Date: 20080630

Docket: IMM-5636-06

Citation: 2008 FC 820

Vancouver, British Columbia, June 30, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

JUNIOR CHRISTOPHER WEEKES
By his litigation guardian John Norquay

Applicant

and

THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Junior Christopher Weekes, represented by his litigation guardian Mr. John Norquay, seeks judicial review of the decision of Martin Kosichek, Enforcement Officer (the "Officer"), not to defer his removal from Canada. The decision was made on October 18, 2006, relative to the removal of the Applicant that was scheduled for October 26, 2006. By Order made on October 23, 2006, the removal order was stayed, pending disposition of the application for leave and if leave were granted, until the final disposition of the matter.

[2] The Applicant is a citizen of Guyana. Pursuant to the sponsorship of his father, he became a permanent resident of Canada in 1995. A deportation order was issued against the Applicant on October 23, 1998. He was detained and later released on a bond. However, the Applicant breached the reporting requirements and was detained again on October 5, 2000. He was released from that detention in February 2001.

[3] On April 7, 2006, the Applicant was notified of his right to submit a Pre-Removal Risk Assessment ("PRRA"). He did not do so.

[4] The Applicant was advised on September 8, 2006, that his removal was scheduled for October 26, 2006. On October 12, 2006, he attended his pre-removal interview. On October 16, 2006, Counsel for the Applicant requested deferral of his removal. The basis for that request was to allow the Applicant to remain in Canada pending disposition by the Immigration Appeal Division (the "IAD") of a motion to extend the time for appealing the deportation order against him. That motion had been submitted to the IAD under cover of a letter dated October 16, 2006.

[5] The motion before the IAD was supported by the affidavit of Mr. Norquay, a barrister and solicitor called to the bar of Ontario. By letter dated October 16, 2006, Counsel for the Applicant requested the IAD to appoint Mr. Norquay as the designated representative for the Applicant, pursuant to subsection 19(2) of the *Immigration Appeal Division Rules* (SOR/2002-230) (the "IAD Rules").

[6] In his affidavit, Mr. Norquay reviewed the relevant facts pertaining to the Applicant's history of criminal charges, as well as relevant facts respective to his family relationships. The Applicant has no remaining family members in Guyana and had not been in contact with his father for several years.

[7] Mr. Norquay also referred to the Applicant's history of mental health problems, including an assessment by a Dr. Cooper, a psychiatrist, who had diagnosed the Applicant as schizophrenic, in the 1990's. A copy of the report prepared by Dr. Cooper was attached as an exhibit to Mr. Norquay's affidavit. Mr. Norquay further deposed that he had met the Applicant on October 11, 2006, and at that time, he formed the impression that the Applicant did not understand or appreciate the nature of the proceedings against him undertaken under the relevant immigration legislation.

[8] Mr. Norquay described the Applicant's criminal record as being "relatively minor". At paragraph 14 of his affidavit, he said the following:

> From my review of his file, it appears that Mr. Weekes has a relatively minor criminal record. On June 16, 1998, he received a conditional discharge for failing to attend court and obstructing a police officer. He spent 60 days in pre-sentence custody. On October 2, 1998, he was convicted of failing to comply with probation for which he received time served of 13 days, uttering a forged document and possession of property obtained by crime over $5000, for which he received a 60 day concurrent sentence. Mr. Weekes was also convicted of break and enter and theft on October 26, 1998, and received a one month sentence. Further charges in 2000 and 2001 were withdrawn by the Crown.

[9] The Applicant did not appeal the deportation order that was issued on October 23, 1998, within the time limited for filing an appeal. However, on November 3, 1999, an application was made by Mr. Chet Sharma, an immigration lawyer acting on behalf of the Applicant, for an extension of time to appeal the deportation order. That application was sent by facsimile to the IAD on November 3, 1999. A copy of the application was attached to Mr. Norquay's affidavit; that exhibit included a copy of the facsimile transmission sheet that indicated that the message had been successfully sent to the IAD. It appears from the Tribunal Record that Mr. Sharma never received a response from the IAD. Further, it appears that no decision was made by the IAD with respect to the November 1999 application for an extension of time to appeal the deportation order.

[10] On April 3, 2007, the IAD denied the Applicant's motion for an extension of time to file a Notice of Appeal from the deportation order. An application for leave and judicial review was filed in respect of that decision. In a decision dated March 4, 2008 and cited as 2008 FC 293, Justice O'Keefe allowed the application for judicial review and quashed the decision of the IAD that denied the Applicant's request for an extension of time within which to file his Notice of Appeal.

[11] In deciding not to defer removal of the Applicant, the Officer referenced a number of factors. He noted that there was no statutory bar to removal, the number of attempts to remove the Applicant since 1998, the difficulties associated with removals to Guyana, including the high detention costs for Guyanese Nationals awaiting verification by the Guyanese government.

[12] The Officer also recorded that no designated representative had been appointed for the Applicant by the Immigration and Refugee Board, pursuant to subsection 167(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), although he had appeared before that body on several occasions. The Officer interpreted the absence of a designated representative as meaning that the Applicant was not suffering from a mental illness or was unable to appreciate the nature of proceedings undertaken under the Act.

[13] The Officer also purported to make his own assessment of the Applicant's mental health on the basis of a conversation with the Applicant when he was informed about his pending removal. The Officer mentioned, as well, a report prepared by a Dr. Jerry Cooper on December 13, 1999, in which the Applicant was described in terms of being "of low to average intelligence" without suicidal or homicidal ideation. The Officer said that he considered that the Applicant was described as "having schizophrenia".

[14] The Officer also commented on the timing of the request for the deferral of removal, noting that his current counsel was aware of the pending removal of the Applicant as early as September 8, 2006.

[15] In his request for deferral, Counsel for the Applicant had pointed out that an appeal of the deportation order was filed by former counsel on November 3, 1999, but no response was provided by the Board in that regard. The Officer recorded the following in his notes to file:

> … In my opinion, I believe it is reasonable that if the application was filed properly that the IRB would have responded in good time.

> Secondly, I believe it reasonable to expect counsel to follow-up with the IRB if no response is received in good time. I believe that it is not reasonable to request deferral, based on a matter that due to a lack of diligence was not dealt with seven years ago.

[16] Finally, the Officer said that since the Applicant has no means to support himself financially, has been in receipt of social assistance and had no fixed addressed but was residing at the Salvation Army, has previously breached the condition of his release and had been charged with possession of cocaine, which charge was subsequently withdrawn, he, the Applicant, would likely return to "street life" if released from detention.

[17] In his written representations, the Applicant argued that the Officer made a patently unreasonable finding respecting his mental health, in light of the evidence before him. He submitted that the Officer misinterpreted the timing of his deferral request, in particular the difficulty in obtaining information about his history, since his mental health problems prevented him from instructing counsel about his actual background and circumstances. Finally, the Applicant argued that the Officer erred by basing his decision, not to defer removal, on irrelevant considerations.

[18] For his part, the Minister of Citizenship and Immigration (the "Respondent") focused his written submissions on two issues: first, he argued that the application for judicial review is moot since the factual circumstances relating to the decision under review have changed. In this regard, the Respondent notes that the basis for the Applicant's request for removal was the disposition by the IAD of his request for an extension of time to appeal from the deportation order against him.

[19] The Respondent says that the negative decision by the IAD in this regard made on April 3, 2007, renders the within application moot, on the basis of the decision in *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342.

[20] Second, the Respondent submits that the Officer, having a limited discretion to defer removal, committed no reviewable error in making his decision.

[21] At the hearing of this application for judicial review, Counsel for the Applicant conceded that the application for judicial review is moot, since the basis for the request to the Officer for a deferral was a postponement of his removal until the IAD made a decision upon his request for an extension of time to appeal from the deportation order that was made in 1998.

[22] The IAD made its decision in April 2007 and consequently, the facts and circumstances in which the original decision was made no longer exist. Nonetheless, the Applicant asked the Court to exercise its discretion to hear the matter on its merits on the grounds that removals officers may benefit from guidance in the manner of exercising their limited discretion to defer removal pursuant to the Act.

[23] As noted by Justice Gibson in *Higgins v. Canada, (Minister of Public Safety and Emergency Preparedness*, [2007] F.C.J. No. 516, the seminal decision on the issue of mootness is *Borowski*. At page 353, Justice Sopinka, writing for the Court, said the following:

> The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. …
>
> The approach with respect to mootness involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case. (In the interest of clarity, a case is moot if it does not present a concrete controversy even though a court may elect to address the moot issue.)

[24] At pages 358 through 362, Justice Sopinka addressed the principles that govern the exercise of discretion to hear a matter, notwithstanding its mootness. Justice Sopinka said the following:

> Since the discretion which is exercised relates to the enforcement of a policy or practice of the Court, it is not surprising that a neat set of criteria does not emerge from an examination of the cases …
> It is, however, a discretion to be judicially exercised with due regard for established principles.
>
> …
>
> The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system…
>
> …
>
> The second broad rationale on which the mootness doctrine is based is the concern for judicial economy…
>
> …
> The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the

> parties may be viewed as intruding into the role of the legislative branch …

[25] The first element to be addressed in deciding whether a proceeding is moot is the determination whether a "live controversy" exists between the parties. The second step is a decision by the Court whether or not to exercise its discretion to determine a matter, notwithstanding the mootness of the issue.

[26] In the present case, I am satisfied that this proceeding is moot, but not for the reasons advanced by each party.

[27] The subject of this proceeding is the refusal of the Officer to defer the removal of the Applicant. That removal was scheduled for October 26, 2006 but was stayed by an Order dated October 23, 2006. The specific subject of the controversy between the parties is no longer alive. The basis for the deferral request, that is to allow the Applicant to remain in Canada pending a decision of the IAD upon his application for an extension of time to appeal, was not the subject of the application for judicial review. The reason for the deferral request does not give rise to a "live controversy" or otherwise between the parties.

[28] In my opinion, the point of departure in identifying the "controversy" between the parties is the originating document in a proceeding, in this case, the Notice of Application for judicial review. That document clearly describes the subject of the "live controversy" between the parties proceeding as follows:

> The applicant seeks leave of the Court to commence an application for judicial review of:
>
> > The decision of Enforcement Officer, M. Kosichek, of the Canada Border Services Agency, dated October 18, 2006, wherein he decided not to defer the removal of the Applicant.

[29] In *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 341, [2008] F.C.J. No. 434, Justice Dawson decided that an application for judicial review of the refusal of a removals officer to grant a stay of removal was moot due to the absence of a live controversy between the parties, once the stay order was granted. Justice Mactavish reached the same conclusion in the case of *Palka v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 342, [2008] F.C.J. No. 435.

[30] In each case, Justice Dawson and Justice Mactavish proceeded to consider whether discretion should be exercised for the purpose of disposing of the respective applications for judicial review dealt with upon the merits, regardless of the mootness of the issues raised. In each case, they declined to exercise their discretion.

[31] Both the Applicant and the Respondent addressed the decisions in *Baron* and *Palka* in a continuation of the hearing of the judicial review application held on June 17. The Applicant repeated his request that the Court exercise its discretion to entertain the merits of his application principally on the grounds that there is little guidance available to removals officers relating to the exercise of the limited discretion conferred by subsection 43(2) of the Act. He referred, as well, to

the comments made by Justice Dawson in *Baron* concerning the lack of written guidelines in that respect.

[32] The Respondent took the position that there was nothing about the present case to distinguish it from the situations prevailing in *Baron* and *Palka* when Justices Dawson and Mactavish, respectively, declined to exercise their discretion to adjudicate the cases before them on their merits. Further, the Respondent submitted that a decision of this Court in the present case would be of limited utility. The Respondent also made the observation that the fact that this application concerns a vulnerable person will remain unchanged, regardless of any decision by this Court to exercise its discretion to hear the matter.

[33] As discussed by Justice Sopinka in the *Borowski* decision, the Court's discretion to hear a moot proceeding is not open-ended. The exercise of that discretion is to be informed by three principles.

[34] The first principle is the existence of an adversarial context. The second is a "concern for judicial economy" that must be balanced against circumstances where a case raises "… an issue of public importance of which a resolution is in the public interest."

[35] Finally, in choosing to exercise its discretion, the Court must "… demonstrate a measure of awareness of its proper law making function. The Court must be sensitive to its role as the adjudicative branch in the political framework."

[36] In this case, the Applicant remains the subject of a deportation Order. He remains vulnerable to removal from Canada. In a broad sense, he remains in an adversarial relationship with the Respondent who controls the entry and continuing presence of immigrants in Canada. In that regard, I refer to the decision in *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711.

[37] With respect to the second principle, that is concern for judicial economy, I agree with the recent argument made by the Applicant, that the Court has already "expended" its resources, having heard this application on the merits. The factor of judicial economy is now neutral.

[38] Finally, there is the question of public interest. The Applicant submits that it is in the public interest that the Court provide guidance to removals officers when deferral requests are made. He notes that Justice Dawson in *Baron* commented on the lack of written guidelines in that regard.

[39] There is another element that, in my opinion, weighs in favour of the exercise of discretion to dispose of this application on the merits, that is, the relative lack of expertise that can be expected of a removals officer. In the hierarchy of those who make decisions under the Act, including the Refugee Protection Division and the Immigration Appeal Division, removals officers are not required to demonstrate any particular expertise yet their decision can have far-reaching consequences for an applicant.

[40] The Act provides for access to judicial review, upon the granting of leave; see subsection 72(1). The powers of the Court upon an application for judicial review are set out in sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c.F-7. In my opinion, it would be anomalous, as well as unfair, to shield a decision of a removals officer from review if it is erroneous and a full adjudication may provide future guidance.

[41] For these reasons and having regard to the principles discussed in *Borowski*, I chose to exercise my discretion to review the subject matter of this application, that is, the negative decision of the Officer.

[42] Section 48 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), describes the duty imposed upon removals officers relative to the removal of persons from Canada:

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.

[43] Typically, a discretionary decision involves an assessment of the facts within the relevant legal context. It is the hallmark of a discretionary decision that the decision-maker, in this case, the removals officer, can either make within a positive or negative decision, as informed by the applicable legislation. Subsection 48(2), by itself, provides no guidance.

[44] A developed body of jurisprudence makes it clear that a removals officer has but a limited discretion to defer execution of a removal order. I refer to the decisions in *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 F.C. 682; *Bastien v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 711, 306 F.T.R. 33; *Hailu v. Canada (Solicitor General)* (2005), 2005 FC 229, 27 Admin. L.R. (4th) 222; *J.B. v. Canada (Solicitor General)*, 2004 FC 1720, [2004] F.C.J. No. 2094 and *Boniowski v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1161, 44 Imm. L.R. (3d) 31 (F.C.).

[45] In the course of supplementary submissions, Counsel for the Respondent submitted that the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 did not so radically change the "landscape or administrative law "as to oust the continuing application of the decision in *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2. At pages 7 and 8 of that decision, Mr. Justice McIntyre said the following:

> In construing statutes such as those under consideration in this appeal, which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. In my view, in dealing with legislation of this nature, the courts should, wherever possible, avoid a narrow,

> technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved. It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.
> …

[46] In my opinion, the Officer erred in refusing the Applicant's request for a deferral of his removal because he ignored relevant evidence, specifically the evidence that appears on the record about the Applicant's mental health. In this regard, I refer to the transcripts of proceedings before the Immigration Refugee Board Adjudication Division on July 12, 1999. That transcript clearly shows that the president member was concerned about the Applicant's mental health and his ability to understand the nature of the proceeding in which he was involved.

[47] The Officer also ignored the medical report dated October 13, 1999, from Dr. Jerry Cooper, a psychiatrist at the Humber River Regional Hospital. In this report, Dr. Cooper expressed the opinion that the Applicant may be subject to a "schizophrenic process." He expressed the opinion that the Applicant would not be able to understand the need to appeal the deportation order.

[48] This medical report, written soon after the detention review that was held on July 12, 1999, where the presiding member expressed similar concerns about the Applicant's ability to understand what was happening, was relevant evidence. In my view, the Officer's notes do not show that he took it into account. On the contrary, these notes suggest that he ignored this relevant evidence.

[49] According to his notes to file, the Officer took into account the “facts” of the Applicant’s impecuniosity, lack of a permanent address and prior breaks of condition of his release when refusing the request to defer removal. In my opinion, these factors are irrelevant and extraneous to the issue of whether the removal of the Applicant should be deferred.

[50] At the time the Applicant sought to defer his removal, the principal ground for that request was an outstanding request to the IAD to extend the time to appeal for the deportation order that had been issued in 1998. The filing of the notice of appeal raised issues of procedural fairness. The Officer’s notes recorded his personal view that the failure to file the notice of appeal in 1998 was due to a lack of diligence on the part of the Applicant. This view is contradicted by the evidence that was before the Officer: see the Tribunal Record at page 57. In my opinion, the Officer either ignored or misunderstood relevant evidence.

[51] These examples demonstrate that the Officer’s decision, refusing to defer removal of the Applicant, fails the test set out in *Maple Lodge Farms* where the Supreme Court of Canada said that a discretionary decision of an administrative decision-maker was entitled to deference unless it was based upon consideration of irrelevant and extraneous matters and ignored relevant evidence.

[52] As a result, this application for judicial review is allowed and the decision of the Officer is quashed.

[53] At the initial hearing of this application, Counsel sought certification of the same question that had been certified by Justice Gibson in *Higgins*. On June 17, upon a reconvening of the hearing, neither Counsel requested certification of a question. Nonetheless, in my opinion and having regard to subsection 74(d) of the Act, I am satisfied that a question should be certified and state the question, as certified in *Higgins*, as follows:

> Where an applicant has filed an application for leave and judicial review of a decision not to defer the implementation of a Removal Order outstanding against him or her, does the fact that the applicant's removal is subsequently halted by operation of a stay Order issued by this Court render the underlying judicial review application moot?

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is allowed and the decision of the Officer is quashed. The following question is certified:

> Where an applicant has filed an application for leave and judicial review of a decision not to defer the implementation of a Removal Order outstanding against him or her, does the fact that the applicant's removal is subsequently halted by operation of a stay Order issued by this Court render the underlying judicial review application moot?

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5636-06
STYLE OF CAUSE:	**JUNIOR CHRISTOPHER WEEKES** **By his litigation guardian John Norquay** **v.** **THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 8, 2007 and June 17, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	HENEGHAN J.
DATED:	June 30, 2008

APPEARANCES:

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