Federal Court  Cour fédérale

Date: 20170223

Docket: IMM-1744-16

Citation: 2017 FC 225

Ottawa, Ontario, February 23, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

KHUONG BA NGUYEN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Khuong Ba Nguyen, is a 36 year old citizen of Vietnam who is married to a permanent resident of Canada. He and his wife have three children, all of whom are under six years of age and each of whom is a Canadian citizen. The Applicant first entered Canada in 2004 on a study permit to pursue an Economics degree from York University, returning to Vietnam at various times throughout his studies. He last entered Canada on December 27, 2009 and has remained here continuously since then. The Applicant left university before completing his

degree because his girlfriend, who is now his wife, became pregnant with their first child, and in 2010 he changed his status from a student to that of a visitor, a status he maintained until July 15, 2014.

[2] On August 11, 2014, the Applicant was arrested by the Toronto Police Service on domestic assault charges; as a result of this arrest, the Canada Border Services Agency became aware that the Applicant had overstayed his visitor status. CBSA arrested the Applicant and reported him as inadmissible; a removal order was issued. The Applicant initiated a pre-removal risk assessment [PRRA] application in October 2014, but on January 13, 2016 he was informed that his PRRA application was rejected and that he had to leave Canada immediately. On March 11, 2016, the Applicant was served with a direction to report for removal scheduled for May 1, 2016. An inland enforcement officer [the Officer] denied the Applicant's request for deferral of his removal in a letter dated April 29, 2016. His removal was stayed though by an Order of this Court dated April 29, 2016. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the Officer's decision.

I. The Applicant's Deferral Request

[3] In a fax sent on April 24, 2016, the Applicant, through his counsel, requested that his removal be deferred pending the outcome of his application for permanent residence on humanitarian and compassionate [H&C] grounds. The Applicant included a copy of his H&C application with the deferral request; the Applicant's H&C application remained outstanding at the time of the hearing of this matter.

[4] In his deferral request, the Applicant submitted that his removal should be deferred in view of the best interests of his three children and the principle of family unity enshrined in paragraph 3(1) (d) of the *IRPA*. He outlined his family circumstances and the impact his removal from Canada would have: notably, that his wife would be unable to support their children since she receives social assistance and has limited English skills; that she has no family in Canada to provide support; and that the children would have no replacement for their father.

[5] The Applicant further submitted that it was unlikely his wife could find suitable employment to support their three young children. He also noted that his wife was ineligible to sponsor him because she receives social assistance; but if he was allowed to stay in Canada and his H&C application was successful, he would be able to secure paid employment so the family would no longer need social assistance. The Applicant also outlined how the domestic assault charges resulted in his separation from his wife. The Applicant stated that he and his wife were working on reconciling their marriage and were committed to making their marriage work, but that the marriage might not survive if he were removed from Canada. The Applicant concluded the deferral request by stating there would be a real possibility that the family would be separated indefinitely and the children left fatherless if his removal was not deferred.

II. The Officer's Decision

[6] In a letter dated April 29, 2016, the Officer refused the Applicant's request to defer his removal pending resolution of his H&C application. In the notes accompanying this letter, the Officer noted his role and obligation to enforce a removal order as soon as possible under subsection 48(2) of the *IRPA* and also noted he had "little discretion" to defer removal. After

outlining the Applicant's circumstances, the Officer questioned the timeliness of the H&C application, noting that the Applicant had been aware of his removal from Canada since he was issued an exclusion order on August 25, 2014, and that the onus was upon him to seek options with regard to acquiring status in Canada. The Officer stated that while he had considered the H&C factors presented in the deferral request, he was "not mandated to conduct an assessment of the merits of an H&C application" and, in the context of a request to defer removal, his discretion was "centered on evidence of serious detrimental harm resulting from the enforcement of the removal order as scheduled."

[7] The Officer acknowledged that the removal process and relocation may be difficult, especially when children were involved, but that these factors alone did not warrant a deferral of removal. The Officer noted that he was alive, alert and sensitive to the short-term best interests of the children, but found that: "insufficient evidence was submitted to demonstrate that, in the short-term Mr. Nguyen's spouse and children will be unable to cope without him." The Officer further noted that the children were quite young and that they will remain in the care of their mother, stating that: "Mr. Nguyen's spouse and children are permanent residents or Canadian citizens, and as such, they have access to the array of social programs, including, health care, and education, available to Canadians, should they need them." The Officer said that while he sympathized with the separation and disturbance removal would cause in their lives, "insufficient evidence was presented to establish that Mr. Nguyen's removal will result in permanent or irreparable hardship upon his family." The Officer concluded by remarking that the separation need not be complete or permanent inasmuch as the Applicant's spouse might submit an

overseas sponsorship, choose to visit him with the children, or keep in contact over the internet or telephone.

III. Issues

[8] This application for judicial review raises one central issue: namely, was the Officer's decision not to defer the Applicant's removal reasonable?

IV. Analysis

[9] An enforcement officer's decision whether to defer an individual's removal from Canada is afforded deference and is reviewed on the standard of reasonableness (*Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25, [2010] 2 FCR 311 [*Baron*]; *Escalante v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 897 at para 13, [2016] FCJ No 859; *Lilala v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 500 at para 18, [2016] FCJ No 466).

[10] Under the reasonableness standard, the Court is tasked with determining whether the decision-maker's decision is justifiable, transparent, and intelligible, and also "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and*

Labrador (Treasury Board), 2011 SCC 62 at para 16, [2011] 3 SCR 708. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; and it is also not "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339.

A. *The Scope of an Enforcement Officer's Discretion*

[11] An enforcement officer's discretion to defer removal is narrow. As stated by the Federal Court of Appeal in *Baron*: "It is trite law that an enforcement officer's discretion to defer removal is limited" (para 49). In *Baron*, Justice Nadon cited *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FCR 682 at para 48, 2001 FCT 148 [*Wang*], where it was found that deferral of removal orders "should be reserved for those applications or processes where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment in circumstances where deferral might result in the order becoming inoperative." Justice Nadon also adopted the reasons from *Wang*, outlining the boundaries of an enforcement officer's discretion to defer removal as follows (*Baron* at para 51):

> – There are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths.
>
> – 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.
>
> – 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.
>
> – Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application.

[12] An enforcement officer has a limited ability to address H&C grounds raised in the context of a request for deferral of a removal order. Both this Court and the Federal Court of Appeal have noted that, "absent special considerations" an outstanding application for permanent residence on H&C grounds is not a bar to execution of a valid removal order unless there is a threat to personal safety (see: *Baron* at para 50; *Wang* at para 45; *Arrechavala de Roman v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 478 at para 25, 432 FTR 176).

[13] Moreover, in *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at para 45, [2012] 2 FCR 133, the Court of Appeal stated that enforcement officers' "functions are limited, and deferrals are intended to be temporary. Enforcement officers are not intended to make, or to re-make, PRRAs or H&C decisions." In *Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180 at para 36, [2006] 2 FCR 664 [*Munar*], the Court observed that enforcement officers "cannot be required to undertake a full substantive review of

the humanitarian circumstances that are to be considered as part of an H&C assessment. Not only would that result in a 'pre-H&C' application, to use the words of Justice Nadon in *Simoes*, but it would also duplicate to some extent the real H&C assessment." More recently, in *Newman v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 888, [2016] FCJ No 852 [*Newman*], the Court stated that:

> [19] …. no matter how compelling or sympathetic an applicant's H&C application may be, CBSA enforcement officers are under no duty to investigate H&C factors put forth by an applicant as they are not meant to act as last minute H&C tribunals. The obligation to conduct an H&C assessment properly rests with an officer deciding an H&C application. It is well established that a removal officer is not required to conduct a preliminary or mini H&C analysis and to assess the merits of an H&C application (*Shpati v Canada (Minister of Public Safety & Emergency Preparedness)*, 2011 FCA 286 [*Shpati*] at para 45; *Munar v Canada (Minister of Citizenship & Immigration)*, 2005 FC 1180 at para 36; Prasad at para 32).

[14] In view of the foregoing cases, it can be said that a pending H&C application may justify a deferral of removal if there are either "special considerations" or a threat to personal safety. As noted by the Court in *Newman*, "special considerations" are broader than a threat to personal safety, but do not "include the strength or compelling nature of the underlying H&C application" (at para 29); "special considerations must therefore be looked at bearing in mind the limited discretion granted to enforcement officers on requests for deferral of removal. …they must be other than simply the basis for the H&C claim, or else all H&C applications would have 'special considerations'" (*Newman* at para 30).

[15] The extent to which an enforcement officer must address the best interests of a child [BIOC] is also limited. In *Baron*, Justice Nadon stated that: "an enforcement officer has no

obligation to substantially review the children's best interest before executing a removal order" (para 57). In *Munar*, Justice de Montigny found that the "obligation of a removal officer to consider the interests of Canadian born children must rest at the lower end of the spectrum" (para 38) and, in contrast to an immigration officer who must weigh the long term BIOC in the context of an H&C application, an enforcement officer has to consider only the short-term BIOC such as whether "to defer removal until a child has terminated his or her school year, if he or she is going with his or her parent" (para 40). Similarly, in *Canada (Minister of Citizenship and Immigration) v Varga*, 2006 FCA 394 at para 16, [2007] 4 FCR 3, Justice Evans stated: "Within the narrow scope of removals officers' duties, their obligation, if any, to consider the interests of affected children is at the low end of the spectrum, as contrasted with the full assessment which must be made on an H&C application under subsection 25(1)."

[16] More recently, in *Kampemana v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1060 at para 34, [2015] FCJ No 1119 [*Kampemana*], the Court confirmed that while enforcement officers "must consider the immediate and short-term interests of the children and treat these fairly and with sensitivity", they "are not required to review the best interests of any children comprehensively before enforcing a removal order." Similarly, in *Ally v Canada (Citizenship and Immigration)*, 2015 FC 560 at para 21, [2015] FCJ No 547, the Court concluded that enforcement officers "lack jurisdiction to perform the full substantive analysis of the best interests of the child that is required in an application for permanent residence on H&C grounds" and they "should consider only the short-term best interests of the child."

[17] The jurisprudence has established that enforcement officers are required to consider the short-term best interests of a child in a fair and sensitive manner (see: *Joarder v Canada (Minister of Citizenship and Immigration)*, 2006 FC 230 at para 3, 146 ACWS (3d) 305; *Kampemana* at para 34). It is also clear that: "while the best interests of the children are certainly a factor that must be considered in the context of a removal order, they are not an over-riding consideration" (*Pangallo v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 229 at para 25, 238 ACWS (3d) 711).

B. *Was the Officer's decision reasonable?*

[18] At the hearing of this matter, the Applicant abandoned the argument in his written submissions that the Officer misstated the proper legal test and fettered his discretion by analysing the "detrimental harm" caused by the Applicant's removal. He did, however, maintain his argument that the Officer unreasonably speculated that the children "would have every opportunity to become capable and caring individuals." According to the Applicant, the Officer's reasoning demonstrates a failure to consider the evidence included in the application package; for example, the Officer's remark that the Applicant's wife could sponsor him after his removal ignores the fact that she is currently ineligible to sponsor him because she receives social assistance; and the Officer's finding that the Applicant's family could visit him in Vietnam ignores his wife's financial circumstances. The Applicant contends that the Officer erred by not considering whether it would be in the children's short-term best interests to have their father in their lives and whether his removal would destroy the family unit.

[19] The Respondent argues that the Applicant conflates and confuses the Officer's role to that of an officer assessing an H&C application and faults the Officer for not undertaking a proper H&C analysis. The Respondent states that enforcement officers are bound by law to execute removal orders and their discretion to defer removal is very limited. According to the Respondent, case law has established that an enforcement officer does not have a duty to defer removal of a parent with a Canadian born child, and also that a pending H&C application alone is not a basis for deferral. The Respondent says an enforcement officer's role is limited simply to consideration of the immediate and short-term best interests of a child caused by a parent's removal and to circumstances where there is no practical alternative to deferral in order to ensure the care and protection of a child.

[20] The Respondent submits that the Officer's decision was reasonable since it properly considered the evidence and was consistent with the jurisprudence. According to the Respondent, the Officer reasonably concluded that the Applicant had failed to demonstrate any short-term impediment to his removal from Canada and found that there was insufficient evidence the Applicant's family would be unable to cope without him in the short-term. The Respondent says the Officer did not ignore evidence by stating that the Applicant's wife could sponsor him, noting that his wife was not always in receipt of social assistance and the materials before the Officer indicated that she might be able to sponsor him at some time in the future.

[21] In this case, although the Applicant raised the best interests of his children in the deferral request, he did not identify or expand upon what those interests were, on a short-term basis or otherwise, in any significant detail or show how they would be impacted by his removal. The

Officer could only assess the submissions and evidence as provided by the Applicant, and his decision cannot be faulted since the Applicant failed to provide sufficient submissions or evidence to show why deferral of his removal was necessary in view of his children's short-term best interests. An enforcement officer cannot be expected to identify and define the short-term best interests of a child and examine those interests in a fair and sensitive manner or with a great deal of attention where the evidence concerning those interests is wanting or, as the Officer reasonably found in this case, insufficient.

[22] The Applicant failed to meet the onus upon him to establish that the short-term interests of his children would be unduly or adversely affected by his removal. In *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635, the Federal Court of Appeal noted that:

> [5] An immigration officer considering an H & C application must be "alert, alive and sensitive" to, and must not "minimize", the best interests of children who may be adversely affected by a parent's deportation: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 75. However, this duty only arises when it is sufficiently clear from the material submitted to the decision-maker that an application relies on this factor, at least in part. Moreover, an applicant has the burden of adducing proof of any claim on which the H & C application relies. Hence, if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless.

[23] The burden upon an applicant of adducing evidence with respect to the BIOC in the context of an H&C application applies equally in the context of a request for deferral of a removal order. In this regard, the Court in *Omidsorkhabi v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 954 at para 15, [2015] FCJ No 980, stated: "removal officers have very limited discretion to defer removal…The burden is on the Applicant to

provide the necessary evidence and justification for his request." Furthermore, it has been established that: "it is up to the person relying on the best interests of the child to adduce proof supporting his or her allegations. Vague conjectures are not sufficient" (see *Mondelus v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1138 at para 76, [2011] FCJ No 1392).

[24] An enforcement officer's discretion to defer a removal order under section 48 of the *IRPA* is focused on harm. In *Baron*, the Court of Appeal stated that "family hardship", without more, may not amount to sufficient harm or special circumstances to warrant a deferral of removal: "Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application" (para 51). Moreover, "family hardship is the unfortunate result of a removal order which can be remedied by readmission if the H&C application is successful" (*Baron* at para 69). The Applicant's submissions to the Officer in this case amounted to no more than vague allegations as to the inevitable family hardship associated with his removal, and it was not unreasonable for the Officer to find that removal would not "result in permanent or irreparable hardship upon his family."

[25] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 23, [2015] 3 SCR 909, the Supreme Court observed that: "There will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)." In my view, the same is true in the context of a request to defer enforcement of a removal order: hardship alone will

generally be insufficient to warrant a deferral of removal despite the hardship which may befall the children who remain in Canada following a parent's deportation.

[26] In this case, the Officer reasonably concluded that the Applicant's removal would not cause "permanent or irreparable hardship" on his family. The Officer recognized that the children's separation from their father would cause a disturbance, but noted that the children would remain with their primary caregiver. The Officer further recognized that "family hardship", without more, does not necessitate a deferral of removal if the family hardship can be remedied by readmission following a successful H&C application. All in all, the Officer's decision in this case was justifiable, transparent, and intelligible, and an acceptable outcome defensible in respect of the facts and law.

V. Conclusion

[27] The Officer's decision in this case was reasonable. Accordingly, the Applicant's application for judicial review is dismissed.

[28] Neither party proposed a question for certification, so no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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