Federal Court Cour fédérale

Date: 20241010

Docket: IMM-5360-23

Citation: 2024 FC 1606

Toronto, Ontario, October 10, 2024

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

MUNIR AHMED HOATH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Munir Ahmed Hoath [the Applicant], brings this application for judicial review of a decision of an Officer [the Officer] of the Canadian Border Services Agency [CBSA], dated April 26, 2023, refusing the Applicant's request for a deferral of removal [the Removal Decision]. The Applicant was successful on a motion to stay the removal order in April 2023. This is a judicial review on the merits of the judicial review application.

II. Facts

[2] The Applicant is a citizen of Pakistan. He has a wife and five minor children, the youngest of which was born in Canada. The Applicant came to Canada in January 2016 on a two-year work permit. The Applicant was nominated through the Provincial Nominee Program and submitted an application for permanent residence in December 2016.

A. *The first exclusion order*

[3] The family's passports were stolen in November 2018 and the renewal deadline for the Applicant's work permit expired by the time he received new passports. The Applicant applied for restoration of his status and an extension of his work permit, but he was refused.

[4] The CBSA issued an Exclusion Order in December 2020, by reason that the Applicant had overstayed his visa.

[5] The Applicant has filed various unsuccessful applications in an attempt to stay in Canada: his Pre-Removal Risk Assessment was rejected in July 2021; and his application for permanent residence was refused in September 2021 as the province of Saskatchewan withdrew the nomination based on the exclusion order that had been issued against him.

B. *The Applicant's first removal order was stayed*

[6] In December 2021, the Applicant was issued a Direction to Report for removal from Canada on January 3, 2022. The Applicant submitted a deferral request which was refused by the CBSA. The Applicant brought a motion to stay the CBSA's order which was granted on December 31, 2021.

C. *The Applicant's second request for deferral*

[7] Removal proceedings resumed in March 2023. When the Applicant failed to report, CBSA issued a Direction to Report for removal on April 30, 2023. The Applicant's family members were not subject to inadmissibility reports.

[8] The Applicant filed an application for permanent residency based on humanitarian and compassionate [H&C] grounds [the H&C Application] on April 19, 2023. Days later, the Applicant submitted a request for a short deferral of his removal order until either a stage 1 decision was reached on the H&C Application, or alternatively, until the end of June 2023 so he could attend his eldest child's graduation [the short-term Deferral Request].

D. *The Removal Decision*

[9] On April 26, 2023, the CBSA refused the Applicant's short-term Deferral Request. In the Removal Decision, the Officer considered the Applicant's submissions based on his filing of an H&C application, which the Applicant's counsel advised had been submitted just the week

prior. The Officer noted that the H&C Application did not appear in the CBSA database, but concluded in any event that enforcement officers are not required to assess the merits of an H&C application when assessing deferral requests. The Officer also added that it is beyond the jurisdiction of an officer to conduct a "mini H&C" evaluation. The Officer found that a decision on the H&C Application was neither imminent nor overdue and that a deferral of removal is intended to address temporary practical impediments to removal. On this basis, the Officer held that a deferral of the Applicant's removal for 12 months was not warranted.

[10] The Officer also considered the Applicant's request for a two-month deferral to allow his daughter to finish her Grade 12 school year and allow the Applicant to attend her graduation. The Officer concluded that the Applicant's removal would not have an impact on his eldest child's ability to complete her school year and there was insufficient evidence to warrant deferral based on the best interests of the children [BIOC].

E. *The Applicant's stay of the second removal order*

[11] The Applicant brought a motion to stay the removal order, which was granted by Justice McDonald by Order dated April 28, 2023. Justice McDonald held that it was within the Officer's discretion to consider the short-term BIOC and the Officer did not explain why the Applicant's removal could not be deferred for two months to allow him to attend his eldest child's graduation. Justice McDonald considered that the removal of the Applicant would amount to an unnecessary forced family separation that constituted irreparable harm and that the balance of convenience therefore favoured the Applicant.

III. Legislative Framework

[12] The execution of removal orders is governed by section 48 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], which provides that: (i) a removal order is enforceable if it has come into force and is not stayed; and (ii) once a removal order is enforceable, the foreign national against whom the removal order is made must leave Canada immediately and the order must be enforced "as soon as is reasonably practicable."

IV. Issues and Standard of Review

[13] The Applicant has raised the following issues on this application:

A. Did the Officer ignore arguments and evidence when considering the pending H&C application?

B. Did the Officer fail to explain why a two-month deferral was not warranted?

C. Did the Officer ignore evidence when assessing the best interests of the children?

[14] Discretionary decisions of removal officers are reviewed on the reasonableness standard (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 at para 25).

[15] The role of the Court in a reasonableness review is to holistically and contextually examine the administrative decision maker's reasoning and the outcome to determine whether the decision is "based on an internally coherent and rational chain of analysis and … is justified in relation to the facts and law that constrain the decision maker" (*Canada (Minister of*

Citizenship and Immigration) v Vavilov, 2019 SCC 65 at paras 85, 97 [*Vavilov*]). This Court must be satisfied that the decision bears the hallmarks of the proper exercise of public power by being justified, intelligible and transparent to those who are subject to it (*Vavilov* at paras 95, 99). In conducting this analysis, the Court must not reweigh or reassess the evidence (*Vavilov* at paras 95, 125).

V. Analysis

A. *Did the Officer ignore arguments and evidence when considering the pending H&C application?*

[16] The Applicant submits that the Officer erred in refusing to defer his removal until a stage 1 decision is made on the H&C Application. The Applicant argues that the Officer ignored and erred in the assessment of the evidence regarding both the actual filing of the Applicant's H&C application (since it did not appear in the CBSA database) and the processing times for H&C applications.

[17] The Applicant further argues that he presented the Officer with "compelling" circumstances that warranted deferral related to the delay in the filing of his H&C Application by his counsel. While the Applicant obtained a Legal Aid certificate in January 2022, it took 15 months for the law firm he hired to submit his H&C application after the lawyer assigned to the file left the firm in 2022. The Applicant argues that the filing of the H&C Application was timely in the circumstances and that timeliness is what is relevant, not the imminence of the decision and cites *Katwaru v Canada (Public Safety and Emergency Preparedness)*, 2008 FC

1045 at paras 30-31, which holds that an Enforcement Officer improperly fetters their discretion by failing to appreciate an applicant's individual circumstances.

[18] I am not persuaded that the Officer failed to take into account the circumstances advanced by the Applicant related to the filing and processing of the Applicant's H&C application. The Removal Decision shows that the Officer meaningfully addressed the Applicant's arguments but ultimately found "insufficient compelling evidence" to warrant a deferral of his removal from Canada. This Court is not entitled to reassess that evidence (*Vavilov* at para 125). Nor do I find that the Officer's varying acceptance of the filing of the H&C Application amounts to a misapprehension of the evidence. Ultimately, as the Officer pointed out, while a removal officer has some discretion to consider a broad range of circumstances, "the mere existence of a pending H&C application does not warrant a deferral of removal" (*Prasad v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 614 at para 32).

B. *Did the Officer err in failing to explain why a two-month deferral was not warranted?*

[19] The Applicant argues that the removal order was unreasonable as the Officer failed to explain why the two-month deferral requested on the grounds of the BIOC was not warranted and that this error is a valid basis for remitting the matter back to a new officer for reconsideration.

[20] The Respondent has raised a preliminary issue of mootness. The Respondent argues that the BIOC ground was based on the Applicant's request to attend his daughter's graduation in

June 2023, and since the event has passed, the issue is moot. At the hearing, counsel for the Applicant agreed that this aspect of the Removal Decision was moot and was not being pursued.

[21] However, the Applicant submits that his request for a deferral was also based on an argument put directly to the Officer that a deferral could also allow the family to leave the country together, thus avoiding an unnecessary family separation. The Applicant argues that this remains a live issue.

[22] The Supreme Court established a two-step test for determining mootness in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]. The first step in the analysis requires a consideration of whether there remains a live controversy or concrete dispute between the parties. The second step of the analysis permits the Court to exercise its discretion either to hear or to decline to hear the matter (*Borowski* at 353).

[23] I find that the issue of the reasonableness of the Officer's decision not to defer the removal order for two months to allow the Applicant's family to leave Canada together is also moot by virtue of the passage of the two-month period upon which the request was based. The Applicant's request for deferral was posited on short-term BIOC considerations coupled with the family's intention to leave Canada. This is evident in three aspects of the record.

[24] First, in making the deferral request, the Applicant's counsel stated:

> I am asking for a deferral of [the Applicant's] removal for 2 months so that he can attend his daughter's Grade 12 graduation at the end of June 2023. It is my understanding that the rest of the family – spouse and 4 children – have been permitted to stay until

> the end of the school year. [The Applicant] would also like to remain here with his family until the end of June.

[25] Second, a further letter from the Applicant's counsel days later includes the following submission:

> This family has struggled a lot and needs to remain together. Another two months will not inconvenience CBSA or IRCC since they will likely be scheduled for removal in early July once school is over. At that point, they can simply leave together. It seems cruel to separate this family from their father/husband simply to gain two months on the [Applicant's] removal. It is contrary to s. 3 of the IRPA, the principle to keep families united or to reunite families. In this case, for no other reason than expediency, you are tearing apart this family.

[26] Finally, the serious issue identified by Justice McDonald was based on short-term BIOC considerations. She held:

> …the short-term BIOC factors to be considered … include the need for a child to finish a school year during the period of the requested deferral and the short-term needs of the children if their parent or parents are to be removed while the children remain in Canada.

[27] In the words of *Borowksi*, the "concrete dispute" related to the family's short-term separation as articulated by the Applicant in the deferral request has become academic.

[28] I have nevertheless decided to exercise my discretion to review the reasonableness of that aspect of the Removal Decision based on the interests of justice, given that the best interests of children are involved.

[29] I am satisfied that the Officer gave sufficient reasons for not granting a short-term deferral in order to avoid an unnecessary family separation. The Officer addressed this aspect of the deferral request in the section entitled, "Conclusion and Decision." The Officer considered that the CBSA had afforded "considerable accommodation" to the Applicant and his family by exercising its discretion not to issue inadmissibility reports against the Applicant's family as it was established they would voluntarily depart Canada together at the end of the school year. This reasoning was open to the Officer on the record and was responsive to the argument put to the Officer (*Vavilov* at para 127).

C. *Did the Officer ignore evidence when assessing the best interests of the children?*

[30] I note that my findings on the first two issues also answer the third issue raised by the Applicant which alleges that the Officer ignored evidence when assessing the BIOC. More specifically, the Applicant argued that the Officer ignored: (i) evidence from the Applicant's eldest child about the importance of her father attending her graduation; and (ii) the potential for a lengthy family separation which could result from the Applicant's removal.

[31] The Applicant has acknowledged that the first issue is moot. The second argument is also moot, but more importantly, it is not consistent with the Applicant's own evidence and submissions that the family would voluntarily leave Canada together at the end of the school year. The Officer was reasonably entitled to rely on this evidence in considering the BIOC related to family separation.

VI. Conclusion

[32] The Applicant has not discharged his onus of demonstrating that the Removal Decision is unreasonable. This application for judicial review is dismissed.

JUDGMENT in IMM-5360-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. There is no question for certification.

"Allyson Whyte Nowak"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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