Date: 20080627

Docket: IMM-2784-07

Citation: 2008 FC 815

Ottawa, Ontario, June 27, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

ALBERTO GIUSEPPE FERRARO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] On July 9, 2007, Enforcement Officer Adele Holmes (the Officer) refused to defer, until the determination of his outstanding humanitarian and compassionate considerations application (the H&C application) sponsored by his common law partner, the applicant's removal from Canada to Ecuador scheduled for July 17, 2007. Mr. Ferraro sought judicial review of that decision. His removal was stayed on July 16, 2007 by order of Justice Snider pending the determination of his

leave and judicial review application. Leave was granted. These reasons deal with the hearing of his judicial review application.

[2] This case gives rise to a new and to an old problem. The new issue is what impact the Supreme Court of Canada's recent decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*) has on the standard of review of a decision not to defer the scheduled removal of an applicant.

[3] The old problem is not so much what is the scope of the limited discretion an Officer has to defer the execution of a removal order under section 48 of the *Immigration and Refugee Protection Act* (*IRPA*) but whether the Officer erred in the application of recognized factors. In particular, in this case, the applicant argues the Officer failed to properly apply the "compelling personal circumstance (e.g. humanitarian and compassionate considerations" factor) adopted by my colleague Justice O'Reilly in *Ramada v. Canada (Solicitor General)*, 2005 FC 1112 and subsequently followed in several other decisions issued by my colleagues.

Facts

[4] Alberto Giuseppe Ferraro was born in Ecuador in 1962. The family returned to Italy in 1969 and it came to Canada in 1970. He was 9 years old at the time, became a permanent resident of this country and has lived continuously here since that time.

[5] His entire family is in Canada including his 76 year old widowed father, his two daughters, Vanessa age 24 and Victoria age 11, his common law wife and his stepson age 9, his only sister and

his aunts, uncles and cousins. They are all Canadian citizens except for the applicant seemly because his parents did not apply for him believing he automatically became one as a child.

[6] His immigration troubles began in 2001; on September 17, 2001, after pleading guilty, he was convicted of trafficking a controlled substance and possession of stolen property for which he received concurrent sentences of 3 years imprisonment. He was released from custody on an accelerated parole after serving seven months.

[7] As a result of his criminal convictions, a deportation order was issued against him which, as a permanent resident, he appealed to the Immigration Appeal Division (IAD) where a stay of his removal with conditions could have been granted by the IAD after consideration of the Ribic factors endorsed by the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84 at paragraph 40, namely, the circumstances leading to his deportation, the seriousness of the offence, the possibility of rehabilitation, the length of time spent in Canada, the degree of his establishment in Canada and the hardship to him and his family if deported.

[8] However, before his IAD appeal was heard, *IRPA* came into force on June 28, 2002. His appeal was terminated on jurisdictional grounds by the IAD because he had received a sentence of more than two years. He sought judicial review of the IAD's decision which was not resolved against him until the Supreme Court of Canada rendered its decision in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539. On November 2006, his appeal against the IAD was dismissed.

[9] On January 2, 2007, the applicant was interviewed by the Officer for purposes of effecting his removal. In her notes of decision, the officer summarized what transpired during that meeting and recorded subsequent events as follows:

> 02JAN2007 PC attended interview at GTEC and filled out a travel document application. PC advised he would be scheduled for removal once a valid travel document was available and that he should start making preparations to sell his business. PC asked for and was given a subsequent PRRA application but was advised that there is no STAY for subsequent PRRA. PC advised the officer that he had an H&C outstanding since MAY2006 – officer checked and noted on file that there is no outstanding H&C in the system.
> 05FEB2007 H&C application received by CPC Vegreville
> 02MAY2007 Consulate of Ecuador wants passport back. Passport released to PC in order to comply with Consulate's request – PC indicated that he wanted to buy his own ticket
> 21JUN2007 H&C remarks indicate that Rachel Rotenberg was advised that CPC Vegreville was currently processing H&C applications received up to 13MAY2006
> 03JUL2007 PC served with a direction to report to LBPIA T. 1 for removal on 17JUL2007 at 15:30 on AC962 via Bogota to Guyaquil, Ecuador for escorted removal
> 05JUL2007 Deferral request received via courier at GTEC at 15:30
> [Emphasis mine.]

[10] On July 4, 2007, Mr. Ferraro's legal advisers requested the deferral of his removal pending the determination of his H&C application they said had been filed "back in 2006, … processing began in February 2007".

[11] The grounds invoked in the submission urging the Officer to favourably exercise her discretion to defer removal were as follows:

- Mr. Ferraro has a strong pending application for permanent residence based on his establishment, his rehabilitation, his marriage, his children and his extended family in Canada. Canada has been his home since 1972;

- He is solely financially responsible for his step child and his common law wife. “If he is deported they would suffer irreparably i.e. lose their father, lose their home, lose their life, etc.”;

- He is funding his eldest daughter’s post secondary education. “If he is deported, she will suffer irreparable harm in that she will not be able to continue her post secondary education, which will significantly impact her future”;

- He provides financial support to his children [*sic*] from another relationship without which the children [*sic*] would suffer irreparably;

- He is a successful business owner “that employs a number of Canadians who will suffer irreparable harm if he is deported”.

[12] His submission mentioned his family would be responsible for contractual commitments related to his business and could lose all the business assets. The record shows he is in the limousine and exotic car rental business and has between 15 to 20 full and part time employees.

The Officer's decision

[13] I summarize her reasons for not deferring Mr. Ferraro's removal. Her reasons are contained in her notes to file.

[14] First, she took issue with when the applicant's H&C application was filed. The FOSS system maintained by the Government of Canada in immigration matters indicated the H&C application was received in Vegreville, Alberta only in February 2007. She stated she had asked the applicant for a postal tracking number to confirm the H&C application was submitted in 2006. She states she never received that confirmation. She further notes the processing of his H&C application has not yet begun in Vegreville and it would take an additional 10 to 11 months to make a decision. On this basis, she concluded a consideration of his H&C application was not close at hand and deferral, for this reason, was not warranted.

[15] Second, she did not accept his ownership of his automotive rental business was a justification for non-removal. She noted he was told back in January 2007 at his pre-removal interview he would be deported as soon as his travel documents would be available and that he should begin to make arrangements to divest his business. She wrote in her notes she had no evidence he had taken any such steps and, to the contrary, he continued to lease vehicles for his business as late as June 2007.

[16] Third, she acknowledged Mr. Ferraro supported his common law wife who was at home raising her 9 year old son. She recognized he paid for child support for his daughter Victoria who lives with her mother. She noted Mr. Ferraro's father received a pension and helped out at his

business. She said there was no proof he was helping out his daughter Vanessa at university. She noted Vanessa was an adult and if she was in school she could get a student loan to complete her education.

[17] Fourth, the Officer did not accept these factors affecting the family and his children were sufficient to warrant deferral appreciating removal impacted the family emotionally and economically but that there was, additionally, no evidence to the effect support would not continue after his removal expressing her belief Mr. Ferraro, having been a successful business man, "will be able to enter the local market in time". She also said there was "no indication that the sale of his business would not be able to provide financial resources would sustain Mr. Ferraro and his family during the transition."

[18] Fundamentally, she accepted removal would cause hardship in the Ferraro family but this was a difficult but natural consequence of deportation. In this respect, she concluded the hardship which will be experienced by the Ferraro family was not unique to it since all deportations of a family member share such experiences.

The applicant's case

[19] I summarize below the principal arguments raised by the applicant.

[20] First, he argues the tribunal failed to apply to the unique particular circumstances of his situation, the compelling personal circumstances factor set out in *Ramada*, above, and, in particular, failed to properly account for:

- His lengthy establishment in Canada of 37 years;

- It was the first time a tribunal had had the opportunity to consider humanitarian and compassionate considerations to his circumstances since he had no opportunity to do so before the IAD whose power to issue a stay on appeal was taken away under the new *Act* in the case of a person inadmissible on grounds of serious criminality;

- The tribunal failed to consider the impact of his status on account of his inadmissibility for serious criminality. He argues the tribunal failed to consider the temporary resident permit requirement under section 24 of the *IRPA* combined with his ineligibility to apply for a pardon until 2009 and the time it would take to have his pardon application considered under paragraph 36(3)(b) of *IRPA*;

- The tribunal failed to appreciate or ignored the centrality of his role in financially supporting his family and, in particular, his common law wife who without his support would be forced to return to the workplace, his financial support to his daughter's post secondary education who without it would be compelled to obtain a student loan, his financial support to his father's medical needs and his financial support to his youngest daughter Victoria.

[21] Second, counsel for the applicant argues the tribunal failed to appreciate his integration in Ecuador would not be as easy as the officer determined; he does not speak Spanish and has no longer any roots in that country having been away from it for 39 or so years.

[22] Third, he argues the tribunal ignored all of the letters in the record from his dependants who attest to the need for his financial support as well as other letters, particularly from his outside commercial counsel, attesting to the impact of his forcing to sell the business.

[23] Fourth, he raised a preliminary issue of law on the inadmissibility of parts of the affidavits of Jason Atkinson and Jillian Schneider. I need not deal with this objection as counsel for the parties agreed that those affidavits should be struck from the record provided that new affidavits could be sworn and re-filed with the Court without agreed to deleted paragraphs. Such affidavits were filed with the Court.

Standard of review

[24] The parties had filed their submissions on the appropriate standard of review of an enforcement officer's decision not to defer the execution of a removal order before the Supreme Court of Canada released, on March 7, 2008, its decision in *Dunsmuir* which reformed the law on the standard of review analysis for provincially appointed administrative decision makers. In that decision, the Supreme Court eliminated the patently unreasonable standard of review with the result that only the correctness and the reasonableness standard remain. Counsel for the applicant argued for the reasonableness standard while counsel for the respondent argued for the patently unreasonableness standard.

[25] Counsel for the applicant relied upon Justice Campbell's decision in *Cortes v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 78 arguing in favour of the reasonableness standard when reviewing, on the merits, such a decision. He had certified a question to the Federal Court of Appeal who held the matter was moot and that it would not exercise its discretion to hear the case (see, *The Minister of Citizenship and Immigration v. Cortes*, 2008 FCA 8).

[26] Counsel for the applicant also mentioned Justice Kelen's recent pre-*Dunsmui*r decision released on February 21, 2008 in *Level v. The Minister of Public Safety and Emergency Preparedness*, 2008 FC 227 where he identified the divergence in this Court on the standard of review of the merits of an enforcement officer's refusal to defer as between patent unreasonableness and reasonableness *simpliciter*. Justice Kelen mentioned his decision in *Ragupathy v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1370 where he stated the standard of patent unreasonableness was often only applied where the question before the enforcement officer turns on fact alone. He did not have to decide, in the case before him, which standard of review applied because the only issue in that case was one of procedural fairness which he ruled was subject to the correctness standard.

[27] My colleague Justice Dawson in *Uthayakumar v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 998 acknowledged at paragraph 5 of her reasons: "While there is some divergence in the jurisprudence with respect to the applicable standard of review, the preponderance of authority appears to be to the effect that the appropriate standard of review of an officer's refusal to defer removal is patent unreasonableness" referring to Justice Mosley's analysis

in *Zenunaj v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1715. Justice Dawson indicated in her case, counsel for the parties agreed that patent unreasonableness was the appropriate standard of review: "at least where the question is essentially one of fact" and that she was prepared to apply that standard of review to the decision before her.

[28] I agree with Justice Dawson's approach where the issue before the Court is essentially a question of fact engaging section 18.1(4)(d) of the *Federal Courts Act* empowers this Court to grant relief where it is satisfied a federal tribunal based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it which the Federal Court of Appeal in *C.U.P.W. v. Healy*, 2003 FCA 380 analogized to the patent unreasonableness standard.

[29] A review of the jurisprudence of this Court shows that the patent unreasonableness standard on the issue of a refusal to defer removal was first crafted by Justice Martineau in *Adviento v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1430 basically because, as he said at paragraph 29, the determination made by a removals officer is essentially factual.

Principles

[30] Before setting out my conclusions in this matter, it is useful to identify in summary form, a number of well settled principles established by the Federal Court and by the Federal Court of Appeal governing decisions of removals officers refusing to defer an applicant's removal from Canada pending the determination of his/her outstanding H&C application which is now

specifically provided for in section 25 of *IRPA* keeping in mind that same statute provides in section 48 as follows:

Enforceable removal order	Mesure de renvoi
48. (1) A removal order is enforceable if it has come into force and is not stayed.	48. (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
Effect	Conséquence
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

[31] This statutory provision was found, in similar terms, in section 48 of the *Immigration Act* repealed by *IRPA* in June 2002.

[32] Based on a review of the jurisprudence, it is settled law that:

- An enforcement officer has a limited discretion to defer the execution of an enforceable removal order;

- The scope of that discretion being limited it may only be properly exercised in appropriate circumstances in relation to the timing of the execution of that removal order;

- Justice Nadon, then a member of this Court, in *Simoes v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 936 recognized several years ago some of the factors which might justify the deferral of the timing of a person's removal from Canada such as "illness, other impediments to travelling, and pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system … to enable a young child's completion of a school year";

- With respect to a pending H&C application, Justice Nadon recognized the mere existence of such an application is not per se a bar to the execution of a valid removal order;

- My colleague Justice O'Reilly, in *Ramada*, above, expressed an enforcement officer's discretion as his/her ability to consider "whether there are good reasons to delay removal". He identified "valid reasons may be related to the person's ability to travel (e.g. illness or lack of proper travel documents), the need to accommodate other commitments (e.g. school or family obligations), or compelling personal circumstances (e.g. humanitarian and compassionate considerations) … It is clear, however, that the mere fact that a person has an outstanding application for humanitarian and compassionate relief is not sufficient ground to defer. On the other hand, an officer must consider whether exigent personal circumstances, particularly involving children may justify delay";

- In the case before him, Justice O'Reilly indicated Mrs. Ramada had asked the officer to defer because immediate removal would not be in the interests of her youngest child, who suffers from febrile seizures; she (Mrs. Ramada) has Type 2 diabetes and her removal might interfere with the proper monitoring of her blood sugar levels. In the end, Justice O'Reilly allowed the judicial review application because the officer had not considered the young three year old child's circumstances and, in particular, his right to remain in Canada and take advantage of her health benefits while she had no similar expectation or entitlement in Portugal;

- There is no obligation on an enforcement officer to engage in an extensive analysis of the personal circumstances of persons subject to a removal order. Justice O'Reilly in *Ramada*, above, expressed himself at paragraph 7 writing:

> "I have some reluctance in granting this application for judicial review, out of concern for imposing on enforcement officers an obligation to engage in an extensive analysis of the personal circumstances of persons subject to removal orders. Obviously, officers are not in a position to evaluate all of the evidence that might be relevant in an application for humanitarian and compassionate relief. Their role is important, but limited. In my view, it is only where they have overlooked an important factor, or seriously misapprehended the circumstances of a person to be removed, that their discretion should be second-guessed on judicial review." [Emphasis mine.]

[33] Recent jurisprudence related to the refusal of deferral of the execution of a removal order has focussed on such issues as the scope of the duty (how deep or thorough such inquiry must be) in particularly in relation to the best interest of children and what is the gauge of the adequacy or

sufficiency of reasons given by an enforcement officer for not deferring. I summarize this jurisprudence:

- On an application to defer removal, the enforcement officer is not deciding the substance of an outstanding H&C application which, in the case of the best interest of children, would include their long term financial, emotional and other effects. On a deferral application, the enforcement officer need only consider the short-term interest of those affected including, upon the removal of a parent, whether the children will be adequately looked after. Put in the words of my colleague Justice Barnes in *Griffiths v. Canada (Solicitor General)*, 2006 FC 127, a case which is very similar to the case at hand: "A deferral is obviously a temporary measure necessary to obviate a serious, practical impediment to immediate removal. It is not the equivalent of a stay of the order for removal and it is not a means by which a person facing deportation can obtain an indefinite reprieve." He also added, in considering the short term best interest of children which he stated in *Munar v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 761 to include arrangements in place upon the removal of one parent (see also *Uthayakumar*, above) and Justice Evans' decision in *Varga v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 where he held, on behalf of the Federal Court of Appeal, in exercising his/her statutory duty, a removals officer: "has a limited but undefined discretion under section 48 with respect to the travel arrangements for removal, including its timing. Within the narrow scope of removals officers' duties, their obligation, if any, to consider the best 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 section 25 of *IRPA*."

[34] I cite Justice Von Finckenstein's decision in *Adomako v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1100 where at paragraph 18 he wrote:

> "Removal officers have limited discretion and accordingly, the reasons for decision are often sparse and not as well written as one might wish. They have to be read in their totality; rather than focusing on a single sentence and reading it too literally. In this case, after looking at the entire decision, it becomes clear that the removal officer was aware of the total situation and took all of the relevant factors into account." [Emphasis mine.]

[35] I also refer to Justice Mosley's decision in *Boniowski v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1161 where he concluded given the purpose of section 48(2) of *IRPA* in the statutory scheme: " … any reasons requirement was fulfilled in the decision letter of September 12, 2003 where the officer indicated that she had received and reviewed the applicants' submissions, and her decision was not to defer removal." He was of the view the nature of the decision was one where the officer has a very limited discretion, and no actual, formal decision is mandated under the legislation or regulations to defer removal. He was of the view: "Instead, the jurisprudence instructs that an officer must acknowledge that she has some discretion to defer removal, if it would not be "reasonably practicable" to enforce a removal order at a particular point in time." He was not satisfied that a higher level of formal, written reasons is required "for this sort of administrative decision".

[36] On the argument put to him the officer's reasons for decision failed to indicate if she had turned her mind to the best interest and concern of their child and how those interests were balanced

and taken into account in reaching the final decision not to defer removal, Justice Mosley rejected this argument on the basis the removals officer was not required to undertake a lengthy and involved review of the factors involved in the H&C determination, given that this was not the officer's role and must only do so to the minimal extent required in exercising his or her discretion on the timing of the removal.

Analysis and Conclusions

(a) The impact of *Dunsmuir*

[37] The question may be asked what is the impact of *Dunsmuir* on this jurisprudence? *Dunsmuir* did not just collapse two standards of unreasonableness into one. The Supreme Court offered guidance on what is a reasonable decision. It dealt with a tribunal which is under provincial law. It should have no impact on the interpretation of section 18.1 of the *Federal Courts Act* which allows the Federal Court to grant relief if a federal tribunal erred in law or based its decision on an erroneous finding of fact.

[38] In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, the Court said this about the *Federal Courts Act*:

> **37** Applications for judicial review of administrative decisions rendered pursuant to the *Immigration Act* are subject to s. 18.1 of the *Federal Court Act*. Paragraphs (c) and (d) of s. 18.1(4), in particular, allow the Court to grant relief if the federal commission erred in law or based its decision on an erroneous finding of fact. Under these provisions, questions of law are reviewable on a standard of correctness.
>
> **38** On questions of fact, the reviewing court can intervene only if it considers that the IAD "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it" (Federal Court Act, s. 18.1(4)(d)). The IAD is entitled to base its decision on evidence adduced in the proceedings which it considers credible and trustworthy in the

> circumstances: s. 69.4(3) of the *Immigration Act*. Its findings are entitled to great deference by the reviewing court. Indeed, the FCA itself has held that the standard of review as regards issues of credibility and relevance of evidence is patent unreasonableness: *Aguebor v. Minister of Employment & Immigration* (1993), 160 N.R. 315, at para. 4. [Underlining mine.]

[39] In *Dunsmuir*, the Supreme Court of Canada explained, at paragraph 47, reasonableness is a deferential standard which is concerned with "certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions." The Court went on to say that in judicial review, reasonableness "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process … it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are reasonable in respect of the facts and law." At paragraph 53, the Court, under the rubric "Determining the Appropriate Standard of Review" wrote "where the question is one of fact, discretion or policy, deference will usually apply automatically … We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated."

[40] While, *Dunsmuir* collapsed the patently unreasonable standard into the reasonableness standard and as indicated the impact of section 18.1 of the *Federal Courts Act* is yet to be known I find in the circumstances of this case, I am to apply the reasonableness standard because the questions before the Court are not essentially questions of fact but of mixed fact and law. The Officer's decision had to fall within a reasonable range of acceptable outcomes in terms of the facts and the law. In other words, the Officer in reaching a decision had to be sensitive to the submissions

made on behalf of the applicant, assess the factual issues with the statutory and jurisprudential framework to arrive at his decision. She was in my view.

b) Conclusions

[41] I conclude this judicial review application must be dismissed. Within the framework of the law and the facts the officer's decision was reasonable.

[42] The jurisprudential framework is clear the Officer has by law limited discretion to defer a lawful removal. Her decision had to be concerned with the timing of the removal. The applicant only raised one issue related to the timing of his removal: the outstanding H&C. He could not establish, although he was given an opportunity to do so, his outstanding H&C application was "backlogged". No substantive error was shown to impugn the Officer's decision. In terms of Justice O'Reilly's decision in *Ramada*, the applicant could not establish the Officer ignored an important fact or seriously misapprehended the circumstances of his removal.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is dismissed. No certified question was proposed.

"François Lemieux"

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Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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