

Federal Court



Cour fédérale

Date: 20101201

Docket: IMM-1937-10

Citation: 2010 FC 1212

Ottawa, Ontario, December 1, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

LIANA GURSHOMOV

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant is an Israeli citizen living in Canada with her three children. After what can only be considered an unmitigated administrative error (in which she was induced to believe that her H&C application was proceeding when in fact it had been denied), the Applicant was ordered to be deported. Her deferral of removal request was denied. A stay was granted and this is the judicial review of the refusal to defer.

II. BACKGROUND

[2] The Applicant entered Canada in late 2003 with her husband (the couple are still married but separated) and their children. After their refugee claim was denied, the Applicant's husband filed an H&C application (1st H&C) on May 28, 2004 which was based on his circumstances.

[3] In January 2008 the Applicant and her husband separated. As a consequence, the Applicant filed her own H&C application (2nd H&C) on May 27, 2008.

[4] As matters turned out, the 2nd H&C was denied on February 5, 2009 and the 1st H&C, filed five years previously, was denied on March 9, 2009. The 2nd H&C denial was given to the Applicant at the same time as receiving her negative PRRA. She contends that she did not appreciate that her H&C was denied and her subsequent conduct is consistent with her contention.

[5] On April 7, 2009 the Applicant's counsel checked the CIC website which indicated that one H&C was pending. Counsel and the Applicant assumed that it was the 2nd H&C that was pending.

[6] CIC confirmed to counsel that the 2nd H&C was pending and that additional fees were required. The Applicant paid the additional fees and made further submissions on May 8, 2009. These further submissions were augmented by additional submissions on May 28, 2009 and July 22, 2009, all in the belief that the 2nd H&C had not been decided. This H&C addressed, in part, the Applicant's concerns for her and her children's safety.

[7] On July 24, 2009, two days after the last set of submissions, the Applicant requested deferral of any removal on the basis of the “pending” 2nd H&C. That deferral request was granted by CIC on August 14, 2009.

[8] It was on March 25, 2010 that the Applicant became aware that the 2nd H&C had been dismissed back in February 2009. The Applicant learned of the circumstance because she had just been informed of her removal itinerary.

[9] The next day the Applicant filed a third H&C (3rd H&C) application incorporating all of the materials filed in respect of the 2nd H&C.

[10] By March 31, 2010 the Applicant was notified of the latest travel arrangements; she immediately requested a deferral of removal which was denied.

[11] In the refusal to defer the Removals Officer noted that the 3rd H&C decision was not imminent and that two earlier H&C decisions had been made.

[12] The Officer discounted any risk to the Applicant by virtue of a return to Israel where her abusive husband now lived. The Officer’s attention with respect to the “best interests of the children” was directed primarily at their ability to adjust to a new locale. No attention was paid to the Ontario custody order in favour entirely of the Applicant nor to the evidence, however weak it may have been, that Israel would not respect the Ontario order.

III. ANALYSIS

[13] The overarching standard of review for deferral cases is reasonableness (*Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81). Issues of procedural fairness are subject to the correctness standard. Finally, a best interests of the children analysis is subject to the reasonableness standard of review (*Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165).

[14] The pivotal point in this judicial review is the confusion surrounding the 2nd H&C – a confusion caused by the Respondent and experienced by both parties.

[15] The Court is cognizant of the limited jurisdiction of a removals officer to address the consequences of the 2nd H&C error. However, the status of an H&C, and its timeliness, can be factors in a deferral decision.

... With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.

Baron, above, at para. 51.

[16] In only addressing the timing of the Applicant's pending 3rd H&C application, the Officer failed to address the substantive element – the reason for what, on its face, is a late H&C. The real reason for the late H&C application was the actions of another branch of the Canadian government which led the Applicant to believe that her 2nd H&C was under active consideration.

[17] In addition, the 2nd H&C raised issues of personal safety which had never been addressed.

[18] Therefore, the Court concludes that this is one of those instances where the Removals Officer failed to properly address a relevant consideration (see *Simoes v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 936), thus constituting an error of law and one where “special considerations”, as mentioned in *Baron*, above, are present.

IV. CONCLUSION

[19] This judicial review is granted, and the decision not to defer is quashed. The Applicant may file another deferral request if she deems it necessary.

[20] There is no question for certification.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is granted, and the decision not to defer is quashed. The Applicant may file another deferral request if she deems it necessary.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1937-10

STYLE OF CAUSE: LIANA GURSHOMOV

and

THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 17, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

DATED: December 1, 2010

APPEARANCES:

Ms. Jennifer Egsgard FOR THE APPLICANT
Ms. Aviva Basman

Mr. Laden Shahrooz FOR THE RESPONDENT

SOLICITORS OF RECORD:

REFUGEE LAW OFFICE FOR THE APPLICANT
Toronto, Ontario

MR. MYLES J. KIRVAN FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario