Federal Court Cour fédérale

Date: 20160802

Docket: IMM-4759-15

Citation: 2016 FC 888

Ottawa, Ontario, August 2, 2016

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

DANIEL NEWMAN

Applicant

And

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Daniel Newman, is a citizen of the Czech Republic. Mr. Newman left his country years ago, prior to a competency hearing requested by his parents who were trying to institutionalize him against his will. He made unsuccessful refugee claims in four different

countries, before coming to Canada in January 2008. Mr. Newman is currently residing in Toronto, where he spends his days volunteering for a number of organizations.

[2] Since his arrival, Mr. Newman has had a long history of dealings with the Canadian immigration authorities, starting with a Convention refugee claim initiated in 2008 and culminating in the issuance, in October 2015, of a decision by an Inland Enforcement Officer [the Officer] of the Canada Border Services Agency [CBSA] refusing to defer the execution of a removal order against him. The removal of Mr. Newman to the Czech Republic was scheduled for October 26, 2015 but it was stayed by this Court until the determination of Mr. Newman's underlying application for leave and judicial review.

[3] This is Mr. Newman's application for judicial review of the Officer's decision. Mr. Newman contends that, in his decision, the Officer fettered his discretion by refusing to consider the exceptionally compelling circumstances of his case, and that the decision is thus unreasonable. He asks this Court to quash the Officer's decision and to order that a different CBSA enforcement officer reconsider his request for deferral.

[4] The sole issue to be determined is whether it was reasonable for the Officer to refuse to defer the execution of the removal order issued against Mr. Newman. For the reasons that follow, I conclude that Mr. Newman's application for judicial review must be dismissed. Having considered the decision, the evidence before the Officer and the applicable law, I find no basis for overturning the Officer's findings. The decision thoroughly reviewed the evidence and it falls within the range of possible, acceptable outcomes based on the facts and the law. I come to this

conclusion with some reluctance considering the challenging situation of Mr. Newman and his various contributions to the Canadian society. However, I am bound to apply the law as enacted by Parliament and interpreted by the Courts. Given the reasonableness standard of review and considering the applicable provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], I must defer to the Officer's decision.

II. Background

A. *Factual context*

[5] Mr. Newman's immigration history in Canada can be summarized as follows. His Convention refugee claim was refused by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada in August 2010. At the time, the RPD determined that Mr. Newman was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of IRPA. Mr. Newman's application for leave and judicial review of the negative RPD decision was subsequently denied by this Court in March 2011.

[6] Mr. Newman also submitted an application for permanent residence on humanitarian and compassionate [H&C] grounds in October 2010, as well as a Pre-Removal Risk Assessment [PRRA] application in June 2011. His PRRA and H&C applications were both rejected in December 2012. Mr. Newman filed an application for leave and judicial review of the negative H&C decision in February 2013. The judicial review was granted by this Court and the negative H&C decision was sent back for redetermination in August 2014 (Newman v Canada (Citizenship and Immigration), 2014 FC 803). However, the redisposition of Mr. Newman's

H&C application was refused in February 2015, and his subsequent application for leave and judicial review of this negative H&C decision was refused at the leave stage in August 2015.

[7] The removal of Mr. Newman was then scheduled for October 26, 2015. In the meantime, in September 2015, Mr. Newman had submitted a second H&C application, which remains pending. The Officer denied Mr. Newman's request to defer his removal but his deportation order was stayed on the eve of his scheduled departure, as Mr. Justice Shore considered that Mr. Newman's H&C application raised an unusual set of circumstances justifying the suspension of his removal (Newman v Canada (Minister of Public Safety and Emergency Preparedness), IMM-4759-15 (FC) (25 October 2015) [the Order]).

B. ***The Officer's decision***

[8] In his three-page decision, the Officer started by outlining Mr. Newman's immigration case file. The Officer then mentioned that Mr. Newman is under an enforceable removal order. As is typically done by CBSA enforcement officers in this type of decision, the Officer referred to subsection 48(2) of IRPA, which states that CBSA has an obligation to enforce removal orders as soon as possible. The Officer indicated that CBSA customarily proceeds with removal as soon as the order becomes enforceable and added that an enforcement officer has little to no discretion to defer removal.

[9] The Officer noted that Mr. Newman had requested a deferral for two months pending a decision on his second H&C application, claiming that, even though his application was submitted recently, a decision on it is potentially imminent. The Officer observed that

Mr. Newman also submitted that a removal prior to the decision on his second H&C application will negatively impact it. But the Officer stated that an H&C application does not automatically give rise to a stay of removal, nor does it pose an impediment to removal. He considered the evidence on the processing time of H&C applications but found that affidavits from counsel to show that a decision on Mr. Newman's application is imminent were "anecdotal and insufficient." The Officer was also satisfied that Mr. Newman's pending H&C application will be processed even after his scheduled removal from Canada.

[10] The Officer then stated that it is beyond his authority to conduct an adjunct H&C application. However, he nonetheless "reviewed the specific considerations brought forward in the deferral request," namely the submissions supporting Mr. Newman's degree of establishment in Canada, his H&C application and counsel's submissions that a decision could be made earlier than in the established timeframes. The Officer stressed that he is not mandated to conduct an assessment of the merits of Mr. Newman's pending H&C application nor can he review the strength of H&C factors presented by counsel, such as the management of Mr. Newman's diagnosed schizophrenia and his contribution to the community and various charity organizations.

[11] The Officer concluded that in the context of a request to defer removal, "[his] limited discretion is centered on evidence of serious detrimental harm resulting from the enforcement of the removal order" and that insufficient evidence has been adduced that Mr. Newman would face serious risk to his person if he is returned to the Czech Republic.

C. *The standard of review*

[12] It is established case law that the standard of review applicable to the decision of an enforcement officer to refuse a deferral of removal is reasonableness (*Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*] at para 25; *Sorubarani v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 382 [*Sorubarani*] at para 13; *Ortiz v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 18 at para 39). The parties do not dispute that.

[13] When reviewing a decision on the standard of reasonableness, the analysis is concerned with the existence of justification, transparency and intelligibility within the decision-making process, and the Officer's findings should not be disturbed as long as the decision "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 [*Dunsmuir*] at para 47). In conducting a reasonableness review of factual findings, it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 99). Under a reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, and the decision is supported by acceptable evidence that can be justified in fact and in law, a reviewing court should not substitute its own view of a preferable outcome (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 16).

[14] The reasons are to be read as a whole, in conjunction with the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53; *Dunsmuir* at para 47). To determine the reasonableness of a decision, not only must the Court review the reasons but it can also look at the underlying record (*Newfoundland Nurses* at para 15). That said, a judicial review is not a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54). The Court should approach the reasons with a view to "understanding, not to puzzling over every possible inconsistency, ambiguity or infelicity of expression" (*Canada (Citizenship and Immigration v Ragupathy*, 2006 FCA 151 at para 15).

III. Analysis

[15] Mr. Newman submits that the Officer's decision is unreasonable as the Officer fettered his discretion by refusing to consider the "exceptionally compelling circumstances of this case." Mr. Newman complains about the fact that the Officer dealt with the heart of his request, namely his H&C application, in one single paragraph, and failed to properly consider the special circumstances that make up Mr. Newman's H&C application. Relying on various decisions such as *Poyanipur v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1785 [*Poyanipur*], Mr. Newman submits that the Officer's discretion is wide and includes the ability to consider "a broad range of circumstances" (*Poyanipur* at para 9). By refusing to analyze his compelling individual circumstances, argues Mr. Newman, the Officer unlawfully fettered his discretion (*Katwaru v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1045 [*Katwaru*] at paras 30-35; *Hardware v Canada (Minister of Citizenship and*

Immigration), 2005 FC 88 [*Hardware*] at para 14; *Prasad v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 614 [*Prasad*] at para 32).

[16] Mr. Newman adds that, as emphasized by Mr. Justice Shore in the Order, his H&C application contains evidence which "could not be more clear and unequivocal" and that an H&C officer has yet to consider the "exceptional or special circumstances that encompass this case."

[17] I cannot agree with Mr. Newman's arguments and with his submission that the Officer's decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). Instead, I conclude that the Officer's decision fits well within the boundaries of reasonableness.

A. ***The Officer's decision is reasonable***

[18] Removal officers have a narrow discretion and their authority to defer the execution of a removal order exists only in very limited circumstances arising just prior to the removal date. This was acknowledged by the Federal Court of Appeal in *Baron*, where Mr. Justice Nadon stated that "it is trite law that an enforcement officer's discretion to defer removal is limited" (*Baron* at para 49). Deferral is to be reserved for those cases where "failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment" (*Baron* at para 51; *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682 [*Wang*] at para 48). An enforcement officer may also exercise his or her discretion to defer when issues relating to the timing of the execution of the deportation order arise, such as factors relating to travel arrangements or fitness to travel, illness, a child's school year, or a pending birth or death (*Baron*

at para 51; *Simoes v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 936 [*Simoes*] at para 12). I also emphasize that subsection 48(2) of IRPA expressly states that a removal order must be enforced "as soon as possible." The Minister has no authority to refuse to execute the order.

[19] Furthermore, no matter how compelling or sympathetic an applicant's H&C application may be, CBSA enforcement officers are under no duty to investigate H&C factors put forth by an applicant as they are not meant to act as last minute H&C tribunals. The obligation to conduct an H&C assessment properly rests with an officer deciding an H&C application. It is well established that a removal officer is not required to conduct a preliminary or mini H&C analysis and to assess the merits of an H&C application (*Shpati v Canada (Minister of Public Safety & Emergency Preparedness)*, 2011 FCA 286 [*Shpati*] at para 45; *Munar v Canada (Minister of Citizenship & Immigration)*, 2005 FC 1180 at para 36; *Prasad* at para 32).

[20] Mr. Newman essentially complains about the fact that the Officer did not look deeply enough at the merits of his H&C application. This is not a ground to find the Officer's decision unreasonable. On the contrary, the Officer's decision not to engage in such an exercise was reasonable in light of his limited discretion on requests for deferral of removal. I would add that the Court's view of the strength of Mr. Newman's H&C application, as articulated by Mr. Justice Shore in the Order, does not render the Officer's decision not to defer unreasonable. Instead, I find that it was open for the Officer not be swayed by the H&C application forwarded to him by Mr. Newman, including the letters of support, volunteer letters, donation receipts, letters from social workers and letters from businesses. This evidence is not related to the factors that the

Officer had to consider in deciding on the deferral of removal, namely issues relating to the logistics or timing of the deportation, to the personal safety of Mr. Newman back in the Czech Republic or to the harm likely to result from his impending removal.

[21] It may well be that Mr. Newman's second H&C application could be found compelling on its merits by the relevant Canadian immigration authorities or by this Court, but this is not what the Officer had to decide at this stage. Nor is it what I have to determine in this application for judicial review.

[22] In addition, there is no dispute that the mere existence of a pending PRRA or H&C application is not, in and of itself, a bar to the execution of a valid removal order (*Shpati* at paras 34-42; *Baron* at para 50; *Prasad* at para 32). The filing of such an application, at a late stage in the removal process, is not *per se* an impediment to removal (*Baron* at para 53).

[23] All of the Officer's findings are supported by evidence on the record and constitute reasonable interpretations by the Officer. None of the factors raised by Mr. Newman are sufficient to establish that the Officer's decision does not fall within the scope of reasonableness. While they are short, the Officer's reasons are not generic and they clearly considered Mr. Newman's particular request, circumstances and evidence. For instance, the Officer noted Mr. Newman's entire immigration history, including the history of his H&C applications, the exact grounds for a deferral, counsel's statement regarding why he thought a decision of the newly filed H&C application was imminent and Mr. Newman's establishment, management of his schizophrenia and his contributions to the community. I am satisfied that the reasons provide

the justification, transparency and intelligibility required of a reasonable decision, and the resultant determination is in accordance with the limited discretion of the Officer in the deferral of removal orders.

B. ***There are no "special considerations" justifying deferral***

[24] Mr. Newman's concerns with the Officer's decision revolve around the Officer's statement that, in a request to defer removal, "[his] limited discretion is centered on evidence of serious detrimental harm resulting from the enforcement of the removal order" and that insufficient evidence has been adduced that Mr. Newman would face serious risk to his person if he is returned to the Czech Republic. The essence of Mr. Newman's argument is that, through this statement, the Officer unreasonably interpreted the law and misapplied the principles stemming from the Federal Court of Appeal in *Baron*.

[25] I disagree and, since Mr. Newman insisted on this point in his representations before this Court, I will address this issue in more detail.

[26] The boundaries of an enforcement officer's discretion to defer a removal are narrow and they have been circumscribed in *Baron* when Mr. Justice Nadon conveniently summarized the guiding principles established by Mr. Justice Pelletier in *Wang*, in the context of a motion to stay a removal order (*Baron* at para 51). In *Wang*, Mr. Justice Pelletier had made the following points at paragraph 48 of his reasons:

> - 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.
>
> [Emphasis in original.]

[27] In *Shpati*, Mr. Justice Evans, speaking for the Federal Court of Appeal, referred to *Baron* and repeated the statement that "[w]ith respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety" (*Shpati* at para 43).

[28] What do the *Baron* decision and its progeny establish regarding the circumstances in which, in the context of H&C applications, an enforcement officer may be justified to exercise his or her discretion to defer the execution of a removal order? In my view, those circumstances can be regrouped in three categories. First, in all cases (including where an H&C application is at stake), an enforcement officer may consider logistical or practical factors influencing the timing of removal (such as travel arrangements, illness or health issues, the end of a child's school year, imminent births and deaths, etc.). Arguably, the imminence of a decision on an H&C application, if adequately supported by evidence, would fit in that more technical or timing category (*Sorubarani* at paras 28-29). Second, H&C applications can justify a deferral when they are "based upon a threat to personal safety." Third, even where there is no threat to personal safety or no practical or timing concern, H&C applications can still justify a deferral when "special considerations" are present.

[29] Mr. Newman argues that these "special considerations" can and should include the strength or compelling nature of the underlying H&C application. I do not share this reading of the *Baron* decision and I do not agree that, in the context of an enforcement officer's decision, the "special considerations" have the expanded scope that Mr. Newman claims they carry. It is true that, in referring to H&C applications, *Baron* (and the *Wang* case it relies on) goes beyond the sole threats to personal safety. However, the "special considerations" referred to by Messrs. Justices Nadon and Pelletier do not exist in a vacuum and must be understood in the specific context of the *Baron* and *Wang* decisions, namely requests made to an enforcement officer for a deferral pending the determination of an H&C application.

[30] Those special considerations must therefore be looked at bearing in mind the limited discretion granted to enforcement officers on requests for deferral of removal. Obviously, they must be other than simply the basis for the H&C claim, or else all H&C applications would have "special considerations."

[31] This Court has recognized that those special considerations which may warrant deferral in the face of an H&C application can include situations where an H&C application was brought on a timely basis but has not yet been determined by the immigration authorities due to a backlog in the system (*Laguto v Canada (Citizenship and Immigration)*, 2013 FC 1111 at paras 31 and 34; *Guan v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 992 at para 41; *Williams v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 274 at para 36). I pause to observe that this situation could arguably be considered as belonging to the more general category of practical and logistical issues related to the timing of removal orders which, in all instances, may justify the exercise of an enforcement officer's discretion to defer removal (*Shpati* at para 44; *Sorubarani* at para 25; *Simeos* at para 12).

[32] The very failure to look at the reasons for a late H&C application was also found to be an omission to properly address a relevant consideration and thus one where "special considerations" arose (*Gurshomov v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1212 at paras 16-18).

[33] In other instances, both prior to and after *Baron*, decisions from this Court have recognized that particular circumstances arising in the context of H&C applications can amount to a "special consideration" reasonably supporting a deferral of removal. For example, this Court has referred to "exigent personal circumstances" as a ground to justify a deferral of removal, singling out situations involving children and the impact of the removal on their health or medical condition (*Kampemana v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1060 at para 34; *Shase v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1257 at paras 15-19; *Ramada v Canada (Solicitor General)*, 2005 FC 1112 [*Ramada*] at para 3). The Court also pointed out to "compelling individual circumstances" such as personal safety or health issues (*Hardware* at para 14, *Prasad* at para 32; *Ramada* at para 3). The existence of family violence and an abusive relationship was also found to be a factor potentially covered by the "special considerations" (*Blackwood v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 567 at para 37).

[34] The list is not exhaustive and, while they do and can take many incarnations, those special considerations or compelling personal circumstances justifying a deferral of removal in the context of H&C applications all share one common theme. Leaving aside cases raising pure timing issues or the untimely treatment of pending H&C applications by Canadian immigration authorities, those special considerations amount to personal exigencies which, in one way or another, have some relation to the adverse effects or detrimental harm expected to be caused by the impending removal, and which an applicant is required to demonstrate in order to obtain a deferral from an enforcement officer. Stated otherwise, while the special considerations established by *Baron* can go beyond the strict threat to personal safety, they cannot be divorced

from the detrimental harm expected to result from or closely linked to the impending removal, and they must be traced back to an element of harm attributable to or associated with the imminent removal being challenged.

[35] When considered in the context of requests for deferral and through the prism of section 48 of IRPA, as they properly should, those "special considerations" therefore cannot simply encompass any or all factors contained or provided in support of an H&C application, or even less so the H&C application itself. It is well accepted that enforcement officers are not positioned to evaluate all the evidence that might be relevant in an H&C application (*Ramada* at para 7) or its merits, and that a pending H&C application does not in itself constitute one of the special considerations which could allow the enforcement officer to defer a removal (*Shpati* at para 45; *Ponce Moreno v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 494 at para 19). An enforcement officer has neither the general duty, nor the discretion to consider various H&C factors in determining whether to defer removal (*Mkhonta v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 991 at para 26).

[36] Against the backdrop of an enforcement officer's decision on a request for deferral and the limited discretion bestowed to the officer, I thus conclude that the special considerations arising in an H&C context are limited to those elements evoking some form of harm linked to the removal from Canada. In other words, a condition or a situation alleged in an H&C application would not be sufficient to constitute one of the "special considerations" mentioned in *Baron* if it does not translate into some form of detrimental harm caused by the impending removal.

[37] The cases cited by Mr. Newman (*Prasad* at para 32; *Hardware* at para 14; *Katwaru* at para 31) do not broaden the Officer's discretion in that respect. Not only were these decisions all issued prior to *Baron*, but they in fact simply stand for the proposition that an enforcement officer must have regard for "compelling individual circumstances, such as personal safety or health issues." This is consistent with this notion that circumstances must relate to some form of impending harm, and with what the Officer actually said regarding the scope of his discretion in reviewing Mr. Newman's request (namely that his "limited discretion was centered on evidence of serious detrimental harm resulting from the enforcement of the removal order as scheduled").

[38] Here, the Officer found that there were no special circumstances amounting to serious detrimental harm linked to Mr. Newman's removal. In light of section 48 of IRPA, the case law and the limited discretion conferred to removal officers, it was clearly not unreasonable for the Officer to so conclude. The Officer has not overlooked any important factor nor has he seriously misapprehended the circumstances of Mr. Newman. If a decision-maker's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law, the Court is not allowed to intervene even if its assessment of the evidence might have led it to a different outcome. Under the reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, a reviewing court should not substitute its own view of a preferable outcome. This is clearly the case here.

IV. Conclusion

[39] For the reasons detailed above, the Officer's decision to refuse the deferral of Mr. Newman's removal represented a reasonable outcome based on the law and the evidence before the Officer. Therefore, I must dismiss Mr. Newman's application for judicial review. Neither party has proposed a question of general importance for me to certify, and I agree there is none.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs; and

2. No question of general importance is stated.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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