passed, a judicial review of the refusal to defer becomes moot (at paragraph 37):

> As I understand Strayer J.'s Reasons, it is the passing of the events in respect to which the applicant was seeking a deferral of his removal, i.e. a Family Court conference and a medical appointment, which rendered the judicial review application moot. In those circumstances, as Strayer J. says above, "... there can be no practical effect of a judicial review decision". I cannot but agree with that statement in light of the facts before the learned Judge.

[26] In this proceeding, the applicants requested a deferral of 90 days. This time has now passed and no event identified by the applicants in their request is pending. Therefore, this application is moot. If there are new reasons to defer the removal of the principal applicant and her child, they should be incorporated into a fresh request to defer and are irrelevant to this proceeding.

[27] **Issue 2**

Should this Court exercise its discretion to decide the issue?

In *Borowski* above, three factors were identified for a court to consider contemplating whether to exercise its discretion to hear a moot case (at pages 358 to 363):

1. whether an adversarial relationship remains;

2. a concern for judicial economy, hearing moot cases being potentially warranted where the situation is one that is "capable of repetition, yet evasive of review"; and,

3. the Court's awareness of its adjudicative function.

[28] While I appreciate that requests to defer may often be moot by the time they reach a judicial review on the merits, I do not believe they have generally been "evasive of review" by this Court, if only because my colleagues have been willing to exercise their discretion in those moot cases where a decision on the merits would be particularly instructive. This case, however, presents no unique or difficult issue, as the applicants' issues relate to assessment of particular evidence.

[29] Similarly, while I appreciate that providing guidance to enforcement officers in exercising their discretion is useful (see *Katwaru v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1045 at paragraph 27, [2008] FCJ No 1340), I see no issue in this case that would provide particular guidance if it were resolved.

[30] In applying the factors above, I find that an adversarial relationship no longer remains as the applicants' removal did not occur during the requested time period. As described above, I do not find there to be any compelling reason as contemplated by the second and third factors of the test for resolving this dispute.

[31] Due to my decision not to resolve the dispute, I need not consider the third and fourth issues.

[32] The application for judicial review is therefore dismissed.

[33] 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**

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.

FEDERAL COURT

SOLICITORS OF RECORD

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