Federal Court Cour fédérale

Date: 20100629

Docket: IMM-5351-09

Citation: 2010 FC 706

Ottawa, Ontario, June 29, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

MARIO IVAN RIVERO RAMIREZ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This concerns an application brought pursuant to sections 72 and following of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") by Mario Ivan Rivero Ramirez (the "Applicant") whereby he is seeking judicial review of a decision of enforcement officer D. Puzeris (the "enforcement officer") dated October 26, 2009 refusing to defer the Applicant's removal from Canada.

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

Background

[3] The Applicant entered Canada on January 18, 2007 and shortly thereafter made a claim for refugee protection which was subsequently rejected on July 16, 2008 by the Refugee Protection Division of the Immigration and Refugee Board on the basis that an internal flight alternative was available to him in Mexico. Leave seeking a judicial review of this decision was denied.

[4] The Applicant then submitted a pre-removal risk assessment application on February 26, 2009. By decision dated April 14, 2009 the pre-removal risk assessment was found to be negative.

[5] On June 9, 2009, the Applicant was required to report for removal for August 10, 2009. In the interim, on July 23, 2009, an application for permanent residence under the spouse or common law partner in Canada class was submitted on behalf of the Applicant. It should be noted that the Applicant married a Canadian citizen on June 6, 2009 with whom he had previously fathered two children in Canada on June 25, 2008 and July 20, 2009 respectively. The August 10, 2009 removal was deferred in light of the birth of the second child.

[6] However, on October 14, 2009 the Applicant was again directed to report for removal for October 30, 2009. The Applicant sought a deferral of that removal from the enforcement officer on the basis that he had an outstanding inland sponsorship application as a spouse of a Canadian citizen, and on the basis that his wife was experiencing post-partum depressive symptoms requiring his continued presence with her and taking into account the best interests of his two young Canadian born children.

[7] The enforcement officer refused this deferral request. However the Applicant's deferral was stayed by a judge of the Federal Court on October 29, 2010 pending the outcome of this judicial review.

The issues

[8] The Applicant is seeking what amounts to a permanent deferral of his removal pending the disposition of his permanent residence application under the spouse or common law partner in Canada class. Therefore, the principal issue in this application is whether the enforcement officer erred in refusing to defer the Applicant's removal from Canada pending the disposition of this application.

[9] The Applicant also argues that psychological ailments affecting his spouse and the best interest of his children were not adequately taken into account by the enforcement officer when refusing to defer his removal from Canada.

The standard of review

[10] The decision of an enforcement officer not to defer the removal of a person subject to a removal order under the Act is one involving the exercise of discretion, though a very limited discretion. Pursuant to the teachings of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, discretionary decisions are to be reviewed on a standard of reasonableness. This was the standard applied in *Chetaru v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 436 in the judicial review of the decision of another

enforcement officer refusing to defer a removal. Consequently, I shall apply a standard of reasonableness in this judicial review.

Analysis

[11] This application can be decided within the principles set out by the Federal Court of Appeal in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, 309 D.LR. (4th) 411; [2009] F.C.J. No. 314 (QL) ("*Baron*") referring approvingly to the decision of Pelletier J.A. in *Wang v. Canada*, 2001 FCT 148; [2001] 3 F.C. 682; [2001] F.C.J. No. 295 (QL) ("*Wang*") and to the decision of Nadon J.A. in *Simoes v. Canada (Minister of Citizenship and Immigration)* (2000), 187 F.T.R. 219; [2000] F.C.J. No. 936 (QL) ("*Simoes*").

[12] In *Wang*, Pelletier J.A. stated the following at paragraphs 48 and 52 [emphasis added]:

> It has been recognized that there is a discretion to defer removal though the boundaries of that discretion have not been defined. The grant of discretion is found in the same section which imposes the obligation to execute removal orders, a juxtaposition which is not insignificant. At its widest, the discretion to defer should logically be exercised only in circumstances where the process to which deferral is accorded could result in the removal order becoming unenforceable or ineffective. Deferral for the mere sake of delay is not in accordance with the imperatives of the Act. One instance of a policy which respects the discretion to defer while limiting its application to cases which are consistent with the policy of the Act, is 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 re-admitting the person to the country following the successful conclusion of their pending application. Family hardship cases such as this one are unfortunate but they can be remedied by readmission.

> […]
> Turning to the issue in the underlying judicial review, the Removal Officer's refusal to defer the removal pending the disposition of the H&C application, I find no serious issue with regard to the Removal Officer's conduct. As set out above, a pending H&C application on grounds of family separation is not itself grounds for delaying a removal. To treat it as such would be to create a statutory stay which Parliament declined to enact. […]

[13] This approach was approved by the Federal Court of Appeal in *Baron* at paragraph 51 [emphasis in original]:

> 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.

[14] In this case, the personal safety of the Applicant is not at issue. The Refugee Protection Division of the Immigration and Refugee Board of Canada and the officer who carried out the pre-removal risk assessment both found that the Applicant had an internal flight alternative available to him within Mexico. Absent new evidence to the contrary, the enforcement officer did not have the authority to ignore or to overturn these decisions.

[15] Consequently, the principal issue in this application is whether the pending in-Canada spousal sponsorship application is a sufficient reason to defer the removal. In other words, does this application constitute one of the special considerations referred to in *Wang* and *Baron* which could allow the enforcement officer to defer the removal of the Applicant?

[16] As noted by Nadon J.A. in *Baron* at paragraph 50, the mere existence of an H&C application does not constitute a bar to the execution of a valid removal order. The same can be said of an in-Canada spousal application since the Act does not provide that such an application results in the deferral of a removal order. Though the minister has developed a public policy providing for a temporary administrative deferral of removal in certain circumstances for those who have submitted an in-Canada spousal application, the Applicant does not meet the eligibility criteria of

this public policy. The enforcement officer has no authority to modify this policy or to develop a new policy in order to accommodate the Applicant.

[17] Perhaps an enforcement officer may defer the removal if the decision on the in-Canada spousal application is imminent, thus possibly avoiding multiple displacements for the Applicant should his in-Canada spousal application be accepted; and perhaps the length of time for which an in-Canada spousal application has been pending may be a factor in determining if a decision on the application is impeding; however the simple fact that an in-Canada spousal application is pending does not justify a deferral absent special circumstances. The enforcement officer did not act unreasonably in refusing to defer the removal of the Applicant on this basis.

[18] The authority of an enforcement officer is precisely what the title of the position calls for: the enforcement of removals. The enforcement officer has a limited discretion concerning the timing of a removal, but his or her authority does not and should not extend to delaying a removal pending the outcome of an in-Canada spousal application where the Act itself or public policy does not provide for such a deferral and where the decision on the pending application is not imminent.

[19] Moreover, with respect to the presence of Canadian-born children, an enforcement officer is not required to undertake a substantive review of the children's best interests before executing a removal order. As stated by Nadon J.A. in *Baron* at paragraph 57, "an enforcement officer has no obligation to substantially review the children's best interest before executing a removal order. I believe that Pelletier J.A.'s Reasons in *Wang, supra*, support this view."

[20] Finally, concerning the Applicant's spouse's psychological state, the enforcement officer took this fact into account. However, the enforcement officer found that the Applicant had been provided ample opportunity to organize alternative arrangements for his spouse in preparation for his removal and that professional treatment for his spouse was amply available to her in Canada should the Applicant be removed. These were findings which fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para. 47).

[21] This case raises no important question warranting certification under paragraph 74(d) of the Act. Therefore, no such question shall be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

"Robert M. Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MARIO IVAN RIVERO RAMIREZ v. MPSEP
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