Federal Court  Cour fédérale

Date: 20100506

Docket: IMM-3357-09

Citation: 2010 FC 500

Ottawa, Ontario, May 6, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

JOSE ALBERTO VILLAFUERTE RAMIREZ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of an enforcement officer (the Officer) of the Minister of Public Safety and Emergency Preparedness, dated June 30, 2009, wherein the Officer refused the Applicant's request for a deferral of removal.

[2] For the reasons set out below the application is dismissed.

I. Background

[3] The Applicant is a citizen of Costa Rica. He came to Canada in 2001 and claimed refugee protection. His claim was rejected in 2002. In 2003, the Respondent issued a warrant for the Applicant's arrest, which was effected in 2007. During this period, the Applicant had been charged with assault with a weapon. The Respondent then initiated removal proceedings and the Applicant submitted an application to remain in Canada on humanitarian and compassionate grounds (H&C) and filed a Pre-Removal Risk Assessment (PRRA) application. The PRRA was rejected in 2009 and his removal was set for July 6, 2009.

[4] While in Canada, the Applicant married a Canadian citizen. He has a Canadian born son who is 2 years old and a Canadian born daughter who was born on August 13, 2009. The Applicant also has two children in Costa Rica. The Applicant's wife was pregnant with his daughter when the removal order was to be effected. The Applicant requested that his removal be deferred until a decision was rendered on his H&C application or in the alternative until his wife gave birth to their second child, and in consideration of the best interests of his Canadian born children. He supported this request with letters from his wife, two doctors, and his local member of parliament. The letters stated that the Applicant's possible removal was causing stress to his pregnant wife, that it would be difficult for the wife to be with their young children without the Applicant, and that the Applicant would miss valuable bonding time with the children if the removal was effected.

[5] The Officer was not satisfied that a deferral of the execution of the removal order was appropriate in the circumstances. The Officer divided the reasons for the decision into two parts. Part one was subtitled “Best Interests of the Canadian Child” and addressed both the issue and evidence with regard to the wife’s pregnancy and the best interests of the Canadian-born children. Part two was subtitled “Pending H&C application” and the Officer considered the impact of the Applicant’s pending H&C application on the decision to defer removal.

[6] On July 3, 2009, the Applicant’s removal was stayed until his judicial review application was addressed by this Court.

II. Issue and Standard of Review

[7] The Applicant raises the following issue: did the Officer err in law and in fact in refusing to defer the removal dated July 6, 2009?

[8] This issue will be assessed on a standard of reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12; [2009] 1 S.C.R. 339; *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81; 309 D.L.R. (4th) 411).

III. Analysis

[9] Removal orders are governed by Section 48 of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27 (IRPA). Subsections 48(1) and (2) state:

Enforceable removal order	Mesure de renvoi
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.
Effect	Conséquence
(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.

[10] The Applicant argues that the Officer erred by refusing to defer removal for three reasons. First, that there was medical evidence before the Officer that removing the Applicant prior to the birth of the child would cause severe stress to his Canadian wife. Second, that removal was not in the best interest of his Canadian born children as they would miss important bonding time with their father and that their mother would have to go back to work prior to the end of her maternity leave. Third, that the Officer should have deferred removal based on his outstanding H&C application that had been submitted in April 2007.

[11] The Applicant also submits that the Officer made numerous errors in the reasons. These errors were: twice including material from another decision not related to the Applicant, incorrectly stating that the Applicant had served three years in prison in Costa Rica for assault, and stating that the Applicant had been convicted of an offence, assault with a weapon, in Canada. The Applicant actually served five years probation for the assault in Costa Rica and was charged with an assault in Canada but was given a peace bond.

[12] The Respondent argues that enforcement officers have limited discretion to defer a scheduled removal date and that in this case it was within the Officer's discretion to determine that the Applicant's circumstances did not warrant deferral of removal. The Respondent takes the position that any error's in the reasons were minor and without consequence.

A. *The Birth*

[13] The argument with regard to deferring removal based on the birth of his child is moot. The child was delivered on August 13, 2009. There is no longer a live issue between the parties with regard to this point and the Court declines to exercise its discretion to decide the matter on the merits (see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; [1989] S.C.J. No. 14).

B. *The Discretion of the Enforcement Officer*

[14] As set out by Justice Carolyn Layden-Stevenson in *Padda v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1081; 33 Imm. L.R. (3d) 134), when considering the issue of deferring removal, removal is the rule while deferral is the exception and the discretion that a removal officer may exercise is very limited (see paragraphs 8 to 9). While compelling individual circumstances, such as personal safety or health may be considered, the process is not to be a "mini-H&C" (see *Prasad v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 614, [2003] F.C.J. No. 805; *John v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 420; 231 F.T.R. 248).

[15] In *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148; [2001] 3 F.C. 682 (T.D.), Justice Denis Pelletier reviewed the boundaries of the enforcement officer's discretion. In *Baron*, above, Justice Marc Nadon, for the majority of the Court of Appeal, agreed with Justice Pelletier's statement of the law and summarized it as follows (at paragraph 51):

> 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.
>
> [Emphasis in original]

[16] It is this definition of an enforcement officer's discretion that will be applied to the facts of this case.

C. *The H&C Application*

[17] As set out in *Baron*, above, an H&C application does not constitute a bar to the execution of a valid removal order. At the hearing, the Applicant brought to my attention the decision in *Lisitsa v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 599; [2009] F.C.J. No. 1385. In *Lisitsa*, the Court stated that while it is absolutely clear that the mere filing of an H&C

application does not result in a requirement to defer a removal, it may be a different situation where there are special circumstances, such as a timely filed H&C application which has been in the system for a long period of time (see paragraphs 31to 35).

[18] Having considered the decision in *Lisitsa*, above, I return to the words of Justice Nadon of the Court of Appeal in *Baron*, above. Justice Nadon highlighted the fact that harm from removal may be remedied by readmitting the person following a successful H&C application and that this is an important point when consideration the boundaries of the enforcement officer's discretion.

[19] In this case, the Officer took into account the length of time the Applicant's H&C application had spent in processing, the fact that the Applicant had not been served a direction to report until recently and had therefore benefited from a fairly extensive delay in his removal thus far, and that a final determination on the H&C did not appear to be imminent. The Officer's decision was reasonable based on the discretion afforded them.

D. *Best Interests of the Children*

[20] The jurisprudence of this Court has made it clear that illegal immigrants cannot avoid the execution of a valid removal order simply because they are parents of Canadian born children (see *Baron*, above, at paragraph 57). In *John v. Canada (Minister of Citizenship and Immigration)*, above, Justice Judith Snider noted the very limited role played by enforcement officers in the overall

immigration process. At paragraph 20, Justice Snider stated that there was no clear duty on the enforcement officer to consider the Best Interests of the Child under Section 48 removal orders:

> 20 As a result, there is likely no requirement that the removals officer consider H&C factors, including the impact of the removal on the Canadian citizen child. Such a duty on the removals officer, where one already exists at the H&C application stage, would constitute unnecessary duplication.

[21] In this case, the Officer did consider the fact that the children would remain in the care of their mother. The Officer also noted that the family knew that the Applicant was under a removal order and that the wife and children had access to all the social programs and resources available to all Canadians to assist them. The Officer acted reasonably within the ambit of discretion afforded them.

[22] In this case, the Officer considered the material submitted by the Applicant and I have not been persuaded that the Officer made a reviewable error in her or his consideration of the evidence. What the Applicant is asking this Court to reassess the evidence so as to reach a different conclusion. This is not the role of this Court on judicial reviews of this kind (see *Baron*, above, paragraph 60). The Officer reasonably exercised the narrow discretion afforded to enforcement officers with respect to granting temporary deferral.

E. *The Errors*

[23] The Officer clearly made factual errors in the reasons by including passages from another Officer's notes and with regard to the Applicant's criminal record. However, these matters do not affect the heart of the decision. I note that in *Ogiriki v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 420; 2006 FC 342, Justice Simon Noël held that a decision should be taken as a whole and stand even if a few "weaknesses" were identified by the Applicant (see paragraph 13).

[24] The parties did not raise an issue for certification and none arose.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. this application is dismissed; and

2. there is no award for costs.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-3357-09**
STYLE OF CAUSE:	**RAMIREZ v. MPSEP**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**APRIL 20, 2010**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
DATED:	**MAY 6, 2010**

APPEARANCES:

Max Berger	FOR THE APPLICANT
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Max Berger Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General Canada	FOR THE RESPONDENT