Federal Court  Cour fédérale

Date: 20101005

Docket: IMM-4488-09

Citation: 2010 FC 992

Ottawa, Ontario, October 5, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

RONGFENG GUAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY and THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of an Inland Enforcement Officer (Officer) of the Canada Border Services Agency (CBSA), dated September 8, 2009 (Decision), which refused the Applicant's request for a deferral of removal.

BACKGROUND

[2] The Applicant is a citizen of China. He came to Canada on August 20, 2002 to visit his parents and sister, who are Canadian citizens living in Toronto.

[3] On May 23, 2003 the Applicant filed a Convention Refugee claim. The Refugee Protection Division (RPD) refused his claim because he failed to provide sufficient evidence that he is a member of the Falun Gong movement and a person of interest to the Chinese authorities. The Applicant's Pre-Removal Risk Assessment (PRRA) application also was refused because he had submitted no new evidence to overcome the credibility issues raised by the RPD. He claims he did not know that he could present new evidence. He did not challenge his negative PRRA determination in this Court.

[4] On August 18, 2006, the Applicant applied to remain in Canada as a permanent resident based on humanitarian and compassionate (H&C) grounds. The Applicant claims that he is established in Canada, his parents and sister are Canadian citizens, his wife and children residing in China depend upon his income in Canada for their support, and that he would be at risk if he were to return to China. He furnished for inclusion in his H&C application new evidence in support of his claim to membership in the Falun Gong. To date, no decision has been made on this application.

[5] On August 18, 2009 the CBSA advised the Applicant that he was to report for removal from Canada on September 12, 2009. The Applicant requested a deferral of the removal order on the basis that he has an outstanding H&C application with risk factors. The Officer denied this request for deferral on September 8, 2009.

[6] On September 11, 2009 Justice O'Keefe granted a stay of execution of the removal order pending the outcome of this judicial review proceeding.

DECISION UNDER REVIEW

[7] In his Decision of September 8, 2009, the Officer observed that enforcement officers have "very little discretion" to defer removal orders. Indeed, they are obligated under section 48 of the Act to enforce such orders "as soon as reasonably practicable." The Officer noted that submitting an H&C application, in and of itself, is not an impediment to removal. Parliament does not provide for a statutory stay in such circumstances. The Officer noted that, although the Applicant's H&C application had been received on August 18, 2006, as of February 4, 2009 it would be at least 18 to 24 months before the application would be assigned to an officer for review. Nevertheless, the application would continue to be processed after the Applicant's removal to China and he would be informed of the outcome. For these reasons, the Officer concluded that a deferral of removal was unwarranted.

[8] The Officer acknowledged the Applicant's claims that he was established in Canada and, more specifically, that he had a full-time job and relatives in Canada, as well as a family in China that relies on his income. Pursuant to section 209 of the Regulations to the Act, however, a work permit becomes invalid when a removal order made against the permit holder becomes enforceable. Therefore, the Applicant was no longer legally entitled to work in Canada. Moreover, the Applicant was advised when applying for the PRRA that his removal order would be enforced following a negative determination and that he should make arrangements regarding his work and family in the event that such an outcome transpired.

[9] Ultimately, the Officer found insufficient evidence that the Applicant faced exceptional circumstances warranting a deferral of the removal order on grounds that he was established in Canada. The Officer made reference to a statement from Applicant's counsel that new evidence regarding the Applicant's membership in Falun Gong, which was pertinent to the H&C claim, was forthcoming. The Officer noted in the Decision, however, that such evidence had not yet come before him. In the absence of such evidence, he was not satisfied that the alleged risk faced by the Applicant merited a deferral of the removal order.

[10] In a letter dated September 9, 2009, the Officer acknowledged his receipt that same day of the aforementioned new evidence. Upon reviewing it, he found that it failed both to corroborate the alleged risk that the Applicant would face upon his return to China and to prove that the Applicant faced exceptionally difficult circumstances meriting a deferral of the removal order.

ISSUES

[11] The issues on this application can be summarized as follows:

1. Whether the Officer ignored relevant factors;

2. Whether the Officer applied the correct legal test.

STATUTORY PROVISIONS

[12] The following provisions of the Act are applicable in these proceedings:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

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.

[13] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 are also applicable in these proceedings:

209. A work permit becomes invalid when it expires or when a removal order that is made against the permit holder becomes enforceable.	209. Le permis de travail devient invalide lorsqu'il expire ou lorsqu'une mesure de renvoi visant son titulaire devient exécutoire.

STANDARD OF REVIEW

[14] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[15] Reasonableness is the appropriate standard upon which to review whether the Officer erred in his treatment of the evidence. The weight an officer chooses to assign to evidence is a discretionary decision which deserves deference. See *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315, [1993] F.C.J. No. 732 (F.C.A.), and *Dunsmuir*, above, at paragraphs 51 and 53.

[16] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process and [also] with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47. Put another way, the Court should intervene only if the Decision 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."

[17] Issues regarding the legal test applied by the Officer are to be determined on a standard of correctness. See *Golesorkhi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 511, [2008] F.C.J. No. 637 at paragraph 8.

ARGUMENTS

The Applicant

Officer Ignored Relevant Factors

[18] The Applicant says that the Officer failed entirely to consider that his H&C application had been outstanding for three years through no fault of the Applicant. This Court has consistently recognized the ability of an enforcement officer to exercise his discretion to defer a removal order where an applicant has made a timely H&C application that remains outstanding through no fault of the applicant. See *Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 682; *Bhagat v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2009] F.C.J. No. 54 (F.C.); *Harry v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1727 (F.C.); *Simoes v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 936 (F.C.); and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[19] As this Court recently stated in *Lisitsa v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 599 at paragraph 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.

[20] Further, in concluding that the H&C application would continue following the Applicant's removal from Canada, the Officer failed to consider that the removal would effectively render illusory the purpose of the H&C application as a humanitarian remedy. Although not determinative, this consideration was relevant. See *Baker*, above.

[21] The Applicant has waited three years for his H&C decision and must wait an additional 18 to 24 months. This is excessive. There are few, if any, cases where removal will not be attempted within five years. The Officer should have considered the importance of providing fair procedures, as was contemplated by Parliament when it provided for an inland H&C remedy for non-citizens in Canada. See *Baker*, above; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1180 (F.C.A.); *Melo v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 403 (F.C.); *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.).

Officer Applied the Wrong Legal Test

[22] The Officer erred when he asked whether the evidence provided by the Applicant corroborated his fear of removal to China. This is the wrong legal test. The Officer should have asked whether the evidence was sufficient to give rise to a credible concern about risk such that another officer, mandated to consider the issue in the context of an H&C application and with the expertise to do so, should consider that evidence before the Applicant is removed from Canada. See

De Gala v. Canada (Minister of Employment and Immigration), [1987] F.C.J. No. 7 (F.C.); *Ochnio v. Canada (Minister of Employment and Immigration)*, [1985] F.C.J. No. 816 (F.C.).

[23] Moreover, the Officer erred by addressing directly the issue of risk, which is an issue best left for an officer with expertise.

[24] The Officer should have recognized that the purpose of the H&C application is to catch at-risk applicants who "fall through the cracks" because they do not understand how the process works. The Applicant's failure to provide new evidence in his PRRA was due to such a misunderstanding. The Officer also should have recognized that applicants may face risks that fall short of those required to meet the statutory definition of refugee or person in need of protection but that are nevertheless compelling. See *Pinter v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 366 (F.C.) at paragraphs 2 and 5-6; *Ramirez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1763 (F.C.) at paragraphs 46-47; *Melchor v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1600 (F.C.) at paragraphs 19-20; *Sahota v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 882 (F.C.) at paragraphs 8, 12; *Thalang v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1001 (F.C.) at paragraph 14.

[25] For the above-stated reasons the Officer's decision was unreasonable.

The Respondents

Officer Has Limited Discretion to Defer Removal

[26] It is trite law that an enforcement officer has the authority to defer a scheduled removal order in very limited circumstances only. These circumstances are tied to an applicant's physical ability to comply with the order; for example, fitness to travel. See *Pavalaki v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 338 (F.C.); *Wiltshire v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 571 (F.C.) at paragraph 6; *Simoes*, above; *Wang*, above, at paragraphs 31-32, 45; *Prasad v. Canada (Minister of Citizenship and Immigration)*, 2003 F.C.T. 614 (F.C.) at paragraph 32; *Padda v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1081 at paragraphs 8-9.

[27] The Act does not provide for the reconsideration of decisions to execute a valid removal order. In the instant case, the duty of the Officer was merely to "particularize when and where the deportation order [was] to be executed" and to ensure that the removal took place as soon as reasonably practicable pursuant to section 48 of the Act. The Officer found that the Applicant's circumstances did not merit a deferral of removal. The Officer had no discretion with respect to removal, and therefore his failure to reassess cannot constitute grounds for judicial review. See *Brar v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1527 (F.C.); *Williams v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1133 (F.C.).

Deferral Request Is Not a Mini H&C

[28] An enforcement officer has neither the duty nor the discretion to consider various H&C factors in determining whether or not to defer removal. See *Benitez v. v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. 1802 (F.C.) at paragraph 19; *Wright v. Canada (Minister of Citizenship and Immigration)* (2002), 20 Imm. L.R. (3d) 97 (F.C.) at paragraph 15; *Thirunavukkarasu v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1350 (F.C.) at paragraphs 4-5; *John v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 583 (F.C.) at paragraph 20.

[29] Furthermore, to require the Officer to speculate on the effect that a removal order would have on an H&C application is to require him to go beyond the scope of his duties and to conduct the kind of analysis reserved for an H&C officer. The Officer did not err by concluding that an H&C decision was not imminent. The Officer in this case reasonably exercised the narrow discretion afforded him with respect to granting a temporary deferral.

Applicant's Reply

Limited Discretion

[30] The Applicant acknowledges the Officer's limited discretion to defer a removal order as well as the absence in the Act of stipulated grounds for granting a deferral. The Applicant takes issue, however, with the Respondents' misstatement of the reasoning in *Wang*, above, and other cases.

[31] Contrary to what the Respondents have stated, this Court has consistently recognized that, in his or her limited discretion, an enforcement officer can consider factors other than the Applicant's physical ability to comply with the order. One such factor is an H&C application that was brought in a timely manner but remains outstanding due to a backlog in the system. See *Simoes*, above; *Wang*, above; *Brown v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1276 (F.C.) at paragraphs 15-16; *Romans v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1201 (F.C.A.) at paragraphs 8-9; *Kahn v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1365 (F.C.) at paragraph 24.

[32] The Applicant acknowledges that a deferral request should not require an enforcement officer to engage in a mini H&C. However, contrary to the Respondents' assertions, an enforcement officer does have the discretion to consider relevant factors pertaining to the H&C application, namely how long the application has been pending and, tentatively, whether that application has any merit.

[33] Contrary to the Respondents' assertions, the jurisprudence does not indicate that enforcement officers need not consider relevant H&C factors. In *Benitez*, above, at paragraph 19,

Justice McKeown indicated that it is up to the Applicant to identify factors relevant to the enforcement officer's exercise of discretion and to bring them to the officer's attention:

> In essence, the submissions of the applicant's counsel do not properly construe the system as set out in the present Immigration Act, i.e. the proper place for the full consideration of all of an applicant's H&C factors is before the H&C Officer, not the removals officer. In my view, the removals officer is entitled to rely on what the applicant's counsel determines to be the overriding factor warranting deferral. As such, counsel must be very selective about what he or she chooses to point out to a removals officer. I reiterate that the current Act does not give a removals officer the discretion to consider various H&C factors in determining whether or not to defer removal of the applicant from Canada.

[34] In *John v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.T. 420 the H&C application had already been rejected. Justice Snider stated at paragraphs 20 and 21:

> 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.
>
> With respect to the case before me, I note that the Applicant had every opportunity to present her concerns for her daughter at the H&C application stage. Her H&C application was rejected and no application for judicial review of that decision was commenced. Alana's medical condition has not changed; no evidence was presented to the Officer that could not have been provided with the H&C application. The practical result of granting the Applicant's application in this case would be to place in the hands of the removals officer the obligation to revisit the H&C decision.

[35] Although there appears to be a lack of consensus in the Court as to whether an enforcement officer has a duty to consider *any* H&C factor, the cases above indicate that where relevant factors have been brought to the officer's attention, the officer must at least consider them. At minimum,

there is a consensus, grounded in *Wang*, above, that enforcement officers may defer a removal order where an H&C application is made in a timely fashion but a determination has yet to be made. Such is the Applicant's case. See *Simoes*, above; and *Wang*, above.

[36] In addition, although the Respondents failed to address it, the Officer erred by discounting the risks facing the Applicant in China. These risks include death, extreme sanction and inhumane treatment. The Court in *Wang*, above, recognized that, in such circumstances, a deferral of a removal order should normally be granted pending the H&C hearing. See also *Simoes*, above. If the Respondents, in paragraph 12 of their Memorandum, subsumed these risks factors under general H&C factors (which, according to the Respondents, the Officer should not consider in exercising his discretion), they were in error.

[37] The discretion to defer the execution of a removal order must be exercised in a manner that accords with Constitutional norms. As a member of the Falun Gong, the Applicant faces risks in China that engage his rights under section 7 of the Charter. This information is new to his H&C application. The Officer, in his discretion, should have deferred removal in circumstances such as these where the Applicant's rights may be breached irreparably. See *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3.

[38] Finally, in calculating the timeliness of an H&C application, the jurisprudence of this Court indicates that the relevant consideration is not how much time remains before the application will be heard but rather how long it has been since the application was filed. In the instant case, however,

the Officer observed that the application would not be assigned to an officer for at least 18 to 24 months. This Court has found that approach unacceptable. In *Bhagat*, above, Justice Lemieux observed at paragraph 18:

> It is clear the Enforcement Officer calculated timeliness not in terms of when the H&C application was filed but when it would be decided. This approach raises a serious issue.

[39] Also with respect to timeliness, Justice Gibson in *Harry*, above, concluded that an H&C application, brought one year before the removal order, had been brought in a timely manner and that failure to weigh this factor properly in an application for deferral of a removal order raised a serious issue.

[40] In the instant case, the Applicant's H&C application was filed in 2006. It was filed in a timely manner and has been delayed through no fault of the Applicant.

ANALYSIS

[41] It is well understood that an enforcement officer has a limited discretion to defer removal. However, this Court has consistently recognized that where an applicant has made a timely H&C application that remains outstanding at the time of the deferral request, then the officer can consider this factor as a special circumstance in deciding whether to exercise his discretion to defer under section 48 of the Act. See *Bagri*, *Wang*, *Baker*, *Bhagat*, *Harry*, and *Simoes*, above.

[42] My review of the Decision convinces me that the Officer in this case, although he acknowledged the outstanding H&C application, failed to turn his mind to whether it amounted to a special circumstance on the facts of this case. The Applicant, at the material time, had a timely H&C application outstanding for some three years through no fault of the Applicant. Not to recognize this as a possible factor in a deferral decision would be to secretly undercut the H&C process from the perspective of applicants. In my view, this is not entirely remedied by the fact that the H&C process can be continued outside Canada.

[43] As the Applicant points out, following *Simoes*, above, 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 travel and pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system. In the present case we also have the same error that occurred in *Bhagat*, above, at paragraph 18: "it is clear that the Enforcement Officer calculated timeliness not in terms of when the H&C application was filed but when it would be decided."

[44] I note also that in *Harry*, above, Justice Gibson calculated that an H&C application was outstanding in terms of the time lapse between the time the H&C application was filed and when the applicant in that case was scheduled to be removed. Moreover, as I pointed out in *Villanueva v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 543 (Can. LII), Justice Zinn in *Williams v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 274 at paragraph 36 made it clear that

> [w]here the Minister has failed in his duty to promptly process an H&C application, then this should be a relevant consideration when determining when it is "reasonably practicable" to remove that applicant. Where an H&C application was filed promptly and the only reason why it has not been determined lies in the hands of the Minister, then the Minister should not be allowed to rigorously enforce his duty of removal when he has been delinquent in his duty to process applications that may make the removal unnecessary or invalid.

[45] In the present case, although asked to defer on the basis of a timely H&C application that was long outstanding through no fault of the Applicant, the Officer failed to turn his mind to this issue in deciding whether this was a special circumstance that affected the reasonable practicality of removal. In my view, this was a reviewable error and the Decision must be returned for reconsideration.

[46] The Applicant has raised other reviewable errors. However, there is no need for extensive reasons on the additional points.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed, the Decision is quashed and the matter is returned for reconsideration by a different officer.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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