Federal Court  Cour fédérale

Date: 20111222

Docket: IMM-3019-11

Citation: 2011 FC 1499

Ottawa, Ontario, December 22, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

DELORIS PHILLIPS, VANESSA PHILLIPS AND DESRON PHILLIPS (BY HIS LITIGATION GUARDIAN DELORIS PHILLIPS)

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] seeking to set aside a decision of Inland Enforcement Officer C. Annamunthodo [the officer] of the Canada Border Services Agency [CBSA], who refused the Applicants' request for a deferral of their removal pending the completion

of a civil litigation matter which could take more than two years to resolve depending on the circumstances that the litigation may reveal.

I. Background

[2] The Applicants, Ms. Deloris Phillips [the principal Applicant] and her two children Vanessa and Desron Phillips, arrived in Canada in August 2001 from Saint Vincent and the Grenadines. The principal Applicant, invoking an abusive partner in her home country, initiated a refugee claim for herself and her children in January of 2003. The application was rejected in July of 2003 and the subsequent application for leave to commence judicial review was also denied in October of the same year.

[3] When the principal Applicant failed to appear for her pre-removal interview in December of 2005, an arrest warrant was issued against her. After moving and failing to notify immigration of her change of address, the principal Applicant was eventually arrested and detained on December 8, 2010 and released five days later on a performance and cash bond.

[4] While in detention, the principal Applicant was notified she may apply for a pre-removal risk assessment [PRRA], but a negative PRRA decision was delivered on February 19, 2011 and leave to commence judicial review of the PRRA decision was denied on May 4, 2011.

[5] In a final attempt to postpone their removal, scheduled for May 13, 2011, the Applicants requested a deferral on May 3, 2011. The officer refused the application on May 4, 2011, but the subsequent motion for an order to stay the execution of removal order was granted on May 12, 2011, pending the hearing of the application for leave and for judicial review of the officer's decision, which was granted on September 27, 2011.

II. Impugned Decision

[6] The deferral request consisted of a letter from the Applicants' lawyer, an affidavit from the principal Applicant, and attached exhibits: a statement of claim and two additional letters from the Applicants' lawyer.

[7] The May 3, 2011 letter requested a deferral from removal until an ongoing litigation matter arising from injuries suffered by Desron Phillips on November 4, 2009 could be concluded. The letter indicates that if Desron and his mother were to leave Canada at this time, the claim for damages against the owner and landlord of a property where Desron was injured could not proceed and that significant injustice would result if a deferral was not granted (Application Record [AR] at 14 and 17).

[8] An affidavit from the principal Applicant explained that on November 4, 2009, Desron was in the family's apartment making something to eat "when the cupboards over the counter fell down onto him," that the principal Applicant never imagined that "the cupboard would actually fall on [her] child," and that a "portion of the cupboard" tore through his arm, leaving him hospitalized and then bedridden at home for a month (AR at 20, Affidavit of Deloris Phillips [ADP] at para 5).

[9] The Applicants retained a personal injury lawyer who sent a letter to the owner of the apartment, but the letter went unanswered. As a result, on February 8, 2010, the Applicants filed a $100,000 claim against the owner (AR at 21, ADP at paras 7 and 8). Incidentally, I note the Applicants' statement of claim provides a slightly varied description of the November incident in that it was not "cupboards" that fell down on Desron, but rather a "cupboard door" (AR at 27, Statement of Claim at para 4).

[10] The principal Applicant explained in her affidavit that she was appointed litigation guardian for her son and that as a result, she was required to be present for all of her son's litigation related meetings, court dates, and procedures. She also indicated that examinations for discovery were scheduled for July 5, 2011 and their attendance was mandatory (AR at 21, ADP at paras 9 and 10).

[11] The principal Applicant explains that when she notified her lawyer of their imminent removal from Canada, he told her it was imperative that they be physically present in Canada and that if they were not, their claim would be at an end. When she enquired as to whether there were any alternatives to continue the litigation should she be removed, her lawyer indicated they were at a critical stage in the litigation and that removal at this point would be both disastrous and irreparable to their claim (AR at 21, ADP at para 11). In support, the principal Applicant referred to a letter from her lawyer stating that her presence in Canada "is required for her to complete the above claim and to act as litigation guardian for her son" (AR at 35).

[12] As a consequence of the claim being dropped, according to the principal Applicant, Desron would not be able to receive compensation for the trauma which he was forced to endure, that they would not be compensated for the time and money poured into the litigation, and that Desron would be unable to receive any reconstructive surgery or therapy which could potentially form part of a settlement (AR at 21, ADP at para 12).

[13] In the deferral notes and decision, the officer notes that the CBSA has an obligation under subsection 48(2) of IRPA to enforce removal orders as soon as a negative PRRA decision is delivered, providing there are no impediments to removal. The officer notes that "involvement in mediation or a civil court proceeding does not, in and of itself, constitute a stay of removal nor is it an impediment to removal" and that there was no evidence submitted as to any decision, injunction

or stay issued by a provincial court preventing removal (AR at 3). Finally, there was no evidence submitted that the Applicants' presence was required for medical examination, depositions, or trial, nor any indication that their lawyer could not continue to represent them in their civil proceedings after their departure from Canada. As a result, the officer concluded that there was no impediment to removal and deferral of removal was not warranted (AR at 7).

III. Position of the Parties

[14] The Applicants raise two issues. First, they argue that the officer ignored the duty imposed by *Ramada v Canada (Solicitor General)*, 2005 FC 1112 at para 3, [2005] FCJ 1384 [*Ramada*], to properly consider the "exigent personal circumstances" of the Applicants, particularly those of sixteen year old Desron. Though the officer was made specifically aware that the interests of a child were at stake, the decision makes no mention of the fact Desron is a minor and appears not to consider his interests from this perspective. Second, the Applicants argue that the officer did not understand the ramifications upon their litigation claim if they were to be removed. He failed to consider that their claim would be dismissed if they were to leave Canada, noting only that there was no evidence their lawyer could not continue to represent them.

[15] The Respondent submits that in *Johnson v Canada (Solicitor General)*, 2004 FC 1286 at para 8, [2004] FCJ 1572 [*Johnson*], this Court has recognized a pending lawsuit is not a bar to removal. In addition, the *Rules of Civil Procedure*, RRO 1990, Reg 194 [*Rules of Civil Procedure*], most notably rules 34 and 36, allow for lawsuits to be conducted from abroad. The Respondent also argues that the completion of the lawsuit for damages does not fall within the category of "exigent personal circumstances," invoking instead broader "best interest of the child" considerations which are more appropriately dealt with in an application for permanent residence based on humanitarian and compassionate grounds. Finally, should it be necessary for the Applicants to offer testimony as

witnesses in their injury claim, the Respondent notes that they are free to apply for a Minister's permit pursuant to section 24 of IRPA so as to enter Canada.

IV. Issue and Standard of Review

[16] The Court must determine whether the officer erred in refusing to defer the Applicants' removal. The applicable standard of review to such an analysis is that of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25, [2009] FCJ 314 [*Baron*]). As a result, the decision will stand if the officer's conclusion falls within a range "of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

V. Analysis

[17] The removal order made against the Applicants must be enforced "as soon as is reasonably practicable" (Subsection 48(2) of IRPA) and there is no doubt the officer's discretion to defer removal is limited (*Baron*, above at para 49; *Simoes v Canada (Minister of Citizenship and Immigration)*, 187 FTR 219 at para 12, [2000] FCJ 936, [*Simoes*]).

[18] In *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682 [*Wang*], reasons adopted by the Federal Court of Appeal in *Baron*, above, this Court made clear that a deportation order is mandatory and the Minister is bound by law to execute it. The Court further stipulated that an alternative remedy should weigh heavily in the balance against deferral. In fact, it has been stated that deferral should be reserved for cases where the failure to defer will expose the applicants to the risk of death, extreme sanction or inhumane treatment (*Wang*, above, at paras 45 and 48; *Baron*, above, at para 51).

[19] Nevertheless, it has been recognized that in deciding when it is "reasonably practicable" for a removal order to be executed, the officer may consider various factors such as illness, children's school years, pending births or deaths, lack of proper travel documents, other impediments to traveling, and pending H&C applications that were brought on a timely basis (*Simoes*, above at para 12; *Baron*, above, at para 51; *Ramada*, above, at para 3).

[20] In a more recent decision, one at the heart of the Applicants' argument, this Court has stated the officer "must consider whether exigent personal circumstances, particularly those involving children, justify delay [emphasis added]" (*Ramada*, above, at para 3). The Applicants argue that Desron's pending injury claim is precisely this sort of exigent personal circumstance. While the officer determined otherwise, the Applicants argue the officer did not take into consideration Desron's age and status as a minor since this is not explicitly mentioned in the decision. As a result, the Applicants are of the view the officer failed to properly consider whether the claim was an exigent personal circumstance. My colleague Justice Donald Rennie agreed that at the very least, this was an issue that deserved to be tried.

[21] After examining the issue closely however, I must disagree with the Applicants' assertion. The documents presented to the officer made it clear that Desron was a minor and that the principal Applicant was her son's litigation guardian. That the officer did not explicitly refer to Desron as a minor does not mean the officer was not aware of the situation or did not take it into consideration when rendering the decision. In addition, I note that the officer did quote from the Applicants' lawyer's letter which informed the officer that the principal Applicant was acting as litigation guardian for her son. Lastly, I fail to see what would have been obtained further by explicitly referring to Desron as a minor.

[22] Having determined the officer properly considered the issue raised in the deferral request, I am left to examine whether the officer's conclusion itself was reasonable. In light of the facts before me and the jurisprudence of this court, I believe the decision not to grant deferral was reasonable. For one, this Court has previously rejected an ongoing lawsuit as a cause for deferral. In *Johnson*, above, Justice Von Finckenstein stated that he found it difficult to accept that the launching of a lawsuit could be a bar to deportation proceedings: "If I were to hold otherwise, any Applicant could commence a civil action to avoid removal." (*Johnson*, above, at para 8). While the Applicants' claim is not a lawsuit against the Crown, as it was in that case, the same logic prevails. Citing *Gosczyniak v Lewis*, [2001] OJ 3622, 16 Imm LR (3d) 74 [*Gosczyniak*], Justice Von Finckenstein added that lawsuits against the Crown could continue even if the plaintiff had residence abroad.

[23] Indeed, that decision and a review of the *Rules of Civil Procedure*, specifically rules 34 and 36, confirm that discoveries and the taking of evidence before trial can be conducted outside of Ontario. The Applicants offered no explanation as to why such provisions could not be employed in this case. The Applicants also failed to explain why the injury claim would consequently be at an end or why their removal would be both disastrous and irreparable to their claim, as alleged in the affidavit submitted to the officer (AR at 21, ADP at para 11).

[24] The Applicants argue the consequence to their claim would be that they would not be present for medical examinations and that they could not attend the settlement conference or the trial and that they could not be called as witnesses. However, the Applicants and their counsel can take appropriate steps to conduct a medical examination beforehand. Their presence is also not strictly required at the settlement conference or at trial. In *Gosczyniak*, above, Justice Templeton of the Ontario Superior Court of Justice noted that there are provisions in place for the plaintiff to seek leave to re-enter the country, that there was no credible evidence that the plaintiff would be unable

to instruct counsel from abroad, and that the plaintiff was not barred from prosecuting this case although a resident elsewhere (*Gosczyniak*, above, at para 67). Should these conclusions not apply to the present case, the Applicants remain free to apply for a Minister's permit to re-enter Canada.

[25] The fact is, there is an alternative to deferral – applying for a Minister's permit to enter Canada under section 24 of IRPA or employing the *Rules of Civil Procedure* to pursue the litigation claim from abroad – and this weighs heavily in the balance against deferral (*Wang*, above, at paras 45 and 48; *Baron*, above, at para 51). Because this is also not a case where the failure to defer will expose the applicants to the risk of death, extreme sanction or inhumane treatment (*Wang*, above, at paras 45 and 48; *Baron*, above, at para 51), I must conclude that the officer's decision to refuse deferral falls within a range of possible, acceptable outcomes, defensible in respect of the facts and law. As a result, the officer's decision must stand.

[26] Finally, I end by referring to the comments of Chief Justice Blais of the Federal Court of Appeal in *Baron*, above, at para 80:

> While enforcement officers are granted the discretion to fix new removal dates, they are not intended to defer removal to an indeterminate date. On the facts before us, the date of the decision on the H&C application was unknown and unlikely to be imminent, and thus, the enforcement officer was being asked to delay removal indeterminately. An indeterminate deferral was simply not within the enforcement officer's powers.

Likewise, the date of the Applicant's trial was unknown and unlikely to be imminent – estimates offered by counsel as evidence before the officer varied, suggesting trial could take place more than two years after discovery, itself scheduled for July 5, 2011 (AR at 32-34, and 35). I agree with the Chief Justice's view expressed in *Baron*, above, that an indeterminate deferral of the sort should not be within the enforcement officer's powers in this case.

[27] No question for certification arises and none was suggested by the parties.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No question is certified.

"Simon Noël"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

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