Federal Court  Cour fédérale

Date: 20120420

Docket: IMM-4730-11

Citation: 2012 FC 471

Ottawa, Ontario, April 20, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

EMILJANO RODHAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review from the decision of a Canadian Border Services Agency [CBSA] Enforcement Officer, dated July 28, 2011 [the Decision], in which the Officer dismissed Mr. Rodhaj's request to defer his removal from Canada pending the determination of his spousal application for permanent residency status.

[2] The Applicant argues that the Decision should be set aside because the Officer improperly fettered his discretion and ignored the best interests of Mr. Rodhaj's family, including those of his

child and step-child, who would likely face permanent separation from Mr. Rodhaj if he is removed from Canada.

[3] To understand the Applicant's arguments, it is necessary to review the relevant factual background, including the procedural history in respect of the various hearings that Mr. Rodhaj has participated in over the past several years that culminated in the Decision.

I. BACKGROUND

[4] Mr. Rodhaj is an Albanian citizen. In 2005, while still in Albania, he met his wife, Ms. Berisha, online and began a relationship with her over the internet. Also Albanian by birth, she was living in Canada, having been sponsored by her former husband in 2000. That marriage was an arranged one, and Mr. Rodhaj alleges that Ms. Berisha's former husband was controlling and emotionally abusive.

[5] The relationship between the Applicant and Ms. Berisha developed, and they met in person in Albania in 2006.

[6] In October 2007, Mr. Rodhaj came to Canada and sought refugee protection, alleging that he was at risk in Albania by reason of a blood feud. In 2007, Ms. Berisha began seeing the Applicant, with whom she had a child in October of 2008.

[7] In November of 2009, the Refugee Protection Division of the Immigration and Refugee Board [RPD] rejected Mr. Rodhaj's refugee claim. The RPD held that the determining factors were

Mr. Rodhaj's lack of credibility and the availability of adequate state protection in Albania. In May of 2010, this Court denied Mr. Rodhaj's application for leave to commence a judicial review application in respect of the RPD's decision.

[8] On December 22, 2010, Citizenship and Immigration Canada [CIC] held a pre-removal interview with Mr. Rodhaj, during which he was informed of his right to submit an application for a pre-removal risk assessment [PRRA], under section 112 of *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] . In the same interview, he was told that if his PRRA application were rejected, his removal from Canada would occur within two to three weeks of being advised of the negative PRRA decision.

[9] On December 28, 2010, Mr. Rodhaj submitted a PRRA application. That application was denied on June 8, 2011, and Mr. Rodhaj received the negative PRRA decision on June 28, 2010.

[10] According to Mr. Rodhaj, he learned in February 2010 from his lawyer that Ms. Berisha could sponsor Mr. Rodhaj for permanent residency status, after she and Mr Rodhaj lived together in a common-law relationship for at least one year. According to Mr. Rodhaj, he and Ms. Berisha commenced cohabiting in February 2010. At the time, Ms. Berisha was still married to her former husband. However, she commenced divorce proceedings in May of 2010.

[11] Ms. Berisha's former husband evaded service of the divorce papers, and Ms. Berisha was obliged to seek a court order for substituted service. The divorce was granted on January 19, 2011.

On May 25, 2011, Ms. Berisha and Mr. Rodhaj were married. On June 1, 2011, Ms. Berisha sought to sponsor Mr. Rodhaj for permanent residency status in the context of a spousal application.

[12] Since arriving in Canada in 2000, Ms. Berisha has only worked for a few months as an assistant in a bakery. She has stayed at home to care for her children. Mr. Rodhaj worked as a window installer and supported the family. Their child is now three years old, and Ms. Berisha's daughter from her former marriage also lives with them.

[13] On July 7, 2011, Mr. Rodhaj received a direction to report for removal to Albania, which was scheduled for July 28, 2011. On July 12, 2011, he made a deferral request to CBSA to have his removal deferred until his spousal application was decided.

[14] In the Decision that is the subject of this application for judicial review, the Officer rejected the request for deferral. In so doing, the Officer considered that Mr. Rodhaj could not benefit from CIC's administrative deferral policy, because his spousal application was filed after the pre-removal interview. The policy in question, which is now set out in CIC's Operating Manual, *Inland Processing 8: Spouse or Common-law partner in Canada Class* [Immigration Manual IP8] at pp 53-60, provides that an automatic deferral will be granted if an applicant's spousal or humanitarian and compassionate application is filed before the pre-removal interview. However, the policy also provides that no such deferral will be granted if the application is made after the pre-removal interview because individuals are then considered to be "removal ready".

[15] After determining that the administrative deferral policy did not apply to Mr. Rodhaj's application, the Officer moved on to consider whether he should exercise his discretion under section 48(2) of the IRPA to grant the deferral request. In so doing, he reviewed and rejected the Applicant's argument that his spousal application was timely in that it was made as soon as Mr. Rodhaj and Ms. Berisha were married, and therefore should benefit from a deferral akin to the administrative deferral. In rejecting this argument, the Officer evaluated the timeliness of the application with reference to the pre-removal interview, noted that a decision on the spousal application was not imminent (as it would take 9 or 10 months) and stated that a permanent separation of the family was not inevitable, as Mr. Rodhaj had other options open to him, such as an overseas spousal application or an application under the Skilled Worker Program.

[16] The Officer then went on to consider the best interests of Mr. Rodhaj's daughter, wife and his step-daughter, noting that while separation would doubtless be difficult, counsel had not submitted evidence to "demonstrate that Mr. Rodhaj faces exceptionally difficult circumstances" that would justify a deferral. In so holding, the Officer noted that there was no medical evidence to support Ms. Berisha's inability to work, but, rather, merely a note from her doctor which stated that her medical condition would deteriorate without Mr. Rodhaj's support but which provided no details of her condition or symptoms. Counsel filed medication receipts for high blood pressure medication that Ms. Berisha is apparently taking.

[17] The Officer also noted that Ms. Berisha could obtain child support from her ex-husband and had worked in the past, rejecting counsel's submission that she would be forced onto welfare if Mr.

Rodhaj were removed from Canada. The Officer further underscored that Mr. Rodhaj had been working illegally in Canada, having failed to renew his work permit.

[18] Based on these facts, the Officer determined that there was no basis to exercise the limited discretion he is afforded under section 48(2) of IRPA to defer the removal order.

II. ISSUES

[19] In this application, the Applicant argues that the Decision should be set aside because:

1. The Officer improperly fettered the discretion he possesses under section 48(2) of IRPA, by effectively applying the test for administrative deferral (now contained in the CIC Immigration Manual IP8), which is inapplicable to Mr. Rodhaj's situation as his spousal application was filed as soon as reasonably practicable in the circumstances; and
2. The Officer unreasonably concluded, based on improper speculation, that family separation was not likely to be permanent because Ms. Berisha may well be forced onto social assistance and then could not sponsor an overseas spousal application (due to subsection 134 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227). He also asserts that it is unlikely that Mr. Rodhaj would qualify under the Skilled Worker Program. Counsel argues that in coming to these erroneous conclusions, the Officer failed to appropriately assess the best interests of Mr. Rodhaj's daughter and step-daughter.

III. ANALYSIS

[20] It is common ground between the parties that the standard of review applicable to both of the errors alleged by the Applicant is reasonableness. I concur.

[21] The reasonableness standard is a deferential one and requires the Court review both a tribunal's reasons and the record before the tribunal. The Court may intervene only if it is satisfied that the reasons of the tribunal are not "justified, transparent or intelligible" *and* that the result does not fall "within the range of possible, acceptable outcomes which are defensible in respect of facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47).

[22] In evaluating the reasonableness of the Officer's deferral decision, regard must be given to the nature of the inquiry with which the Officer was tasked under subsection 48(2) of IRPA. Deferral decisions are made at the very end of what is often years of proceedings before various immigration tribunals and the courts. The present application is a case in point: the Officer's Decision was made a little over three and one half years after the Applicant made his refugee claim and followed several other decisions, including an unsuccessful judicial review application, which finally determined that Mr. Rodhaj's refugee claim is without merit.

[23] Moreover, under section 48 of IRPA, the Officer was afforded only a limited discretion to stay the removal order, as this Court and the Federal Court of Appeal have noted on several occasions (see e.g. *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 49, [2009] FCJ No 314 [*Baron*]; *Shpati v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 286 at para 45, 209 ACWS (3d) 150, [*Shpati*]; and *Williams v Canada (Minister of Public Safety & Emergency Preparedness)*, 2010 FC 274 at para 31, 89 Imm LR (3d) 58 [*Williams*] at para 31). Indeed, this is apparent from the wording of IRPA itself. Section 48 provides:

(1) A removal order is enforceable if it has come into	(1) La mesure de renvoi est exécutoire depuis sa prise

force and is not stayed.	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.

[24] Section 48 stipulates that those who are subject to an enforceable removal order *must* leave Canada as soon as "reasonably practicable". CBSA officers' discretion, therefore, is limited to determining when the earliest point is at which departure will be "reasonably practicable". As Justice Zinn noted in *Williams* at paras 32-35, the case law essentially recognizes three types of situations where a deferral may be granted by a removals officer. These are:

1. Where the originally selected date is not viable, due to difficulties with travel arrangements, such as the unavailability of travel documents or transportation;
2. Where there are other factors that render the originally selected date impracticable, such as the need for children to finish the school year or imminent birth or death of one of the individuals to be removed from Canada; and
3. Where a pending process under IRPA, which might result in landing, would be rendered nugatory by the removal.

[25] The final type of situation has given rise to most of the litigation before this Court. In *Baron* and *Shpati*, the Federal Court of Appeal clearly indicated that the mere fact that there is a pending application for a pre-removal risk assessment or for a humanitarian and compassionate [H&C] consideration does not warrant a deferral of removal being granted. Rather, "special circumstances"

must exist with respect to the pending application. Those special circumstances will include situations where the failure to defer will expose the person to the risk of death, extreme sanction or inhumane treatment (*Baron* at para 51, citing *Wang* at para 41). Beyond that, such circumstances have sometimes been found to include situations where an H&C application was filed in a timely way, but has been backlogged for a lengthy period (see e.g. *Simoes v Canada (Minister of Citizenship and Immigration*), [2000] FCJ No 936, 7 Imm LR (3d) 141 (Fed TD) at para 12; *Villanueva v Canada (MPSEP)*, 2010 FC 543 at para 35).

[26] The Applicant has not provided any authority in support of his claim that a pending spousal application might constitute a "special circumstance" if a sponsor would lose his or her ability to support a spousal application because the sponsor would be forced onto social assistance if the applicant is removed. This Court has dealt with the impact of removal on a spouse's ability to maintain sponsorship in an inland spousal application in the context of applications to stay removal orders. In *Acevedo v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 401, Justice Shore granted the stay, in part because the applicant's wife was disabled, could not work, and, consequently, would not be able to sponsor her husband to enable him to return to Canada as a permanent resident if she were forced to seek social assistance following his removal. On the other hand, in *Mondelus v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 1138 [*Mondelus*], Justice Shore refused the stay, holding at para 87 that it was "… speculation to say that the applicant's spouse will be dependent on social assistance if the applicant is removed, thereby making her unable to sponsor the applicant from outside Canada". In *Mondelus*, the spouse, like Ms. Berisha, was not disabled, but had not previously worked outside the home. In refusing the stay, Justice Shore noted at para 88 that " there [was] no evidence in the record that the

applicant's spouse [could not] use the services of government-subsidized day care centers, family members or friends or, as a last resort, private daycares, as do many other mothers who are in the workforce".

[27] In my view, the Officer's Decision was reasonable. Contrary to what Mr. Rodhaj asserts, the Officer did not fetter the discretion he possessed under section 48 of IRPA. In this regard, he did not merely determine that CIC's administrative policy did not apply to Mr. Rodhaj's situation, nor did he apply that policy. Rather, the Officer considered the arguments advanced by the Applicant and determined that they were not sufficient to justify deferral. More particularly, he considered and rejected the argument that the spousal application was made as soon as Mr. Rodhaj and Ms. Berisha were married and held that this fact, in and of itself, was not sufficient to justify the deferral. He also considered the other relevant factors, including the best interests of the affected children, and noted that there was no evidence before him that Ms. Berisha was unable to work. This finding is entirely reasonable.

[28] Indeed, just like the spouse in the *Mondelus* case, in my view, it would be entirely speculative to conclude that Ms. Berisha would be forced onto social assistance if Mr. Rodhaj were removed from Canada. The fact that she is taking blood pressure medication (like myriads of other Canadians) is not indicative of an inability to work. Nor is the fact that she has, to date, only worked briefly when in Canada. She is no different from millions of other Canadian women who obtain daycare for their children when they must work. In addition, her first husband is obliged to assist in supporting one of the children, and the Officer was entirely correct in concluding that means were available to Ms. Berisha to enforce these support obligations. Thus, it is entirely speculative to

conclude that Ms. Berisha would be forced onto social assistance and would be unable to maintain her sponsorship of Mr. Rodhaj in an overseas spousal application if he is removed from Canada.

[29] Consequently, the Officer's Decision is reasonable. In short, there was ample evidence before the Officer for him to conclude that this situation does not constitute a "special circumstance", where deferral of removal is necessary so as to ensure that a spousal application by Ms. Berisha is not rendered nugatory. Nor did he fetter his discretion.

[30] Accordingly, this application for judicial review will be dismissed.

[31] No question for certification under section 74 of IRPA was presented and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. No question of general importance is certified; and

3. There is no order as to costs.

"Mary J.L. Gleason"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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