Federal Court  Cour fédérale

Date: 20141119

Docket: IMM-6009-13

Citation: 2014 FC 1091

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, November 19, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DELORES SPRING

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), for judicial review of a Canada Border Services Agency (CBSA) officer's refusal to grant a stay of removal to the applicant.

II. Facts

[2] The applicant is a citizen of Saint Vincent and the Grenadines (Saint Vincent). The applicant first arrived in Canada in September 1999 as a visitor, and stayed beyond her authorized stay until August 2002, before returning to Saint Vincent. The applicant came to Canada on February 21, 2003, as a visitor and then stayed in Canada without valid status.

[3] In 2009, the applicant filed an application for permanent residence on humanitarian and compassionate grounds, which was refused on May 24, 2012. A removal order was issued against her on June 5, 2012. On June 23, 2012, the applicant filed a pre-removal risk assessment (PRRA) application, which was rejected on February 25, 2013. On February 6, 2013, the applicant filed a new application for permanent residence on humanitarian and compassionate grounds, raising several significant changes to her medical situation, namely the exacerbation of her type II diabetes; the worsening of cataracts in both of her eyes; her morbid obesity and related health problems; her high-risk pregnancy of more than 32 weeks; the fact that her pregnancy posed a high risk of preeclampsia and intrauterine fetal death; and the violent atmosphere in the applicant's family in Saint Vincent (Applicant's Record, at pp 47-48).

[4] The applicant receives medical treatment and follow-up free of charge by the charity La Maison Bleue, which works together with the Centre de santé et de services sociaux de la Montagne and the Unité de médecine de famille de Côte-des-Neiges, as stated in the letters on record dated May 13, 2013, June 17, 2013, July 18, 2013, August 27, 2013, and September 16, 2013 (Applicant's Record, at pages 52, 62, 64, 75 and 90).

[5] On March 8, 2013, the applicant gave birth to her child, Josiah Spring—whose father is unknown—by emergency C-section, because the applicant's gestational diabetes could no longer be controlled with insulin.

[6] On July 10, 2013, the applicant filed a motion to stay her removal, which was scheduled for July 13, 2013. In support of her motion, the applicant raised the worsening of the state of her health as well as humanitarian and compassionate considerations (Applicant's Record, at pages 57-60).

[7] On July 26, 2013, and August 28, 2013, the applicant updated the CBSA regarding the worsening of the state of her health. In particular, the applicant presented the CBSA with two medical reports by Dr. Aggarwal Sanjay. Dr. Aggarwal contends that the applicant has hyperosmolar hyperglycemic state. That is apparently a worsening of the applicant's health and a fatal medical emergency for type II diabetics. The medical report dated August 28, 2013, states that a disruption to the applicant's care, like her removal, would put her life in danger. Furthermore, Dr. Aggarwal stated that the state of the applicant's health requires specialized medical care and highly supervised medical follow-up (Applicant's Record, at pages 64-79).

[8] On September 4, 2013, the applicant received a letter from the CBSA scheduling her removal for September 22, 2013. The next day, the applicant sent an application for an administrative stay of removal to the CBSA, raising as grounds the worsening of her health and the best interests of her child, who was approximately 6 months old at the time. That application was dismissed by the CBSA on September 10, 2013. On September 17, 2013, a motion to

reconsider the new facts was sent to the CBSA, in light of a report by Dr. Fanny Hersson-Edery, dated September 16, 2013. That report contains new evidence regarding the availability and cost of insulin in Kingston, the capital of Saint Vincent. On September 18, 2013, the CBSA informed the applicant that it was again refusing to stay her removal, which is the subject of the present application for judicial review.

III. Decision

[9] In a letter dated September 18, 2013, the removal officer stated that she had learned of the documents submitted by the applicant in support of her motion for a stay of removal. First, regarding the worsening of the state of the applicant's health, the officer stated that a doctor from Citizenship and Immigration Canada (CIC) considered Dr. Hersson-Edery's letter dated September 16, 2013, and found that diabetes care is available in Saint Vincent and that the [TRANSLATION] "country is well equipped with medication and medical facilities" (Officer's Decision, Applicant's Record, at p 31).

[10] The officer then addressed the best interests of the applicant's child. The officer stated that [TRANSLATION] "because the child will always be accompanied by his only parent, his interests are not brought into play" and that the child [TRANSLATION] "is not the subject of a removal order and is therefore under no obligation to leave the country". The officer relied on the findings of the PRRA officer to find that the applicant, who left Saint Vincent and [TRANSLATION] "knew how to cope and live a normal life" in Canada, did not demonstrate that she would face violence or a risk of persecution in Saint Vincent (Officer's Decision,

Applicant's Record, at page 32). The officer found that the applicant's situation does not justify a stay of removal.

IV. Statutory provisions

[11] The following statutory provisions of the IRPA apply:

Enforceable removal order **48**. (1) A removal order is enforceable if it has come into force and is not stayed.	**Mesure de renvoi** **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 (2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.	**Conséquence** (2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

V. Analysis

[12] It has been established that the standard that applies to reviewing a decision to refuse to grant a stay of removal is reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 (*Baron*)). The intervention of the Court is warranted if it is established that the removal officer's decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at paragraph 47).

[13] Removal officers have limited discretion when dealing with applications for a stay of removal under subsection 48(2) of the IRPA (*Baron*, above; *Wang v Canada (Minister of*

Citizenship and Immigration), [2001] FCJ 295 (*Wang*)). Factors that enable officers to grant a stay of removal may, on the one hand, be practical or organizational in nature, such as individual's capacity to travel or the need to fulfil school commitments. On the other hand, "compelling personal circumstances" may also justify the granting of a stay of removal, in limited circumstances (*Ramada v Canada (Solicitor General)*, 2005 FC 1112 (*Ramada*); *Canada (Minister of Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at paragraph 43). Furthermore, stay motions must be allowed "where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment" (*Ortiz v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 18 at paragraph 44; *Wang*, above at paragraph 48).

[14] In *Toth v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1051, Justice Russell W. Zinn stated that a change in the situation of a person who is being removed, such that the applicant faces a new or increased risk that has not been previously assessed, may, in the circumstances, justify a stay of removal:

> [23] Further, what *Suresh* teaches is that it is the assessment of an alleged risk that is required; it does not teach how it is to be assessed. I agree with the submission of the Minister that there are mechanisms available to assess risk other than a PRRA; the refugee determination process is one such a mechanism. A request for a deferral of removal is another. In *Wang*, Mr. Justice Pelletier, as he then was, wrote: "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 [emphasis added]." This observation, among others, was endorsed by the Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81. If there is evidence of changed circumstances of an applicant or of changed conditions within the

> country to which the applicant is being removed, such that the applicant faces a new or increased risk that has not been previously assessed, or the protection of the state has been compromised, then the enforcement officer must assess that risk and determine if a deferral of removal is warranted.

[15] First, the applicant maintains that the officer's finding regarding the state of her health is unreasonable. The applicant argues that the removal officer relied on the assessment by the CIC medical officer and failed to consider the ample evidence demonstrating the severity of the state of her health. Namely, the letter dated September 16, 2013, from the attending physician, Dr. Hersson-Edery, presented to the officer, reiterates the complex nature of the applicant's medical situation, the high cost, and the lack of available medication in Saint Vincent (Applicant's Record, at page 90). In her memorandum, at paragraph 99, the applicant stated the following:

> [TRANSLATION]
>
> [T]he record shows that the applicant's life was put at risk by the statement made by a doctor in another country that [TRANSLATION] "her condition should improve with time", whereas the applicant's attending physicians emphasized the seriousness of her problems, in particular, clearly, her diabetes, her vision problems and her morbid obesity, but especially that every health professional who has followed the applicant on a regular basis agrees that disrupting the specialized treatment that she is currently receiving would put her life in danger medically, without adequate medication and regular medical follow-up.

[16] In the context of a decision with similar circumstances (*Averin v Canada (Minister of Public Safety and Emergency Preparedness)* 2012 FC 1456), Justice James W. O'Reilly found that a removal officer's failure to consider the unavailability of adequate medical treatment in a

motion for a stay of removal may, depending on the circumstances, warrant the intervention of the Court:

> [10] However, the deciding officer did not address this issue and made no reference to the evidence on the point. In my view, given the evidence before him, the officer was obliged to consider whether the unavailability of medication for Mr Averin presented an "exigent personal circumstance" that justified a deferral. The mere fact that Mr Averin had an outstanding H&C application would not have justified a deferral. But the fact that Mr Averin would not have available to him the medication he required would have provided that justification. The officer did not consider that issue.
>
> [11] In my view, the officer's decision was unreasonable because it did not take account of an exigent personal circumstance facing Mr Averin. There was evidence before the officer showing that Mr Averin may not have access to the medication he required. The officer simply did not consider that evidence. Accordingly, I find that the officer's decision does not represent a defensible outcome based on the evidence before him, and the law requiring him to consider the applicant's personal circumstances. Therefore, I must grant this application for judicial review.

[17] However, the removal officer did not assess the facts related to the state of the applicant's health beyond a simple reiteration of the CIC medical officer's report that medical facilities and diabetes care are available in Saint Vincent, and that [TRANSLATION] "diabetes care is available in the country". This case turns on its own facts; considering the evidence in the record before the removal officer concerning the gravity and the exceptional circumstances surrounding the state of the applicant's health, the inadequate nature of the proof of available medical services in Saint Vincent to treat her medical condition, as well as the need for the applicant to obtain highly specialized medical follow-up, the Court finds that the intervention of this Court is warranted.

[18] Second, the applicant contends that the officer erred by not being alert, alive and sensitive to the best interests of her child (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 75). It was imperative for the officer to assess whether the arrangements that were made for the care of the applicant's child, in view of her departure, were adequate (*Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180 at paragraph 19; *John v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ 583). However, the assessment of the best interests of the child at the removal stage is limited to short-term considerations without looking at the overall situation.

[19] Furthermore, the assessment must deal with the interests of the child, rather than those of the parent(s). In *Ramada*, above, Justice O'Reilly found that the removal officer did not adequately consider the interests of the Canadian child of the applicant who was the subject of the removal:

> [7] I have some reluctance in granting this application for judicial review, out of concern for imposing on enforcement officers an obligation to engage in an extensive analysis of the personal circumstances of persons subject to removal orders. Obviously, officers are not in a position to evaluate all of the evidence that might be relevant in an application for humanitarian and compassionate relief. Their role is important, but limited. In my view, it is only where they have overlooked an important factor, or seriously misapprehended the circumstances of a person to be removed, that their discretion should be second-guessed on judicial review.
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> [Emphasis added.]

[20] In her decision, the officer stated that, because the applicant's child would accompany her in anticipation of her removal to Saint Vincent, [TRANSLATION] "his interests are not brought into play". Moreover, the officer stated that the child, who was born in Canada, has no obligation

to leave Canada and that ultimately, [TRANSLATION] "the decision to leave Canada with her child is still up to [the applicant]". The Court finds that even though the officer was unable, at the removal stage, to carry out an extensive investigation into the interests of the applicant's child, those explanations do not satisfy her obligation to be alert, alive and sensitive to the immediate interests of the applicant's child.

VI. Conclusion

[21] In light of the foregoing, the Court is of the view that the application must be allowed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed;

2. There is no question for certification.

"Michel M.J. Shore"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6009-13
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