Date: 20080917

Docket: IMM-475-07

Citation: 2008 FC 1045

Vancouver, British Columbia, September 17, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

RAMNARESH KATWARU

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Mr. Ramnaresh Katwaru (the "Applicant") seeks judicial review of the decision of Lucia Isidro, Enforcement Officer with the Canada Border Services Agency (the "Enforcement Officer") made February 9, 2007. In her decision, the Enforcement Officer refused to defer the removal of the Applicant to Guyana.

Background

[2] The Applicant was born in Guyana on September 10, 1974. He came to Canada with his family as a permanent resident in 1992.

[3] In 1994, he returned to Guyana where he married on December 25, 1994. The marriage had been arranged by his parents and the parents of his bride. The Applicant returned to Canada on January 5, 1995, together with his wife.

[4] A male child was born to the Applicant and his wife in August 1995. According to a statement of the Applicant submitted as part of the H & C application that he submitted in January 2005, the child was born prematurely and was hospitalized for four months following his birth.

[5] The child died in February 1996; as a result, the Applicant was convicted in 1998 of manslaughter. The Applicant was also convicted of uttering threats and assault upon his first wife.

[6] The Applicant appealed the convictions. The conviction for manslaughter was set aside and following a new trial, he was again found guilty of manslaughter in 2002. The convictions for assault and uttering threats were also set aside and after a new trial, the Applicant was again convicted of assault. He was sentenced to a term of four years and seven months imprisonment upon the manslaughter conviction, with a term of three months concurrent for the assault conviction.

[7] A deportation order was issued against the Applicant on April 3, 2003. In 2005, he received a negative decision upon his Pre-Removal Risk Assessment ("PRRA") application. An application for leave for judicial review of that negative PRRA was denied on May 5, 2006.

[8] The Applicant's removal was originally scheduled for February 7, 2007, and he requested a deferral of removal pending a decision on his application pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 ("IRPA"), that is, an "humanitarian and compassionate ("H & C") application, which he had filed in January 2005.

[9] The Applicant also filed a motion for a stay of removal in the event that his request for a deferral was refused. On February 6, 2007, Justice Gibson granted an interim stay of removal pending a decision on the Applicant's request to defer removal. That decision was made on February 9, 2007. On February 15, 2007, Justice Gibson granted a stay of removal pending disposition of this application for leave and judicial review. The removal had been scheduled for February 19, 2007. In his Order, Justice Gibson noted that another risk assessment has been initiated by the Respondent and remains outstanding.

[10] By Order made on October 26, 2007, leave was granted to bring this application for judicial review. The matter initially came for hearing on January 22, 2008 and was adjourned until March 3, 2008 to allow the parties the opportunity to address the issue of mootness in light of the decision in *Higgins v. Canada (Minister of Public Safety and Emergency Preparedness)* (2007), 64 Imm. L.R. (3d) 98.

[11] By a Direction issued on June 18, 2008, the parties were given the opportunity to address the decisions in *Palka v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 342 and *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)* (2008), 69 Imm. L.R. (3d) 293 since each of these decisions dealt with the issue of mootness relative to the refusal of an enforcement officer to defer execution of a removal order and were released on March 13, 2008, that is after the March 3 hearing. The further submissions on the issue of mootness were presented by counsel for the parties on June 24, 2008.

The Decision

[12] In her notes to file, the Enforcement Officer found that there were no impediments to the Applicant's removal. She noted that the Applicant had been convicted of manslaughter, assault and threatening bodily harm in 1999 and that he was convicted again of assault in 2003. She noted his submissions referred only to convictions for manslaughter and assault.

[13] The Enforcement Officer recorded that the Applicant had been granted a stay of removal in 2006 and that he was denied leave to commence an application for judicial review relative to the negative PRRA decision that had been made in 2006. She noted that the 2006 PRRA decision did not assess risk to the Applicant if he were returned to Guyana.

[14] The Enforcement Officer acknowledged the Applicant's outstanding H&C application and said that this was not a basis upon which to defer removal. She further observed this process of

application would likely be delayed due to the Applicant's criminal conviction and the requirement of rehabilitation or a pardon.

Submissions

i) The Applicant's Submissions

[15] The Applicant submits that the within application for judicial review is not moot, notwithstanding the fact that this removal from Canada was stayed by an Order of this Court. Referring to the decision in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, he argues that the dispute concerns the execution of the removal order prior to the determination of his H&C application. Since this issue is not resolved, there is a live issue between the parties.

[16] Alternatively, the Applicant submits that if the application is found to be moot, the Court should exercise its discretion to hear the matter on the merits. He argues that the Enforcement Officer committed several errors in rejecting his request for deferral, including misapprehension of the evidence, a failure to consider the unavailability of appeal rights, and the failure to consider his personal circumstances.

[17] Further, he submits that the Enforcement Officer engaged in speculation about a delay in the processing of his H&C application.

ii) The Respondent's Submissions

[18] The Respondent also argues that the within application for judicial review is not moot. He submits that a refusal to defer removal becomes moot in only two circumstances, as follows:

1. Where the basis for the deferral request has been resolved prior to the hearing of the judicial review application, relying upon the decisions in *Da Silva v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1154; *Kovacs v. Canada (Minister of Public Safety and Emergency Preparedness)* (2008), 68 Imm. L.R. (3d) 218; and *Surujdeo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 76;
2. Where no stay of removal has been granted and the applicant was removed prior to the hearing of the application for judicial review, relying on the decisions in *Da Silva*, above; *Tran v. Canada (Minister of Public Safety and Emergency Preparedness*) (2007), 58 Imm. L.R. (3d) 93.

[19] In any event, the Respondent takes the position that the Enforcement Officer committed no reviewable error in refusing to defer the Applicant's removal.

Discussion and Disposition

[20] In its recent decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the Supreme Court of Canada identified two standards of review, that is correctness and reasonableness. In *Mauricette v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 420,

Justice Shore concluded that the appropriate standard of review for a refusal to defer removal is that of reasonableness. That standard will apply in this case.

[21] The first issue to be addressed, however, is whether this application for judicial review is moot. The leading case on mootness is the decision of the Supreme Court of Canada in *Borowski* where Justice Sopinka said the following at paragraphs 15 and 16:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.

[22] The first question to be considered is whether a live controversy exists between the parties. In my opinion, the answer must be “no”. The subject of the application for judicial review is the negative decision of the Enforcement Officer to defer the removal of the Applicant that was scheduled for February 19, 2007. That date has passed. The removal did not take place because it was stayed as the result of the Order of Justice Gibson made on February 15, 2007.

[23] The next question is whether this Court should exercise its discretion to hear the matter, notwithstanding the finding that this judicial review application is moot. In *Borowski*, Justice Sopinka observed that the underlying rationale for the doctrine of mootness may guide a Court in deciding whether or not to exercise its discretion in any event. He said the following at paras. 31, 34 and 40:

> 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 concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.
> …
> 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.

[24] In *Baron*, Justice Dawson noted that the validity of the removal order is not affected following the disposition of an application for judicial review of a refusal to defer execution of the removal order; see para. 30. The same applies here. The Applicant remains subject to removal and, in my opinion, this satisfies the requirement that a live controversy exists between the parties.

[25] In *Borowski*, Justice Sopinka noted that when the special circumstances of a case make it worthwhile to apply a court's scarce judicial resources, the concern for judicial economy is answered. The Applicant argues that since he has no right to appeal to the Immigration Appeal

Division (the "IAD") under IRPA relative to the deportation order against him, his only recourse was to follow the H & C application process, as directed by the Federal Court of Appeal in *Powell v. Canada (Minister of Citizenship and Immigration)* (2005), 339 N.R. 189 (F.C.A.).

[26] I am satisfied that the outstanding H&C application, which was found by the Federal Court of Appeal to be an adequate alternative process when an appeal to the IAD is unavailable, constitutes special circumstances.

[27] Finally, there is the third issue, that is, the existence of some public interest that would favour the exercise of discretion. I note the remark by Justice Dawson in *Baron* about the absence of any written policy that may inform enforcement officers in the exercise of their discretion pursuant to subsection 48(2) of IRPA. In my opinion, the opportunity to provide some guidance meets the requirements of the third criterion.

[28] I agree with the Applicant's submissions that the Enforcement Officer misunderstood the evidence relative to his criminal conviction. He had been convicted only once for the offence of assault, not twice. The original conviction was granted and the Applicant was tried for a second time for that offence. Her finding in that regard, that the Applicant had been convicted twice for the offence of assault, is not reasonable.

[29] The Enforcement Officer also erred in concluding that the Applicant had been granted a stay of removal in January 2006, and that leave had been denied with respect to his application for leave to commence an application for judicial review of the negative PRRA decision.

[30] The Enforcement Officer clearly misunderstood the facts that were presented by the Applicant. This casts doubt on her appreciation of the Applicant's personal circumstances which are always a relevant consideration for those persons seeking the benefits that are available under IRPA.

[31] Further, I agree with the Applicant's submissions that the Enforcement Officer improperly fettered her discretion by failing to appreciate his individual circumstances, as discussed in *Prasad v. Canada (Minister of Citizenship and Immigration)* (2003), 28 Imm. L.R. (3d) 87.

[32] Insofar as the Enforcement Officer was authorized to exercise a statutory discretion under subsection 48(2) of IRPA, the decision in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 is relevant. In this decision, the Supreme Court of Canada provided guidance in the review of decisions made by those vested with a statutory power to make discretionary decisions, saying the following at page 7:

> 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. …

[33] In *Poyanipur v. Canada (Minister of Citizenship and Immigration)* (1995), 116 F.T.R. 4, Justice Simpson observed that an enforcement officer enjoys a discretion to assess whether it would be reasonable to defer removal pending a decision on an H & C application. It is well-established that the mere existence of an outstanding H&C application is not sufficient, by itself, to give rise to a stay of removal but it is a factor that may be considered.

[34] In my opinion, having regard to the decision of the Federal Court of Appeal in *Powell*, the existence of an outstanding H & C application is highly relevant when it is the only means of redress, that is in the absence of a right to appeal from a deportation order.

[35] In the circumstances of this case, I am satisfied that the Enforcement Officer failed to fully consider all the evidence before her, including the Applicant's fears of being at risk if returned to Guyana.

[36] Insofar as the Enforcement Officer was authorized to exercise discretion, she erred in doing so by failing to have regard to the evidence before her.

[37] In the result, the application for judicial review is allowed and the decision of the Enforcement Officer is quashed.

[38] Counsel for the Respondent asked that a question be certified, pursuant to subsection 74(d) of IRPA, which is the same question that was certified in *Higgins*. Accordingly, the following question will be 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?

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed and the decision of the Enforcement 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-475-07
STYLE OF CAUSE:	**RAMNARESH KATWARU v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 3, 2008 and June 24, 2008 by videoconference
REASONS FOR JUDGMENT AND JUDGMENT:	HENEGHAN J.
DATED:	September 17, 2008

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