Federal Court  Cour fédérale

Date: 20090611

Docket: IMM-3933-08

Citation: 2009 FC 599

Ottawa, Ontario, June 11, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ALENA LISITSA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA or the Act) for judicial review of a decision of an enforcement officer (the officer) dated September 9, 2008 which refused the applicant's request for a deferral of removal. Removal was stayed by Mr. Justice Russell on September 10, 2008 pending the judicial review of the enforcement officer's decision.

[2] The applicant requests that the decision be declared invalid, quashed or set aside and such further and other relief as this Honourable Court may allow.

Background

[3] Alena Lisitsa, (the applicant), is a citizen of Belarus. She came to Canada with her common law husband, Alexander Poliakov (the husband) in September 2001 from Israel where they had been living and made refugee claims soon after their arrival. Their applications, filed separately, were rejected. The applicant's refugee claim was based on her alleged forced entry into a prostitution ring and was denied in October 2003. The husband's refugee claim was based on persecution and denial of citizenship in Israel.

[4] Subsequently, the applicant submitted a pre-removal risk assessment (PRRA). This was denied on July 9, 2008 and communicated to the applicant on August 28, 2007. The applicant's reaction to the negative PRRA finding and her initial refusal to sign acknowledgement of it, led to her being detained by Citizenship and Immigration Canada/Canada Border Services (GTEC). Since that meeting, the applicant has been detained as a flight risk. In response, the husband initially suggested that he wanted to waive his PRRA rights so that he could be removed with the applicant but later decided that he would try through a bonds person to secure the applicant's release. Despite his efforts, the applicant remains at the detention centre.

[5] Before filing the PRRA application, the applicant and her husband were advised that they could apply for permanent residence on humanitarian and compassionate grounds (H&C grounds). An H&C application was submitted in June 2007. The file was transferred from Vegreville, Alberta to the Scarborough office in October 2007. The applicant and her husband have requested an expedited response to their H&C request but Citizenship and Immigration Canada is unable to accommodate the request citing fairness to other applicants.

[6] The basis for the request for deferral is to avoid the separation of the applicant and her husband. The husband's situation is complicated because he is allegedly stateless. As a young boy, he moved from Azerbaijan to Israel with his aunt after his mother died. While he and his adopted family were initially accepted as landed immigrants because they were Jewish, it was later questioned by the Israeli government and their citizenship was withdrawn. In the mean time, Azerbaijan declared independence from the Soviet Union which left the husband without a straightforward claim to citizenship. The husband's removal process appears to be stalled and GTEC has sought and received the applicant's husband's cooperation in resolving this issue by seeking to obtain travel documents from the Azerbaijani embassy in Ottawa. In the meantime, the applicant's removal has proceeded.

Officer's Decision

[7] On September 9th, the enforcement officer denied the applicant's request for deferral of the execution of the removal order. The officer states that an H&C application "is not an impediment to

removal … therefore should not be utilized as a mechanism of impediment to removal". It is noted that the applicant and her husband waited until 2007, "long after their refugee claims had been denied" to file for permanent residence. The officer also notes that the normal application time for an H&C application transferred to the Scarborough location is 24 to 28 months, and that there would not be any expedited process for the application.

[8] The officer then reviewed the basis for the request. He states that it is based largely on the applicant's husband. The officer does not equate an on-going difficulty obtaining a travel document with statelessness and states that there is no indication in the applicant's husband's file that he cannot be returned to either Israel or Azerbaijan. The officer also finds it "interesting" that the applicant's husband returned to Israel voluntarily in 2000 and returned to Canada a year later with a valid Israeli passport before filing his refugee claim. He doubts that he cannot be returned because the officer states that "these documents are never issued to someone who has never had any status in Israel".

[9] The officer concludes that the information presented did not satisfy him that deferral was "appropriate in the circumstances of this case".

Issues

[10] The applicant submitted the following issues:

1. Is the decision of the officer not to defer the applicant's removal unreasonable? In particular, did the officer fetter his discretion, ignore evidence, make serious factual errors or come to an unreasonable decision when he decided not to defer the applicant's removal from Canada?

2. Is the issue of the refusal to defer the removal date 'moot' given that the applicant was granted a stay of removal and as such the removal date of September 10, 2008 has passed and the applicant has therefore obtained the relief she sought in the application?

[11] I would rephrase the issues as follows:

1. What is the standard of review?

2. Is this review 'moot' given that the applicant has obtained the relief of a stay of removal that she sought?

3. Did the officer err in his finding of fact related to evidence submitted to support a deferral of removal?

Applicants' Submissions

[12] The applicant submits that her husband "was stripped of his Israeli citizenship in 1998 after an investigation into the authenticity of his adopted mother's Jewishness resulted in a finding of a lack of proof of Jewish ethnicity". As well, the applicant's husband missed Azerbaijan's deadline for registration for citizenship after the breakup of the Soviet Union around 1998. And, despite the efforts of GTEC and the applicant's husband, he has been unable to obtain status from the Azerbaijani embassy without an official request by the Canadian government in writing. The

applicant's husband, at the request of GTEC, also called the Embassy of Belarus for an application on naturalization through his wife; however, he was told that he needed a Canadian landing document.

[13] Further, the officer's suggestion that there is no reason that the applicant's husband cannot get travel documents is at odds with GTEC's awareness and involvement in the process of obtaining travel documents from either Azerbaijan or Belarus; all of which has not been revisited since 2007 by GTEC despite assurances that the applicant and her husband would be dealt with together.

[14] The applicant states that their claims about Israel are legitimate. They both entered Canada from Israel in 2001 with false documents and a pre-hearing conference by members of the Refugee Protection Division found that they did not have "citizenship or any other form of status in Israel". The travel document that the officer points to was only issued by Israel for the purpose of exiting because he had no status in Israel. The officer's assertion that the travel document would not have been issued by Israel unless he had status was stated without authority.

[15] The applicant states that the delay in filing an H&C application is only because the applicant and her husband only learned of it from GTEC in 2007. They immediately filed an H&C application in June 2007. At the time of filing with the Federal Court, the application has been processing for 16 months, with one year being at Scarborough.

[16] The applicant states that she and her husband are “extremely emotionally close and attached married couple” in part because of the difficult life they have experienced before they came to Canada and more recently after enduring a difficult miscarriage. The applicant contends that the officer should have considered the trauma that would occur in separating her from her husband without him even being able to travel to visit her.

[17] They were reassured many times by their GTEC officer that they would be dealt with as a couple after they explained to the GTEC officer in numerous interviews that whether they remained in Canada or not, they did not want to be separated. They state that their dealings with this officer were always polite and cooperative until the day that the applicant’s PRRA application was refused and she was informed that she would be removed without her husband. She was not prepared to hear this news and became emotionally distressed at the thought of being removed without him. The applicant regrets her response as she and her husband have always cooperated with GTEC. Further, this incident is at odds with the applicant and her husband’s conduct in Canada gaining employment, paying taxes and contributing to their communities and applying for permanent residence as soon as they knew it was possible.

[18] Also, the applicant was not able to verify the officer’s 24 to 28 month processing time and states that a letter from Scarborough CIC indicated that the processing time was about 18 months which would mean that a possible resolution of the file would be in May 2009 or October 2009 (at the earliest according to the officer’s time frame).

[19] The applicant states that the officer “confus[es] two separate issues”. On one hand, the officer states correctly that and H&C application is “in itself” not an impediment to removal but on the other hand, also states that it “should not be utilized as a mechanism of impediment of removal”. The applicant suggests that he “misinterpreted his role and fettered his discretion”. The applicant states that their request was not on the bare existence of the application but that it was well into the process which suggested a deferral was warranted in accordance with the discretion in subsection 48(2) of the Act. In addition, this was not an application that was filed in response to a removal process but an application in process where the timing is under the respondent’s control.

[20] The applicant states that the words “reasonably practicable” in subsection 48(2) of the Act has been held to cover a broad range of circumstances including a pending H&C decision as in *Cortes v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 78.

[21] Finally, the applicant, in her submissions before the Federal Court of Appeal decision in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2009] F.C.J. No. 314, stated that judicial review is not moot because it has a practical utility as in *Palka v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 342 and that utility is best realized when the underlying issue is resolved in the judicial review.

Respondent's Submissions

[22] The respondent submits that the applicant "has provided no meaningful reason" for a judicial review of the officer's decision. The basis of the applicant's request was considered: her pending H&C application and the separation from her husband.

[23] The respondent disagrees with the applicant that the officer was in error regarding the pending H&C determination. The respondent states that the officer was under "no obligation" to grant a deferral until the H&C application was decided and "the officer's narrow discretion does not encompass deferring removal based on the age of a particular H&C application". Nonetheless, the officer did verify that the H&C decision was not imminent and as such concluded that deferral would not be granted on that ground.

[24] The respondent also approached the issue of the husband's statelessness as not an erroneous assumption but that the officer was not convinced of the husband's statelessness. The officer cited insufficient evidence and stated that in any case, negotiations were continuing to secure a travel document for him. Ultimately, this issue is an H&C factor which "the Court has made it clear that Enforcement Officers are under no obligation to engage in "mini-H&C" assessment" *Munar v. Canada (Minister of Citizenship and Immigration),* 2005 FC 1180 at paragraph 36.

[25] The respondent also states that difficulty making removal arrangements is also self-serving for the applicant's husband and as such it was not unreasonable for the officer to not accept his

claims. As well, the officer did not have the affidavit evidence regarding the husband's travel documents before him when he made his decision and as such, they are not relevant (see *Franz v. Canada (Minister of Employment and Immigration)* (1994), 80 F.T.R. 79.

[26] The standard of review to be applied is reasonableness as defined in *Dunsmuirv. New Brunswick*, [2008] 1 S.C.R. 190, which is "within a range of possible, acceptable outcomes which are defensible in respect of facts and law" as was the case for this decision. The application has not raised an arguable issue that is outside these parameters.

Analysis

[27] **Issue 1**

What is the standard of review?

In the very recent decision of *Baron* above, the Federal Court of Appeal stated:

> 24 There is no dispute between the parties that the appropriate standard of review with respect to the mootness issue is the correctness standard. I agree (See: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235).
>
> 25 With respect to the enforcement officer's decision refusing to defer the appellants' removal from Canada, I cannot see how it can be disputed that the applicable standard is that of reasonableness (See: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190).

The Supreme Court in *Dunsmuir* above, noted that the analysis of the appropriate standard of review need not be undertaken where courts have arrived at consensus in similar cases.

Therefore, reliance can be paid on the standards established in paragraphs 24 and 25 of *Baron* above.

[28] **Issue 2**

Is this review 'moot' given that the applicant has obtained the relief of a stay of removal that she sought?

The applicant raises an issue that is preliminary in nature: whether the issue of refusing to defer the removal order is moot given that the applicant has received the relief she sought in the application, namely a stay on her removal. Further, the fact that another judicial review may be available to the applicant if this one is granted and she is refused deferral again suggests that the practical effect of this review is limited. According to Black's Law Dictionary, a moot case is one where "a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy" and the reasons will be either "academic or dead".

[29] The issue of whether the judicial review is moot was recently decided by the Federal Court of Appeal in *Baron* above. The Federal Court of Appeal held that a judicial review such as the present one is not moot. The parties did not take exception to this at the hearing and accordingly, I am of the view that the judicial review is not moot.

[30] **Issue 3**

Did the officer err in his finding of fact related to evidence submitted to support a deferral of removal?

The applicant filed an H&C application in June 2007 which was transferred to Scarborough in October 2007. The officer stated in the decision that it would take 24 to 28 months to process the application after it came to Scarborough. The applicant stated that the Scarborough CIC told her the processing time was 18 months.

[31] It is absolutely clear that the mere filing of an H&C application does not result in a requirement to defer a removal. However, it may be a different situation for a timely filed H&C application which has been in the system for a long period of time.

[32] Mr. Justice Nadon of the Federal Court of Appeal in *Baron* above, stated at paragraphs 49 to 51:

> 49 It is trite law that an enforcement officer's discretion to defer removal is limited. I expressed that opinion in *Simoes v. Canada (M.C.I.)*, [2000] F.C.J. No. 936 (T.D.) (QL), 7 Imm.L.R. (3d) 141, at paragraph 12:
>
> > [12] In my opinion, the discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, a removal officer may consider various factors 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. For instance, in this case, the removal of the Applicant scheduled for May 10, 2000 was deferred due to medical reasons, and was rescheduled for May 31, 2000. Furthermore, in my view, it was within the removal officer's discretion to defer removal until the Applicant's eight-year old child terminated her school year.

50 I further opined that the mere existence of an H&C application did not constitute a bar to the execution of a valid removal order. With respect to the presence of Canadian-born children, I took the view that an enforcement officer was not required to undertake a substantive review of the children's best interests before executing a removal order.

51 Subsequent to my decision in *Simoes, supra*, my colleague Pelletier J.A., then a member of the Federal Court Trial Division, had occasion in *Wang v. Canada (M.C.I.)*, [2001] 3 F.C. 682 (F.C.), in the context of a motion to stay the execution of a removal order, to address the issue of an enforcement officer's discretion to defer a removal. After a careful and thorough review of the relevant statutory provisions and jurisprudence pertaining thereto, Mr. Justice Pelletier circumscribed the boundaries of an enforcement officer's discretion to defer. In Reasons which I find myself unable to improve, he made the following points:

> - There are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths.
>
> - The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act. In considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission.
>
> - 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 the 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.
>
> - Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application.

I agree entirely with Mr. Justice Pelletier's statement of the law.

[33] The officer stated in his reasons:

> Submitting an H & C application in itself is not an impediment to removal, which is clearly stated in the application guide and therefore should not be utilized as a mechanism of impediment to removal.

[34] In *Simoes* above, the Court spoke of H&C applications brought on a timely basis which were caught in the system for a long time and *Wang* above, stated, "With respect to H&C applications, absent special circumstances will not justify deferral unless based upon a threat to personal safety". I do not view the adoption of the statements from *Wang* above as taking away from the factors listed in *Simoes* above if "special circumstances exist". In the present case, the application has been filed since June 2007 and is still outstanding. This could be considered a special circumstance however, the approach taken by the officer in the above quoted portion of his reasons would never allow a timely H&C application to be the basis to grant a deferral. In my view, this conclusion makes the officer's decision unreasonable. I do not know what the officer's decision would be if he considered the request in light of the law stated in *Simoes* above and *Baron* above, hence the decision must be set aside and the matter referred to a different officer for redetermination.

[35] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[36] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different officer for redetermination. I retain jurisdiction to deal with any issues that might flow from the granting of this order.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

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

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.

FEDERAL COURT

SOLICITORS OF RECORD

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