Federal Court Cour fédérale

Date: 20100311

Docket: IMM-3581-09

Citation: 2010 FC 273

Ottawa, Ontario, March 11, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

LASZLO JONAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to s. 72 of the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27, of an enforcement officer's refusal to defer removal of the applicant from Canada. For the reasons that follow, this application is dismissed.

Background

[2] Laszlo Jonas is a citizen of Hungary and an ethnic Roma. He is deaf, mute, unable to read and write, and apparently suffers from some degree of developmental delay.

[3] Mr. Jonas arrived in Canada on July 12, 2001, and immediately claimed refugee status. The Refugee Protection Division of the Immigration and Refugee Board denied his claim on July 22, 2003. Leave to judicially review that decision was denied by this Court.

[4] A sponsorship application was initiated by Mr. Jonas' wife on January 26, 2006. This application was rejected on January 9, 2008, when Mr. Jonas' spouse withdrew her sponsorship because of their separation.

[5] On March 4, 2008, Mr. Jonas filed an application for permanent residence based on humanitarian and compassionate (H&C) grounds. This application has been transferred to the local CIC Office. It remains outstanding.

[6] On May 16, 2008, Mr. Jonas was given a Pre-Removal Risk Assessment (PRRA) application. This application was rejected on April 17, 2009. He did not seek judicial review of the negative PRRA decision.

[7] On June 1, 2009, Mr. Jonas sought a deferral of his removal until the final determination of his pending H&C application. The grounds for this request were Mr. Jonas' disabled status and lack

of appropriate care in Hungary, his pending H&C application, and the discrimination he would face in institutionalized care in Hungary because of his Roma ethnicity and disability.

[8] On July 13, 2009, the enforcement officer rejected Mr. Jonas' request to defer removal. It is from this decision that Mr. Jonas seeks judicial review. Mr. Jonas successfully sought a stay of removal until 15 days after the earlier of the final determination on this judicial review or the final determination and communication of reasons regarding the outstanding H&C application.

Issue

[9] The issue is whether the enforcement officer's decision to refuse the applicant's request for a deferral of his removal was reasonable.

Analysis

[10] As a preliminary issue, the respondent submits that the letter from Dr. Otto Veidlinger should not be considered by the Court because it is dated after the applicant's deferral request and was therefore not before the officer. I agree. It was not before the decision-maker and is not properly before this Court on a judicial review of that decision.

[11] The applicant submits that the deferral should have been granted because his removal will expose him to inhumane treatment beyond the normal consequences of removal, and because his pending H&C application, which he submits is likely to be successful, would render the removal order inoperative. The applicant submits that the officer's decision is unreasonable because the officer failed to consider the totality of the medical evidence as well as the other evidence provided

in support of the request. The applicant contends that his situation is distinguishable from the case of *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 because, unlike in *Baron*, the applicant's disability and lack of support will prevent him from filing an application for permanent residence from outside Canada.

[12] The respondent cites *Baron*, *supra*, *Simoes v. Canada (Minister of Citizenship and Immigration)* (2000), 187 F.T.R. 219 (T.D.), and *Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 682, for the proposition that enforcement officers have a very limited discretion to grant a deferral of removal. The respondent says that the circumstances of this case do not fall within that limited discretion. The respondent submits that the doctor's notes on record contain inconsequential medical concerns, and that they are not determinative of the request. It is further submitted that deferral requests are not to be considered surrogate H&C applications and that enforcement officers do not have the jurisdiction to consider H&C factors. The respondent submits that it was reasonable for the officer to reject the pending H&C application as the basis for the deferral request and that the officer considered all the evidence and provided adequate reasons that support the conclusion that the decision was reasonable.

[13] Both parties agree that deferral of removal decisions are reviewed on the reasonableness standard. Section 48(2) of the Act obligates enforcement officers to enforce removal orders "as soon as is reasonably practicable." Section 48 has been interpreted to grant enforcement officers only a very limited discretion to consider requests to defer removals: *Baron*, *supra*; *Simoes*, *supra*; *Wang*, *supra*.

[14] In *Wang*, *supra* at para. 48, Justice Pelletier (as he then was), held that:

> …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. The consequences of removal in those circumstances cannot be made good by readmitting the person to the country following the successful conclusion of their pending application.

[15] The applicant argues that he faces the prospect of inhumane treatment because of his disability if he is returned to Hungary and that his disability will prevent him from reapplying for permanent residence. He argues that this brings him within the narrow exception described in *Wang*.

[16] Other than stating that the letters of support provided by the applicant were noted, the officer did not make any express reference to the medical evidence that was submitted. A letter from the applicant's doctor stated:

> Mr. Jonas is suffering from congenital deafness, he is developmentally delayed. He is unable to speak, write or read. He needs assistance regarding all aspects of activities of daily living. He cannot be rehabilitated…. Mr. Jonas needs constant supervision due to his complex medical condition and his mother is the only person who can provide this to him. He has no other relatives and he is unable to exist without his mother's help.

[17] The officer noted that the applicant is a deaf mute, but makes no reference to him being developmentally delayed. The officer focussed on the fact that the risk associated with the issues raised in the deferral request had all been before the RPD and the PRRA Officer and that both decision-makers had rejected the applicant's arguments. The officer further notes that the onus was

on the applicant to prove on his PRRA application that individualized risk exists, that he had an opportunity to do so, but that he was unsuccessful in meeting this burden.

[18] Mr. Jonas does not argue that he will face inhumane treatment because of a lack of care available to people in his circumstances in Hungary; rather, he argues that he will be discriminated against in receiving the care available because of his disability and ethnicity. These arguments were available for him to make before the RPD and the PRRA Officer (if they were supported by new evidence). The PRRA officer found that the RPD had considered the applicant's disability, his developmental delay, and his medical conditions. The PRRA officer concluded that evidence in respect of these issues was not new evidence, and consequently, it could not be considered on the PRRA application. The applicant did not seek judicial review of this decision.

[19] In reply to the applicant's submission that the enforcement officer failed to consider the record that was available to him that was more comprehensive than that available to the PRRA officer, it must be pointed out that consideration of deferral requests is not a second PRRA application. The applicant had an obligation to put his best foot forward at his refugee hearing and on his PRRA application. If he did not, it is he and not the enforcement officer who must bear the responsibility for the consequences. It was reasonable for the enforcement officer to rely on the RPD and PRRA Officer's assessments of the individualized risk that the applicant allegedly faces. The potential inhumane treatment relied on by the applicant is based on the risk that has already been addressed twice.

[20] Enforcement officers may consider "pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system," but the existence of such applications does not obligate the officers to grant a deferral request in all cases: *Simoes*, *supra*, at para. 12.

[21] In this case, the officer did consider the existence of the pending H&C application and it was open to the officer to consider the imminence of a decision in the pending H&C application. In many cases, the imminence of a decision may be a reflection of whether the application had been filed in a timely manner. In this case, the officer does not indicate whether, in his view, the H&C application was filed in a timely manner; however, it is of note that the applicant did not file it until almost five years after the rejection of his refugee claim by the RPD. The officer concluded that a decision was not imminent even though the application had been transferred to the local CIC Office. The officer's determination that the pending H&C application did not warrant his exercise of discretion was reasonable.

[22] I cannot agree with the submission that the officer failed to consider relevant evidence. There is a presumption that a decision-maker did in fact consider all of the evidence: *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.) (QL). The officer in this case made a number of references to the evidence which supports the presumption that all the evidence was considered. The applicant has not pointed to a piece of evidence that was so contradictory to the officer's conclusion that the failure to refer to this specific evidence amounts to a reviewable error.

[23] I do not accept the submission made by the applicant that the officer provided inadequate reasons. The duty to give reasons is commensurate with the particular circumstances of a given case: *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (C.A.). In *Boniowski v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1161, at para. 11, Justice Mosley held that the nature of deferral of removal decisions carries a reduced obligation to give reasons. In this case, the officer's reasons include a discussion of the nature of his discretion, an explanation of what was considered in reaching the decision, and an outline of the basis on which the discretion was not exercised. In the circumstances of this case, nothing more was required; the reasons were adequate.

[24] The question is not whether this Court would have granted a deferral of removal pending the outcome of the applicant's H&C application. The question is whether the officer exercised his discretion in a fair manner and provided reasons that were justified, transparent, and intelligible. The applicant has failed to point to any unfairness in the decision-making process. The reasons provided by the officer were justified, transparent, and intelligible.

[25] Neither party proposed a question for certification and in my view there is none.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and

2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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