

Federal Court



Cour fédérale

Date: 20171018

Docket: IMM-238-17

Citation: 2017 FC 931

Ottawa, Ontario, October 18, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

RAYMOND ORTIZ

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 January 16, 2017, refusing the Applicant's request for deferral of his removal to the United States.

[2] As explained in greater detail below, this application is allowed, because I have concluded that the Officer's decision, in its treatment of the evidence and arguments surrounding the effect of the Applicant's removal upon his autistic son, does not demonstrate the transparency and intelligibility necessary to be found reasonable.

II. Background

[3] The Applicant, Mr. Raymond Ortiz, is a citizen of the United States who entered Canada in December 2002. He has three children with his common-law partner, Anne Kouvas, with whom he has lived since coming to Canada. Their children are a 13-year-old daughter, Periana, a 7-year-old son, Graedyn, and a 4-year-old son, Lukas, who was diagnosed in February 2016 with nonverbal autism. Mr. Ortiz is a stay-at-home father and the children's principal caregiver. His partner works as a corporate travel agent but has been on short-term disability since September 2016, suffering from depression, lupus, fibromyalgia, EDS, scoliosis, and chronic pain.

[4] In December 2016, Mr. Ortiz was charged with assaulting his partner and was detained for a short period. On January 5, 2017, he received a conditional discharge and 12 months' probation. He subsequently received a Direction to Report for removal on January 18, 2017 and requested deferral of removal, citing his family circumstances and an intended application for permanent residence in Canada on humanitarian and compassionate [H&C] grounds. This request was refused by the Officer on January 16, 2017, in the decision which is the subject of this judicial review application. Mr. Ortiz sought a stay of removal, which was granted by Justice Simpson.

III. Issues

[5] As issues supporting his request for judicial review, the Applicant 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 arguments raised by the Applicant can be analyzed under the second issue expressed by the Respondent, in the context of which I will also address the applicable standard of review.

IV. Analysis

[7] My decision to allow this application for judicial review turns on Mr. Ortiz's argument that the Officer's decision does not demonstrate transparency and intelligibility in its treatment of the evidence and submissions surrounding the effect that Mr. Ortiz's removal would have on his four-year-old son, Lukas.

[8] The evidence before the Officer from Lukas's pediatrician was that Lukas has been diagnosed with Autism Spectrum Disorder and that he is not able to speak or interact with others, although he is able to interact to a limited degree with his father, who is his primary caregiver. Mr. Ortiz's partner explained in her affidavit not only that Mr. Ortiz has always been Lukas's primary caregiver but that Mr. Ortiz best understands what Lukas is attempting to communicate

through his different cries, grunts, and motions. She also described Lukas's deterioration during the period his father was in detention. Friends of their family similarly described Mr. Ortiz's unique role in communicating with his son, calming him, and attending to his needs.

[9] The Officer's decision refers to considering Lukas's medical condition and the pediatrician's advice that removing Mr. Ortiz would have a detrimental effect upon Lukas. However, the Officer concluded that Lukas will have the care of his mother and that he has status in Canada and is eligible for and receiving care for his condition from a medical professional such that, while removal of Mr. Ortiz may be difficult for Lukas, the Canadian medical and social system will provide him with proper care.

[10] The parties confirmed their agreement at the hearing of this application that the standard of review, applicable to the Officer's consideration of the evidence and arguments submitted in support of the deferral request, is reasonableness. As such, 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. The Applicant's counsel nevertheless took the position that, given the compelling evidence as to Mr. Ortiz's role in Lukas's care and upbringing, granting the deferral request was really the only reasonable decision the Officer could have made. I disagree with this assertion, as the Officer is afforded discretion and, while the exercise of that discretion must fall within the reasonable range and the parameters of that range may be influenced by the circumstances of the particular case, it is nevertheless a range.

[11] However, while I do not accept the Applicant's position that the Officer was obliged to grant the deferral request, I do agree that the reasons given by the Officer do not demonstrate the required transparency and intelligibility. While noting the psychiatrist's opinion that Mr. Ortiz's removal would have a detrimental effect, the Officer fails to engage with the evidence underlying that opinion or the arguments based thereon. It is not clear how the Officer reached the conclusion that Lukas's status as a Canadian and the availability of medical care would address his circumstances notwithstanding the removal of the individual who is his primary caregiver and is best able to address his communication challenges.

[12] In oral argument, the Respondent placed considerable emphasis on the position that the Officer did not have the authority to grant the requested deferral because of its potential length. The Respondent submits that a removal officer's discretion to defer removal is limited in scope, intended to be short-term in duration, and restricted to taking into account special considerations that represent some form of detrimental harm caused by an impending removal. The Respondent notes that the Mr. Ortiz's H&C application had not been submitted by the time of the deferral request. (Counsel advised at the hearing that it was submitted approximately two weeks later on February 1, 2017.) Observing that an H&C application can take 34 months, the Respondent argues that this duration falls outside the parameters of what can be characterized as a short-term deferral.

[13] While I accept the Respondent's characterization of the Officer's discretion, I do not consider it to support the Respondent's position that the Officer in the case at hand would have been acting outside the parameters of that discretion if the deferral request had been granted. I

have not been referred to any jurisprudence to the effect that there is a particular outside limit on the duration of a deferral that an Officer has the discretion to grant. A deferral until an H&C application has been decided is still temporary in nature and, as the Applicant points out, there is clearly jurisprudential support for an Officer's authority to defer removal pending an H&C decision (see e.g. *Martinez v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1341). The imminence or distance of the decision may be a relevant factor for consideration, but I find no basis to conclude that the Officer has the authority to defer removal only in the case of imminent decisions.

V. Conclusion

[14] 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 re-consideration. The parties raised no question for certification for appeal, and none is stated.

JUDGMENT in IMM-238-17

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

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-238-17

STYLE OF CAUSE: RAYMOND ORTIZ V THE MINISTER OF PUBLIC
SAFETY AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 24, 2017

JUDGMENT AND REASONS: SOUTHCOTT, J.

DATED: OCTOBER 18, 2017

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