Federal Court Cour fédérale

Date: 20090522

Docket: IMM-4631-08

Citation: 2009 FC 529

Ottawa, Ontario, May 22, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

GEORGE KOWLESSAR

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision of an enforcement officer (the officer), dated October 16, 2008, in which the officer refused the Applicant's request for a deferral of his removal order from Canada until his outstanding humanitarian and compassionate (H&C) grounds application for landing from within Canada is determined.

Issue

[2] The only issue to be decided in the case at bar is whether the officer erred in fact or in law, thus rendering her decision unreasonable?

[3] The application for judicial review shall be dismissed for the following reasons.

Factual Background

[4] The Applicant is a 63 year old citizen of Guyana who entered Canada as a visitor on July 17, 1997. The Applicant's visa was valid until July 31, 1997, but he did not depart from Canada as he was required to under the terms of his admission.

[5] The Applicant fled to Canada to escape from assaults against his family and himself by thugs connected to the Peoples National Congress (PNC) in Guyana. The Applicant believes his family was targeted because of their race (they are Indo-Guyanese), their economic status (they were relatively wealthy) and because of his vocal opposition to the PNC by way of editorials and letters to the editor in the various newspapers.

[6] The Applicant's wife died of a stroke in 1995, which he believes was caused by the savage assault she sustained at the hands of PNC supporters. The Applicant suffers from a disability as a result of a physical assault by the PNC and was diagnosed with diabetes in 1999.

[7] When the Applicant first came to Canada, he became involved with the Salvation Army and it was his understanding that they were helping to resolve his immigration status. However, in 2003, he realized that he would have to take steps himself to regularize his immigration status.

[8] On March 13, 2003, a report under section 44 of the Act regarding the Applicant was signed for entering Canada with the intention of establishing permanent residency status without first applying for or obtaining the proper immigrant visa.

[9] Six years after his arrival in Canada, the Applicant applied for protection as a Convention refugee and a person in need of protection in March 2003. The application was heard and refused by the Refugee Protection Board on June 21, 2004. However, the Board found the Applicant to be a credible witness and recognized that there are humanitarian and compassionate factors in his case which merit consideration.

[10] Having been refused, the Applicant continued to live his life in Canada. His son Michael had been sponsored to come to Canada by his wife in early 1995 and they had two children. The Applicant’s son Andrew had also been accepted as a refugee and was now living in Canada with his wife and two children. The Applicant remains very close to his sons, their wives, and especially his grandchildren and he has no family remaining in Guyana. The Applicant’s two other children, Philip and Debbie, live in the United States, while his only brother, Henry, has been living in Canada since the 1980s.

[11] On April 18, 2008, the Applicant attended a pre-removal interview at the Greater Toronto Enforcement Centre (GTEC) where he was served with a Pre-Removal Risk Assessment (PRRA) application. In addition to the PRRA, in May 2008, the Applicant applied for landing in Canada on the basis of H&C grounds. The H&C application remains outstanding and serves as the basis of his request for a deferral of his removal.

[12] On September 18, 2008, the Applicant was notified that his PRRA application had been refused. On September 29, 2008, direction to report for removal on October 31, 2008 was signed. With the assistance of new counsel, the Applicant updated his H&C application and submitted sponsorship undertakings by his sons Michael and Andrew. On October 8, 2008, he made a request for deferral of removal pending the processing of his H&C application.

[13] The officer refused the Applicant's request on October 16, 2008.

[14] On October 30, 2008, the Applicant was granted a stay of removal by Justice de Montigny until final determination of his application for judicial review.

Impugned Decision

[15] The Applicant requested a deferral of removal from Canada based on the fact that he has a pending application for permanent residency under H&C grounds and a pending request for leave and judicial review of the negative PRRA decision.

[16] Under section 48 of the Act, Canada Border Services Agency (CBSA) must carry out removal orders as soon as reasonably practicable. Having considered all available information, the officer did not feel that a deferral of the execution of the removal order was appropriate in the circumstances. The Applicant was expected to report for removal on October 31, 2008, as had been arranged. The officer noted that she had little discretion to defer removal under section 48 of the Act.

[17] The Applicant was aware that a decision is rendered on a PRRA application within 2 to 6 months and also that if his PRRA application was rejected, he would receive removal arrangements for departure within 2 to 3 weeks. The Applicant was given that timeframe to prepare himself for a positive or negative decision and he was told to make arrangements for either eventuality.

[18] According to the deferral request and FOSS (Field Operational Support System), the Applicant's H&C application was received on May 16, 2008, more than one month after the PRRA notification and it was sent to the local Scarborough CIC office on August 15, 2008.

[19] According to a CIC Website, the processing time for Stage 1 approval of H&C applications once they are transferred to a local CIC office is approximately 30 months. Based on the above timeframe, the officer concluded that since the application had been only recently transferred to the local CIC office, a final decision on the application was not imminent.

[20] According to the officer, the enforcement of the Applicant's removal order does not contravene the processing of his H&C application. The application is in the processing queue and will be dealt with accordingly, pursuant to subsection 25(1) of the Act. The CIC Officer assigned to the Applicant's H&C application has jurisdiction to evaluate the factors enumerated in the H&C application, including the reunification of families.

[21] The officer expressed sympathy for the Applicant's family relations in Canada. Nonetheless, the officer recognized that such issues lie beyond his jurisdiction and such considerations may be better addressed in the context of the H&C application. The officer does not have the discretion to conduct a "mini" H&C application.

[22] The Applicant had also filed an application for judicial review of his negative PRRA application. The enforcement of his removal order would not contravene his litigation proceedings, pursuant to subsection 50(a) of the Act. Furthermore, deferral of the enforcement of the Applicant's removal order, based on his application for judicial review of his PRRA application, is not warranted pursuant to section 50(c) of the Act. The Applicant is removal ready because he has not been granted any stay of removal under the Act, nor are there any impediments in this removal process.

Relevant Legislation

[23] For ease of convenience, relevant legislative provisions referred to in these reasons are reproduced in an Annex.

Standard of Review

[24] The decision to defer removal under subsection 48(2) of the Act is a discretionary decision and requires that the officer consider any relevant factors and circumstances unique to the particular facts of a case. There is a broad range of circumstances to be considered (*Poyanipur v. Canada (Minister of Citizenship and Immigration)* (1995), 116 F.T.R. 4, 64 A.C.W.S. (3d) 1182 (F.C.T.D.); *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 F.C. 682).

[25] The Court adopts the reasoning of the latest Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and finds that the proper standard of review of an enforcement officers decision is reasonableness.

[26] In *Dunsmuir*, the Court has held that where the question is one of fact, discretion or policy, deference will usually apply automatically. Deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law (*Dunsmuir*, above at paras. 47, 48, 52 and 53). An impugned decision will be reasonable if it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Analysis

[27] It is trite law that an enforcement officer's discretion to defer removal is limited *Simoes v. Canada (Minister of Citizenship and Immigration)* (2000), 187 F.T.R. 219, 98 A.C.W.S. (3d) 422 (F.C.T.D.) at paras. 12 and 13. Furthermore, the mere existence of an H&C application does not constitute a bar to the execution of a valid removal order.

[28] In the case at bar, the Applicant sets out a number of factors which, taken together, do not render his removal unreasonable at this time: the Applicant is a 63 year old widower with poor health whose entire family is in Canada and the United States; his sons have undertaken to care for him and cover his expenses; he is very active in his church community; he has no remaining family in Guyana and the evidence shows that conditions in Guyana can be difficult. However, a pending H&C application on the ground of family separation does not constitute grounds for delaying a removal.

[29] In the recent decision *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2009] F.C.J. No. 314, the Federal Court of Appeal dealt with the long-unsettled question of whether the judicial review of an enforcement officer's decision not to defer removal is moot once a Judge of the Federal Court has granted a stay. The Court found that if an Applicant seeks a deferral of a removal order until a particular event occurs and that event has not yet occurred, the issue is not moot because there is an existing controversy between the parties.

[30] Under subsection 48(2) of the Act, where a removal order is enforceable, any person subject thereto must leave the country and the enforcement officer is bound to enforce the order "as soon as is reasonably practicable". There are a range of factors which can validly influence the timing of removal on even the narrowest reading of section 48, but the enforcement officer's discretion to defer removal remains limited. The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act.

[31] In order to respect the policy of the Act, which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the Applicant to a risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.

[32] The Court therefore concludes that the enforcement officer's decision to refuse deferral of the Applicant's removal from Canada was reasonable. It has to be noted that in the case at bar, the applicant waited until May 2008 (11 years) before making his H&C application. It cannot be said that it was filed in a timely matter.

[33] No question was proposed for certification and none arises.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

ANNEX

Immigration and Refugee Protection Act, S.C. 2001, c. 27:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.
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.
(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.

50. A removal order is stayed

(a) if a decision that was made in a judicial proceeding — at which the Minister shall be given the opportunity to make submissions — would be directly contravened by the enforcement of the removal order;

(b) in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed;

(c) for the duration of a stay imposed by the Immigration Appeal Division or any other court of competent jurisdiction;

(d) for the duration of a stay under paragraph 114(1)(b); and

(e) for the duration of a stay imposed by the Minister.

50. Il y a sursis de la mesure de renvoi dans les cas suivants :

a) une décision judiciaire a pour effet direct d'en empêcher l'exécution, le ministre ayant toutefois le droit de présenter ses observations à l'instance;

b) tant que n'est pas purgée la peine d'emprisonnement infligée au Canada à l'étranger;

c) pour la durée prévue par la Section d'appel de l'immigration ou toute autre juridiction compétente;

d) pour la durée du sursis découlant du paragraphe 114(1);

e) pour la durée prévue par le ministre.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4631-08
STYLE OF CAUSE:	**GEORGE KOWLESSAR** **and** **THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 19, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Beaudry J.
DATED:	May 22, 2009

APPEARANCES:

Andrew Brouwer	FOR APPLICANT
Ladan Shahrooz	FOR RESPONDENT

SOLICITORS OF RECORD:

Andrew Brouwer Toronto, Ontario	FOR APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR RESPONDENT