Federal Court  Cour fédérale

Date: 20170509

Docket: IMM-4401-16

Citation: 2017 FC 470

Ottawa, Ontario, May 9, 2017

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

JOEL ESON MARCUS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr Joel Eson Marcus, originally from Guyana, became a permanent resident of Canada in 2005. Six years later, he was convicted of aggravated assault and sentenced to two years' probation (in addition to time served). As a result, he was found to be inadmissible to Canada and subject to deportation.

[2] The Canadian Border Services Agency (CBSA) scheduled Mr Marcus's removal from Canada to Guyana for October 22, 2016. Mr Marcus asked a CBSA officer to defer his removal based on medical evidence showing that he was experiencing some heart trouble. The officer reviewed the evidence and sought an independent medical opinion, but found there were insufficient grounds to delay Mr Marcus's removal. Mr Marcus sought and received a stay of removal pending determination of his application for leave and judicial review of the officer's decision. Justice Keith Boswell granted the stay and Mr. Marcus's request for leave to pursue this application for judicial review.

[3] Mr Marcus argues that the officer's refusal of his deferral request was unreasonable in light of the evidence. He also submits that the officer applied the wrong test for granting a deferral. Finally, he asks me to admit fresh evidence to rebut the officer's description of medical services available in Guyana. Mr Marcus asks me to quash the officer's decision and order another officer to reconsider his request for a deferral.

[4] I can find no basis for overturning the officer's decision. The officer's decision was not unreasonable, nor was it based on an incorrect standard. Mr. Marcus proffered fresh evidence in support of this application, but it is not admissible, and in any case, its admission would not affect the outcome. I must, therefore, dismiss this application for judicial review.

[5] There are three issues:

1. Was the officer's decision unreasonable?
2. Did the officer apply the wrong standard?

3. Should the fresh evidence be admitted?

II. The Officer's Decision

[6] The officer summarized the medical evidence, noting that Mr Marcus's doctors were investigating "systolic dysfunction". Further, an independent physician found that the evidence showed "a vague and non-specific history of 'cardiac and neurological testing which revealed global cardiac systolic dysfunction'" requiring further testing. The evidence did not suggest that Mr Marcus was unfit to travel.

[7] Mr Marcus submitted to the officer that he would not be able to afford medical treatment in Guyana, and filed a letter from a Georgetown hospital itemizing the high cost of an angioplasty. The officer noted that the letter showed that medical treatment would be available in Guyana, and that there was no evidence that Mr Marcus would not have access to public health care. The officer concluded that the evidence did not show that Mr Marcus's health would suffer "irreparable harm" if he returned to Guyana.

[8] The officer went on to consider Mr Marcus's family situation. His family lives in Canada, and includes a Canadian-born daughter. The only relative remaining in Guyana is an elderly grandmother who resides in a seniors' home. Again, the officer found that Mr Marcus's family would not suffer "irreparable harm" if he left Canada; nor would Mr Marcus suffer "disproportionate or irreparable harm" on his return to Guyana.

[9] Taking account of his limited discretion, the officer concluded that a deferral of the removal order was not appropriate in the circumstances.

III. Issue One – Was the Officer's Decision Unreasonable?

[10] Mr Marcus submits that the officer unreasonably concentrated on his fitness to travel rather than his overall medical circumstances and access to treatment in Guyana. He maintains that the officer failed to take adequate account of the lack of family support in Guyana and his inability to pay for medical treatment. He also argues that the officer failed to consider the details of the medical evidence, and speculated about the availability of public health care in Guyana.

[11] In my view, the officer's decision was not unreasonable in light of the limited discretion available to him and the evidence on which Mr Marcus relied.

[12] An enforcement officer can defer removal only where the applicant can show exigent personal circumstances justifying a temporary delay. The Federal Court of Appeal has stated that deferrals should generally be granted only where the applicant would otherwise be exposed to a risk of "death, extreme sanction or inhumane treatment" (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 para 51, citing *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148). Given his limited discretion, the officer did not err by considering whether Mr Marcus was sufficiently fit for air travel: it was appropriate to determine whether Mr Marcus's health would be seriously affected by a long flight to Guyana.

[13] In my view, however, the officer did not limit himself to considering Mr Marcus's fitness for air travel. Rather, the officer went on to consider all of the medical evidence before him and summarized it reasonably accurately. That evidence simply did not provide a definitive diagnosis of Mr Marcus's medical condition or any information about what kinds of medical treatment he might require in Guyana. The officer noted that Mr Marcus had only one relative in Guyana, but there was no indication that Mr Marcus would require family support in the future. Finally, Mr Marcus did not provide any evidence showing he would not have access to public health services in Guyana.

[14] Accordingly, I cannot conclude that the officer's decision was unreasonable.

IV. Issue Two – Did the Officer Apply the Wrong Standard?

[15] Mr Marcus argues that the officer's repeated use of the words "irreparable harm" indicates that the officer applied the wrong standard.

[16] I agree with Mr Marcus that the officer's use of those words was inappropriate. It risks importing into deferral decisions the jurisprudence and standards applicable to injunctions and stays of execution, which are not relevant to deferrals.

[17] Still, in the circumstances here, I read the officer's reasons as an attempt to apply a fairly strict standard for the kind of evidence that would justify a deferral. As noted above, the case law uses terms such as "exigent personal circumstances" or a "risk of death, extreme sanction, or inhumane treatment". While I would not condone use of the term "irreparable harm" as a valid

substitute for the applicable standard, the officer's use of it here did not amount to an error that would justify quashing the decision.

V. Issue Three – Should the Fresh Evidence be Admitted?

[18] Mr Marcus argues that I should admit fresh evidence to counter the officer's apparent reliance on an unidentified source indicating that public health services are available in Guyana. Mr Marcus cites a World Health Organization report describing health services in Guyana as "inadequate".

[19] Fresh evidence is rarely admissible on judicial review. The most common exception is where the applicant wishes to argue that he or she was treated unfairly by the decision-maker. Assuming for present purposes that Mr Marcus's situation fits within that exception, the fresh evidence he relies on would not affect the outcome of the officer's decision. The WHO report specifically states that "public health services are mainly financed by the government" and that the government's spending on health care has recently increased significantly. I cannot conclude, therefore, that the fresh evidence would have any effect on the officer's conclusion.

VI. Conclusion and Disposition

[20] The officer's conclusion was not unreasonable on the evidence, and the officer did not commit a reviewable error in respect of the applicable standard. The fresh evidence would not have any effect on the outcome. Accordingly, I must dismiss this application for judicial review. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT in IMM-4401-16

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"James W. O'Reilly"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4401-16
STYLE OF CAUSE:	JOEL ESON MARCUS v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 20, 2017
JUDGMENT AND REASONS:	O'REILLY J.
DATED:	MAY 9, 2017

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