Federal Court Cour fédérale

Date: 20091029

Docket: IMM-1379-09

Citation: 2009 FC 1090

Ottawa, Ontario, this 29th day of October 2009

Before: The Honourable Mr. Justice Pinard

BETWEEN:

Janhun Sufiana TURAY

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 the March 18, 2009 decision of Mr. Daniel Godin, the removals officer, refusing the applicant's request for a deferral of his removal order from Canada.

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[2] Mr. Janhun Sufiana Turay (the "applicant") is a citizen of Sierra Leone. He fled that country for Guinea in 1996 where he remained until his departure to Canada in 2002. He arrived in Canada on February 13, 2002 and claimed refugee status the following day. He is currently married to Oumou Touré, a permanent resident of Canada and they have three children, all of whom are Canadian citizens.

[3] The Refugee Protection Division of the Immigration and Refugee Board (the "Board") dismissed Mr. Turay's refugee claim on November 14, 2002 on the basis that he was not credible. Mr. Turay married his first wife, Hadja Lyka Diallo on December 4, 2002 and on February 3, 2003 filed an application for humanitarian and compassionate considerations under paragraph 25(1) of the Act with risk of return. This application was eventually supported by a sponsorship application by his first wife in July 2005 (the "First Permanent Residency ("PR") Application").

[4] The Federal Court dismissed Mr. Turay's application for leave and judicial review of the Board's decision on March 28, 2003. The removal order issued upon Mr. Turay's arrival was now enforceable. On July 18, 2006, Mr. Turay filed a Pre-Removal Risk Assessment ("PRRA") application claiming a risk of persecution by rebels on the basis of religion and race if returned to Sierra Leone. The removal order was subsequently stayed in conformity with section 232 of the Act.

[5] On August 7, 2006 the PRRA officer determined that the applicant faced no risk upon his return to Sierra Leone. The couple separated in September 2006. On October 6, 2006, a negative

decision was rendered with respect to the First PR Application on the basis that the marriage between Mr. Turay and Ms. Diallo was not authentic.

[6] The negative PRRA decision was issued on November 20, 2006 and the removal order became enforceable again. A meeting with the applicant was scheduled by the Canada Border Services Agency ("CBSA") Law Enforcement Officer for December 14, 2006. At that meeting the negative PRRA decision would be communicated to the claimant. The applicant did not show up to the meeting and a warrant was issued for his arrest on December 20, 2006.

[7] Almost two years later, in September 2008, the applicant obtained a divorce from his first wife. His son with Oumou Touré, named Barack, was born December 14, 2008. The applicant and Oumou Touré were married on December 27, 2008. The applicant states in his affidavit that he met Ms. Touré in 2003. They became romantically involved shortly after they first met, despite his marriage to his first wife, Ms. Diallo.

[8] The applicant applied for permanent residency in the Spouse in Canada Class with sponsorship from Ms. Touré on February 16, 2009 (the "Second PR Application"). A determination of this application is pending.

[9] On March 5, 2009 the applicant attended to the CBSA office and was arrested and released with conditions. He received his negative PRRA decision on March 9, 2009 and his removal was scheduled for March 27, 2009. The applicant requested an administrative stay of removal on

March 10, 2009 until a final decision on the Second PR Application is rendered. The officer denied the request.

[10] The applicant filed an application for leave and judicial review of the removals officer's decision on March 20, 2009. He was granted a judicial stay of removal on March 26, 2009. Justice Luc Martineau found that the applicant had raised a serious issue with respect to the officer's failure to consider the best interests of the children.

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[11] The removals officer considered the request for an administrative stay on March 17, 2009. In support of the request for deferral of his removal, the applicant relied on the fact that he is the father of Oumou Touré's children, he is an indispensable presence to ensure his wife's mental health, he plays an important role in his children's lives and he provides financial and moral support for his family.

[12] At the outset, the removals officer acknowledged that he had taken into consideration the best interests of the children and concluded that the factors presented by the applicant do not justify an administrative stay.

[13] The specific reasons enunciated by the removals officer are as follows:

- The applicant has resided in Canada illegally from December 2006 to March 2009, and throughout this time period there was an outstanding warrant for his arrest;

- His recent PR Application was filed after he was offered a PRRA so there is no stay of removal pending the assessment of the PR Application; and
- His wife's past has left psychological scars; however her stress has diminished since she was granted permanent residency status. She seems to have access to a range of organizations to assist her with the children as well as for her psychological condition.

[14] The applicant merely submits that the removals officer did not properly consider the best interests of the children in this matter.

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[15] The applicable standard of review of an enforcement officer's decision refusing to defer an applicant's removal from Canada is that of reasonableness (*Baron v. Minister of Public Safety and Emergency Preparedness*, 2009 FCA 81). The court should intervene if the decision of the removals officer was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 47). If the court concludes there has been a faulty analysis of the best interests of the children, the enforcement officer's decision will be rendered unreasonable (*Kolosovs v. Minister of Citizenship and Immigration*, 2008 FC 165).

[16] The removals officer's source of power is subsection 48(2) of the Act which imposes a positive obligation on the Minister to execute a valid removal order. However, even on the narrowest reading of subsection 48(2) there are a number of variables that can influence the timing of a removal on a practicable basis as affirmed by Justice Denis Pelletier in *Wang v. Canada*

(M.C.I.), [2001] 3 F.C. 682 (T.D.). There are only two categories of factors that can affect the officer's decision: factual (practicable) and legal (reasonable). This was expressed in *Cortes v. Minister of Citizenship and Immigration* (2007), 308 F.T.R. 69, at paragraph 10:

> . . . removal must occur as soon as practicable, but only as soon as the practicability of the removal is reasonable. . . .

It is well-established that the "enforcement officer's discretion to defer removal is limited" (*Baron*, *supra*, at paragraph 49).

[17] Practicable considerations include "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" (*Simoes v. Canada (M.C.I.)*, [2000] F.C.J. No. 936 (T.D.) (QL) quoted in *Baron*, *supra*, at paragraph 49; see also *Hasan v. Minister of Public Safety and Emergency Preparedness*, 2008 FC 1100, at paragraph 8). In *Baron*, at paragraph 51, the Federal Court of Appeal affirmed the comments in *Wang*, *supra*, defining family hardship as a variable of low importance for a removals officer. Indeed, Justice Pelletier stated as follows:

> [48] . . . deferral should be reserved for those applications or processes where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment in circumstances and where deferral might result in the order becoming inoperative. . . .

[18] In *Mauricette v. Minister of Public Safety and Emergency Preparedness*, 2008 FC 420, at paragraph 23, the Court explained reasonability to be:

> . . . where there are compelling circumstances that make it necessary for the Officer to defer removal, then, justice would require that the Officer exercise that discretion.

[19] The best interests of the children may constitute compelling personal circumstances. However, the Court in *Baron* commented on the relevance of the children's best interests at paragraph 57:

> . . . The jurisprudence of this Court has made it clear that illegal immigrants cannot avoid execution of a valid removal order simply because they are parents of Canadian-born children. . . . an enforcement officer has no obligation to substantially review the children's best interest before executing a removal order.

[20] In *Varga v. Canada (Minister of Citizenship and Immigration)*, [2007] 4 F.C.R. 3, the Federal Court of Appeal held, unambiguously, that the children's best interests are not a significant factor to be considered by the removals officer:

> [16] . . . Within the narrow scope of removals officers' duties, their obligation, if any, to consider the 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 subsection 25(1).

[21] The removals officers need only to consider the short-term interests of the children and not in any great detail. In *Munar v. Canada (M.C.I.)*, [2006] 2 F.C.R. 664, Justice Yves de Montigny explicitly distinguished between the kinds of assessments regarding the best interests of the child taken by different types of officers under the Act:

> [39] When assessing an H&C application, the immigration officer must weigh the long term best interests of the child. . . . Factors related to the emotional, social, cultural and physical well-being of the child are to be taken into consideration. . . . In a nutshell, to quote from Décary, J.A. in *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 F.C. 555 (C.A.), at paragraph 6, "the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other

> factors, including public policy considerations, that militate in favour of or against the removal of the parent."
>
> [40] This is obviously not the kind of assessment that the removal officer is expected to undertake when deciding whether the enforcement of the removal order is "reasonably practicable." What he should be considering, however, are the short-term best interests of the child. For example, it is certainly within the removal officer's discretion to defer removal until a child has terminated his or her school year, if he or she is going with his or her parent. Similarly, I cannot bring myself to the conclusion that the removal officer should not satisfy himself that provisions have been made for leaving a child in the care of others in Canada when parents are to be removed. This is clearly within his mandate, if section 48 of the IRPA is to be read consistently with the *Convention on the Rights of the Child*. To make enquiries as to whether a child will be adequately looked after does not amount to a fulsome H&C assessment and in no way duplicates the role of the immigration officer who will eventually deal with such an application. . . .
>
> (My emphasis.)

[22] It is within this narrow construction of discretion that we must consider the reasonability of the decision of the removals officer. The critical factor to consider for the purposes of this application is whether the best interests of the children were properly considered.

[23] In the case at bar, the applicant argues that the removals officer made no determination as to what the best interests of the children are in this case. The removals officer mentions only that he has turned his mind to this matter and concluded that the application for a deferral of the removal order should be refused.

[24] For his part, the respondent submits that the removals officer determined that the children's mother will be able to look after the children as she has access to numerous social services organizations, and that her stress has diminished since she was granted permanent residency status.

[25] More importantly, the respondent argues that there are two major reasons that illustrate the removals officer's decision to be reasonable. The first is that the applicant delayed or hindered his removal from Canada, and the second is that the timing of his application for permanent resident status came after the removal order was enforceable.

[26] Despite my concerns with how the removals officer considered and weighed the evidence before him, I adopt the respondent's reasoning. I find that the decision was a possible outcome, that the best interests of the children were considered and that a reviewing court, in the circumstances, ought not re-weigh the evidence of the decision-maker.

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[27] For all the above reasons, the application for judicial review will be dismissed.

JUDGMENT

The application for judicial review of the March 18, 2009 decision of Mr. Daniel Godin, wherein he refused the applicant's request for a deferral of his removal order from Canada, is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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