Federal Court  Cour fédérale

Date: 20170906

Docket: IMM-578-17

Citation: 2017 FC 802

Toronto, Ontario, September 6, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

HASSAN MOHAMED EL SAYED

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of a Canada Border Services Agency [CBSA] Enforcement Officer [the Officer], dated February 7, 2017, refusing the Applicant's request for deferral of his removal to Egypt.

[2] As explained in greater detail below, this application is allowed, because I have found that the Officer either misapprehended, or failed to engage with, the evidence and arguments surrounding the mental health of the Applicant's wife and the resulting effect of the Applicant's removal upon his wife and son.

II. Background

[3] The Applicant, Mr. Hassan Mohamed El Sayed, is a citizen of Egypt who arrived in Canada in August 2010 and made a refugee claim which was refused in December 2011. He then filed an application for a pre-removal risk assessment and an application for an exemption to permit him to apply for permanent residence from within Canada on humanitarian and compassionate grounds. Both applications were refused in 2013, and Mr. El Sayed was scheduled for removal from Canada. However, he failed to appear for removal, and a warrant was issued for his arrest in July 2013.

[4] Mr. El Sayed met his current partner, Ms. Alexis Lopez, in 2013, their son was born on February 15, 2015, and the couple were married on April 17, 2016. Mr. El Sayed filed a spousal sponsorship application on January 20, 2017. On January 28, 2017, CBSA located and arrested him, as a result of which he was issued a Direction to Report for removal on February 9, 2017. He sought deferral of this removal, based largely on evidence of Ms. Lopez's psychiatric condition and the best interests of his son, which request was refused by the Officer on February 7, 2017. Mr. El Sayed then filed the present application for judicial review of the Officer's decision and sought a stay of removal, which was granted by Justice Gleeson.

III. Issues

[5] As issues supporting the Applicant's request for judicial review, he submits that the Officer's decision represents a fettering of discretion and that the Officer used the wrong test in considering the best interests of the child. The Respondent articulates the issues as follows:

A. What is the applicable standard of review?

B. Has the Applicant established a reviewable error?

[6] The Respondent also raises a preliminary issue, whether the Court should exercise its discretion not to decide the merits of the application for judicial review, because the Applicant's immigration history demonstrates that he is not coming to the Court with clean hands.

[7] The arguments raised by the Applicant can be analyzed under the second issue expressed by the Respondent. My decision will therefore employ as an analytical structure the Respondent's articulation of the issues, including the preliminary issue of clean hands.

IV. Analysis

A. *Should the Court exercise its discretion not to decide the merits of the application?*

[8] The Respondent notes that Mr. El Sayed has received several negative immigration decisions and argues that he ignored Canadian immigration law and, without compelling reason, actively evaded removal for over three years. The Respondent submits that Mr. El Sayed therefore comes to the Court without clean hands and that the Court should exercise its discretion

to dismiss this application for judicial review without consideration of the merits (see *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 [*Thanabalasingham*]).

[9] In *Thanabalasingham*, at paras 9-10, the Federal Court of Appeal explained the principles applicable to this discretion on the part of the Court as follows:

> [9] In my view, the jurisprudence cited by the Minister does not support the proposition advanced in paragraph 23 of counsel's memorandum of fact and law that, "where it appears that an applicant has not come to the Court with clean hands, the Court must initially determine whether in fact the party has unclean hands, and if that is proven, the Court must refuse to hear or grant the application on its merits." Rather, the case law suggests that, if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief.
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> [10] In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[10] I note that this argument was raised before the Court on the stay motion. Consistent with the balancing exercise described in *Thanabalasingham*, Justice Gleeson’s decision noted the Respondent’s argument that Mr. El Sayed was before the Court with unclean hands but also noted that the deferral request was based, in part, on the negative impacts of removal upon his

spouse and two-year-old child. Justice Gleeson did not expressly reach a conclusion on the clean hands argument but proceeded to find that the balance of convenience, which required assessment in consideration of the request for a stay, favoured the Applicant.

[11] Similarly, I consider the necessary balancing to be between the seriousness of Mr. El Sayed's misconduct and the alleged impact upon his spouse and son. Consistent with the analysis in *Makias v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1218, one of the authorities relied upon by the Respondent, Mr. El Sayed's misconduct cannot be imputed to his family. While I consider his decision to flout Canada's immigration laws since 2013 to represent serious misconduct, I find this is outweighed by the seriousness of the impact upon his family that it is alleged would result from his removal. I therefore exercise my discretion to proceed to consider the merits of this application.

B. *What is the applicable standard of review?*

[12] Mr. El Sayed submits that the issues he raises, involving arguments of fettering of discretion and that the Officer applied the wrong test in considering the best interests of the child, involve questions of law which should be examined on the standard of correctness. The Respondent takes the position that the standard of review applicable to the Officer's consideration of Mr. El Sayed's deferral request is reasonableness, such that the Court should intervene only if the Officer's decision fails to evidence justification, transparency and intelligibility and falls outside the range of possible, acceptable outcomes.

[13] I agree with the Respondent's position on this issue. The standard of review applicable to a CBSA enforcement officer's consideration of a request for deferral of removal is reasonableness (see e.g. *Newman v Canada (Minister of Public Safety and Emergency Preparedness), 2016 FC 888 [Newman]*, at paras 12-13).

C. *Has the Applicant established a reviewable error?*

[14] My decision to allow this application turns on the conclusion that the Officer either misapprehended, or failed to engage with, the evidence surrounding the mental health of Mr. El Sayed's wife and submissions as to the resulting effect of his removal upon his wife and son.

[15] The Officer referred to having considered a letter from the psychiatrist treating Mr. El Sayed's wife, Ms. Lopez, and a letter from the child protection worker who was involved with the family. The Officer noted that Ms. Lopez had been diagnosed with major depressive disorder, anxiety and emotional dysregulation and that she had suicidal ideations. However, the Officer also noted that, while Ms. Lopez had a history of mental instability, her condition was currently controlled, her psychiatrist was still actively involved in her medical care and, in the case of relapse of her condition, Ms. Lopez could turn to her physician for help. The Officer therefore concluded that the evidence submitted did not warrant a deferral of Mr. El Sayed's removal.

[16] However, Mr. El Sayed points out that the evidence does not support the Officer's statement that his wife's condition is currently controlled. There were two letters submitted from

Ms. Lopez's psychiatrist, which explained that she had been treating Ms. Lopez since 2015 when her child was born. Her diagnosis includes a chronically elevated risk of self-harm, and she has had several relapses of depression and required hospitalizations for suicide attempts. The psychiatrist's most recent letter, prepared in February 2017 at the time of the deferral request, states that Ms. Lopez's depression has relapsed again under the pressure of Ms. El Sayed potentially been deported from Canada. She states that she is increasingly concerned about Ms. Lopez's safety if her husband is not in Canada to support her and their child and that, to stay stable, she requires ongoing support, particularly from her husband, as well as ongoing psychiatric treatment.

[17] While the Officer accurately notes that Ms. Lopez's psychiatrist is still actively involved in her medical care, it is not clear on what basis the Officer stated that her condition is currently controlled. I note that the April 14, 2016 letter from the child protection worker with the Children's Aid Society referred to Ms. Lopez following up with her treatment plan, taking prescribed medication, and having been stable since a year ago. However, that letter predated by 10 months the psychiatrist's February 2017 statement that Ms. Lopez's condition had relapsed and that there were concerns for her safety. I also note that the psychiatrist's evidence refers not to past suicidal ideation but rather to past suicide attempts.

[18] I am therefore unable to find the Officer's treatment of the evidence surrounding Ms. Lopez's psychiatric condition to demonstrate the intelligibility necessary to conclude that it falls within the range of reasonable outcomes.

[19] In considering the interests of the couple's two-year-old son, the Officer noted that Mr. El Sayed is involved with raising his child. However, the Officer observed that the child will remain with his mother in Canada, which may attenuate a period of adjustment for the child, that he is eligible for all the social, educational and medical benefits available to Canadians, and that he is very young and would therefore more easily and naturally adjust to his new circumstances. The Officer considered the submission that the child could end up in the custody of the Children's Aid Society if Mr. El Sayed was removed but concluded that this concern was speculative in nature.

[20] My concern with this aspect of the Officer's decision flows from my findings with respect to the Officer's treatment of the evidence surrounding Ms. Lopez's psychiatric condition. The submissions supporting the deferral request argued that Mr. El Sayed's removal would increase the risk of Ms. Lopez attempting to commit suicide again and that, due to this risk and Ms. Lopez's overall psychiatric condition, the child would be left without adequate care. Perhaps because of the findings surrounding Ms. Lopez's psychiatric condition, the Officer does not appear to have engaged with this argument, concluding simply that the child will adjust to the absence of his father because of the availability of care from his mother. Again, I find that the decision does not demonstrate an engagement with the evidence and arguments sufficient to conclude that it falls within the range of reasonable outcomes.

[21] In responding to this application, the Respondent placed considerable emphasis upon the law governing the limited discretion afforded to a CBSA enforcement officer when presented with a request for deferral of removal. The Respondent relied on the recent decision by this

Court in *Newman* at paras 35-36, in which Justice Gascon explained the limits upon an enforcement officer's discretion as follows:

> [35] When considered in the context of requests for deferral and through the prism of section 48 of IRPA, as they properly should, those "special considerations" therefore cannot simply encompass any or all factors contained or provided in support of an H&C application, or even less so the H&C application itself. It is well accepted that enforcement officers are not positioned to evaluate all the evidence that might be relevant in an H&C application (*Ramada* at para 7) or its merits, and that a pending H&C application does not in itself constitute one of the special considerations which could allow the enforcement officer to defer a removal (*Shpati* at para 45; *Ponce Moreno v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 494 at para 19). An enforcement officer has neither the general duty, nor the discretion to consider various H&C factors in determining whether to defer removal (*Mkhonta v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 991 at para 26).
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> [36] Against the backdrop of an enforcement officer's decision on a request for deferral and the limited discretion bestowed to the officer, I thus conclude that the special considerations arising in an H&C context are limited to those elements evoking some form of harm linked to the removal from Canada. In other words, a condition or a situation alleged in an H&C application would not be sufficient to constitute one of the "special considerations" mentioned in *Baron* if it does not translate into some form of detrimental harm caused by the impending removal.

[22] In particular, the Respondent emphasized Justice Gascon's reference to the requirement that the special circumstances to be taken into account by an enforcement officer be those which relate to some form of detrimental harm caused by the impending removal from Canada. The Respondent correctly notes that the psychiatric evidence demonstrates that Ms. Lopez's mental disability significantly predates the impending removal, that the disability is permanent, and that her elevated risk of self-harm is chronic. The Respondent argues that the Officer is not in a position to address a long-term mental health concern of this nature, that the harm argued by the

Applicant is not sufficiently linked to the removal, and that the Officer therefore did not have the authority to defer the removal based on Ms. Lopez's mental health condition.

[23] With respect, I cannot accept this argument. While the mental health condition certainly predates the impending removal, the Applicant's submission based on the psychiatrist's evidence is that Mr. El Sayed's removal could trigger a significant exacerbation of that condition, including the risk of another suicide attempt. In my view, this is precisely the sort of linkage, or detrimental harm resulting from an impending removal, to which Justice Gascon was referring in *Newman*.

[24] I acknowledge the Respondent's point that a deferral of removal is intended to be short-term relief, changing only the timing of removal and not whether removal will eventually take place. However, I understand the Applicant's argument to be that the Officer has the discretion to defer immediate removal, and thereby prevent the immediate harm that he submits would be the consequence of that removal. This preserves the possibility that his removal and the harm argued to result therefrom will be avoided permanently should the sponsorship application succeed. I consider this argument to be sound and responsive to the Respondent's position that the Officer did not have the discretion to defer removal in the circumstances presented in this case.

V. Conclusion

[25] It is therefore my decision to allow this application for judicial review, such that the Applicant's request for deferral of his removal will be returned to another enforcement officer for consideration. The parties raised no question for certification for appeal, and none is stated.

JUDGMENT in IMM-578-17

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and this matter is returned to another officer for consideration. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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