Federal Court  Cour fédérale

Date: 20160411

Docket: IMM-4803-15

Citation: 2016 FC 403

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 11, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

AVTAR SINGH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision rendered on October 26, 2015 by a law enforcement officer [officer], which rejected the application for administrative stay made by the applicant, who was seeking the deferral of his removal to India, which was to take place on November 1, 2015.

[2] Let us recall that section 48 of the *Immigration and Refugee Protection Act*, S.C. 2001, chapter 27 [IRPA] states the following:

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 the order must be enforced as soon as possible.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.
[Emphasis added]	[Soulignements ajoutés]

[3] In this case, the only grounds for deferral cited by the applicant in light of the removal order—which was legally enforceable—was his particular medical condition. In the opinion of his attending physician, the applicant was not supposed to fly for at least four months: "This patient has been followed for hypertension and cardiac problems. His medication has not stabilized and he is still undergoing investigation. He is not fit to fly for the next 4-6 months." Be that as it may, the officer gave preference to the opinion of a doctor from the Canada Border Services Agency (CBSA), who deemed that, on the contrary, the applicant could travel by plane.

[4] On October 30, 2015, the Court agreed to stay the removal order until a final decision was rendered regarding the application for leave and for judicial review: *Singh v. Canada (Public Safety and Emergency Preparedness),* 2015 FC 1235. My colleague, Justice Harrington, notes the following in paragraphs 7 and 8 of his decision:

> In my opinion, Mr. Singh's health is a serious issue. He may suffer irreparable harm such as a heart attack or death in taking two flights to get from Montréal on November 1st to Delhi on November 3rd. The balance of convenience favours him. On the one hand there is no great inconvenience to the Government to await the outcome of Mr. Singh's follow-up tests; while on the other hand it is most inconvenient to be dead.
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> During oral argument, I made reference to two decisions of mine which are somewhat similar, and in both cases stays were granted. See *Solmaz v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 951 and *Tobin v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 325. This is truly a case in which it is preferable to maintain the *status quo ante* until the results of Mr. Singh's scheduled stress test are known.

[5] More than four months have passed since the removal order was stayed. As a preliminary objection, the respondent therefore submits that the applicant obtained the remedy he sought and that this application for judicial review should be dismissed as it is now moot (*Tovar v. Canada (Citizenship and Immigration)*, 2015 FC 490, paragraph 43 and the case law cited in this paragraph). For his part, the applicant—who is basing his argument on *Baron v. Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*]—alleges that the issue is not moot. At the hearing, I decided to hear counsels' arguments on merit, while reserving the right to dismiss the application on the preliminary ground raised by the respondent.

[6] The facts in this case are different from those in *Baron*, wherein the Federal Court of Appeal (Chief Justice Blais holding a dissenting opinion on the issue of theoretical nature) determined that the enforcement officer's refusal to defer the appellants' removal from Canada was reasonable and that the officer's decision must stand. On appeal, both the appellants and the respondent agreed that the dispute was not theoretical and that the trial judge (Justice Dawson) had made an error of law in dismissing the application for judicial review on the ground that it

was theoretical and in refusing to exercise her discretionary power. To this effect, the parties argued "that a live controversy continues to exist between them and that it is not the passing of the scheduled date of removal . . . which renders the application moot." The majority of the Court (Justice Nadon and Justice Desjardins) found that it must be determined "whether [the] appellants should be removed before determination of [their] H&C application."

[7] Based on *Baron*, the law is clear: given an enforcement officer's limited discretion, the simple existence of an H&C application is not a ground for deferral in itself, even though the officer can nonetheless defer the removal until a decision is made regarding the H&C application, if there are indications in the case that such a decision is imminent (*Laguto v. Canada (Citizenship and Immigration)*, 2013 FC 1111, paragraphs 39–41; *Kampemana v. Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1060, paragraphs 33–34, as well as the case law cited in these paragraphs). In this case, the applicant arrived in Canada on July 17, 2007, after having obtained a Canadian visa. The applicant has exhausted all recourse available to him under the Act and there is no H&C application pending, and there are no other grounds—we will come back to the specific medical ground cited by the applicant—that can, at present, authorize an officer to defer the applicant's removal (e.g. the need to conduct a risk assessment before removal).

[8] However, the applicant asks the Court to set aside the October 26, 2015 decision, and to refer the request for deferral of removal back to another law enforcement officer for redetermination. Essentially, the applicant maintains that when a person's life is in danger, the officer must defer the removal, which is the case when a person has a medical condition

rendering him or her unfit to travel by airplane. Since the officer has no medical expertise, the applicant is not contesting the fact that the officer may solicit the advice of a CBSA doctor (*Gonzalez v. Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1178, paragraphs 15–18). However, in the present case, the applicant submits that the officer did not sufficiently explain in the disputed decision why he gave greater weight to the CBSA doctor's opinion, which was based solely on a review of the applicant's medical record. In addition, it was not taken into account that the flight to India takes two days, which increases the applicant's risk.

[9] This application is moot. It is well established that the law enforcement officer has limited discretionary power to defer enforcement of a removal order, when the standard of review for this decision is the reasonableness standard. Even if the officer should have, as the applicant claims, considered the applicant unfit to travel by airplane, he could not have indefinitely deferred the applicant's removal, and if one accepts that he should have deferred the removal order by a few months, he could not have deferred it beyond the period of four to six months recommended in the medical opinion of the attending physician.

[10] When there is no longer any existing dispute that can have a practical impact on the parties' rights, legal recourse becomes theoretical. In such cases, three factors may be taken into account to determine whether a Court should still examine the merits: the existence of an adversarial context; judicial economy; the law-making function of the Court and not intruding into the role of the legislative branch (*Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342). Even if there was an adversarial context regarding the reasonableness of the officer's

decision, judicial economy argues against exercising my judicial discretion to decide on the merit of the application, and as for the law-making function of the Federal Court, no question of law of general importance was really argued by the parties, as was the case in *Baron*.

[11] The applicant's Indian passport has been expired for quite some time, and therefore the applicant cannot be removed to his country without another valid travel document. The practical issue is that the travel document issued in September 2015 by the Indian High Commission contained an expiry date (December 16, 2015), which has now passed. Therefore, it may be a few more months before the removal order can be enforced. Given that the applicant did not take the airplane to India on November 1, 2015, it must therefore be concluded that the question of whether the rights under section 7 of the Charter were upheld is a hypothetical matter. Furthermore, it remains unknown whether the applicant still suffers from hypertension—he has been taking medication to stabilize his condition for several months now—and the applicant's current medical condition is completely unknown. What would this Court's opinion be worth based on an outdated medical record?

[12] What the applicant is actually contesting is how the officer weighed the medical evidence on record. In this case, the applicant submitted in support of his application a letter from his attending physician indicating that he had hypertension and heart problems, that his medication had not yet stabilized his hypertension and that he needed to undergo further tests (an Exercise Stress Test in particular). Since the applicant was not removed from Canada, it can be expected that his attending physician now has the results of the stress test in question, as well as the results of any other blood test that he may have had during the past four months. By the time a new

removal date is set, the previous medical opinions of the attending physician and of the CBSA doctor will be of no value, unless they are updated. The judgment that this Court could render today on the merit would therefore be, in all respects, superfluous and would have no practical effect on the parties' rights (*Solis Perez v. Canada (Citizenship and Immigration)*, 2009 FCA 171, paragraphs 5–6; *Hakeem v. Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1302, paragraphs 8–14; *Banga v. Canada (Citizenship and Immigration)*, 2012 FC 1332, paragraphs 1–2).

[13] At the risk of repeating myself, regardless of the outcome regarding the merit of the application for judicial review—whether it be allowed or dismissed by the Court—everything will have to be redone with another officer. The Court therefore allows the respondent's preliminary objection and dismisses the present application for judicial review. Counsel for the parties agree that there are no serious questions of general importance in this case.

JUDGMENT

THE COURT ORDERS THAT the application for judicial review is dismissed, as it is moot. There is no question to be certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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