Federal Court  Cour fédérale

Date: 20170731

Docket: IMM-4479-16

Citation: 2017 FC 743

Ottawa, Ontario, July 31, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

RUSHAYNE ANN-MARIE CRAWFORD

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision by an enforcement officer of the Canada Border Services Agency [the Officer], dated October 28, 2016, dismissing the Applicant's request to defer her removal pending the outcome of her application for permanent residence on humanitarian and compassionate [H&C] considerations filed with Citizenship and Immigration Canada on October 14, 2016.

[2] The Applicant's removal to Jamaica, which was scheduled to take place on November 1, 2016, was stayed on October 31, 2016, the Court (*as per* Justice Mosley) being satisfied that the Applicant had raised a serious issue with respect to how the best interests of the child principle found in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] was to be applied to an enforcement officer's refusal to defer removal until such time a H&C application for permanent residence is determined.

[3] The Applicant's primary concern with the Officer's decision is that the Officer entirely failed in her duty to be alert, alive and sensitive to the best interests of her six-year old son, Benjamin. She also claims that the Officer erred in her assessment of the risks a removal would pose to her personal safety given her history of depression and past suicide attempts. Finally, she contends that the Officer unreasonably held that the deferral she sought amounted to an indeterminate deferral.

[4] The relevant facts of this case can be summarized as follows. The Applicant is a 36 year- old citizen of Jamaica. In 1994, she moved to Canada with permanent residency status after having been sponsored by her father, who was living in Canada. She was thirteen years old at the time. At age sixteen, she was placed in a group home following a major family altercation. Her life then took a nasty turn. A long list of criminal convictions ensued: obstructing a police officer in 2002, assault with a weapon in 2003 and in 2006, possession of a controlled substance (cocaine), resisting and obstructing a peace officer and carrying a concealed weapon.

[5] In April 2005, a Deportation Order was issued against the Applicant after having been found to be inadmissible to Canada for serious criminality pursuant the subsection 36(1)(a) of the *Immigration and Refugee Protection Act, SC 2001, c 27* [the Act]. The Applicant unsuccessfully sought leave to judicially review that Order.

[6] On January 2, 2009, the Crown agreed to stay outstanding charges of uttering threats and possession of a dangerous weapon against the Applicant to facilitate her removal from Canada. However, the Applicant failed to report for removal on January 21, 2009 and an Immigration Warrant for removal was issued.

[7] While on the run, the Applicant lived under the aliases of "Natalie Stevens" and "Keisha Jackson" and she had her son, born on April 15, 2010. On August 18, 2011, the Applicant was added to the Canadian Border Services Agency's "Most Wanted List".

[8] In June 2016, the Applicant was located and arrested on outstanding criminal and immigration warrants and on October 12, 2016, she was convicted of trafficking a controlled substance and sentenced to one day plus time served. Afterward, she remained in Immigration detention.

[9] As indicated at the outset of these reasons, the Applicant filed her H&C application on October 14, 2016 and a week later, she was informed that her removal to Jamaica would take place on November 1, 2016.

[10] In her decision denying the Applicant's request to defer removal, the Officer highlighted the Applicant's numerous criminal convictions dating back to 2003 and her history with immigration authorities (hearings, failures to appear, warrants, arrests, etc.). The Officer then turned her mind to the Applicant's H&C application. She concluded that in law, there is no automatic stay of removal for persons who submit H&C applications. She disagreed with the Applicant's contention that the H&C process would approximately take 6 months and stated that the current processing time was rather averaging 35 months. Given the length of the process, she concluded that the Applicant's deferral request was not short-term but rather an indeterminate deferral of removal.

[11] The Officer then dismissed the Applicants submission that her removal to Jamaica would jeopardize her safety as it would expose her to psychological hardship and risk of suicide. Indeed, the Officer highlighted that the Applicant had indicated in her initial removal interview held on October 14, 2016 that she had no medical conditions and that while she had been diagnosed with depression in the past, she was not receiving any treatments or medication. The Officer also noted that while the Applicant had admitted having attempted suicide prior to the birth of her son, she had stated during her interview that she was not currently having thoughts of hurting herself.

[12] As for the Applicant's argument that her impending removal would result in irreparable harm to her 6 year-old son, the Officer found that even if family separation can be difficult, the Applicant was aware at the time of her pregnancy that she was subject to an enforceable removal order. As such, the Officer concluded that the Applicant always knew she

might be required to leave Canada and had sufficient time since her son's birth to make arrangements for her family.

[13] The Officer noted that the Applicant's son has always been residing with his father, Mr. Poshtchman, and will remain with him upon the Applicant's removal. She found that there was no evidence demonstrating that Mr. Poshtchman has been or will be unable to adequately care for the Applicant's son during her absence.

[14] The Officer also found that there was no evidence that the Applicant would be unable to communicate with her family upon her removal or that her family could not visit her in Jamaica once she settles in.

[15] The Officer considered the psychological opinion of Dr. Pezzot-Pearce in making her decision. She noted that no treatment plan was proposed for either the Applicant or her son and that Dr. Pezzot-Pearce only indicated that "it is in Benjamin's best interest for his mother to remain in Canada". She also noted that a family support worker had been unable to connect with Mr. Poshtchman. However, given the little information provided as to why, she concluded that there was no evidence that a family support worker or Dr. Pezzot-Pearce would be unable to help the Applicant's son during her absence.

[16] Finally, with regards to the Applicant's contention that she has no supportive network in Jamaica and would be at loss as to how to reside there, the Officer found that the Canadian Border Services Agency had already made arrangements for the Applicant to reside,

for as long as she needs to, in a shelter that would provide her with a bed, hot meals, job skill training, job readiness programs, health care and mental health support at no costs for the Applicant.

II. Issue and Standard of Review

[17] This issue to be resolved in this case is whether the Officer's decision to deny the Applicant's request to defer her removal is reasonable.

[18] It is trite law that an enforcement officer's decision to refuse to defer removal is subject to review by this Court against the standard of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness),* 2009 FCA 81, at para 25 [*Baron*]; *Nguyen v Canada (Minister of Public Safety and Emergency Preparedness),* 2017 FC 225 at para 9 [*Nguyen*]; *Pegito London v Canada (Citizenship and Immigration),* 2015 FC 942 at para 12 [*Pegito*]). Similarly, an officer's assessment of the best interests of the child in the context of a deferral request is also to be reviewed following the standard of reasonableness (*Pegito,* at para 12; *Pangallo v Canada (Minister of Public Safety and Emergency Preparedness*), 2014 FC 229 at para 16).

[19] Therefore, this Court will only interfere with the Officer's decision if that decision falls outside of the "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 [*Dunsmuir*]). Hence, as long as the outcome fits comfortably with the principles of justification, transparency and intelligibility, it is not open to the Court to reweigh the evidence and substitute its own view of a

preferable outcome (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

III. Analysis

A. *Benjamin's short-term best interests were reasonably considered*

[20] While she acknowledges that paragraph 48(2) of the Act requires them to enforce removal orders "as soon as possible", the Applicant insists that enforcement officers have the discretion to grant deferral especially where removal would be contrary to the best interests of a child. In her written submissions before the Court, the Applicant claimed that the Supreme Court's reasoning in *Kanthasamy*, which was decided in the context of an H&C application submitted under section 25 of the Act, was applicable to any assessment in which a decision-maker, including an enforcement officer, has a duty to consider the best interests of a child. In oral submissions, however, her counsel took a more nuanced approach to the impact of *Kanthasamy* on the role of enforcement officers.

[21] The Applicant's position then is that although enforcement officers do not have the authority to conduct a full assessment of the best interests of the child, as is the case in the context of an H&C application, they are nevertheless required to be "alert, alive and sensitive" to the short-term best interests of a child when considering a request to defer removal. She claims that the failure to do so renders a refusal to defer unreasonable.

[22] It is her contention that the Officer erred in that regard by failing to engage in any meaningful consideration of Benjamin's short terms interests. In particular, she claims that the Officer overlooked Dr. Pezzot-Pearce's opinion by failing to consider how Benjamin would be greatly affected by her removal from Canada as evidenced by the fact that Benjamin completely fell apart during her period of detention.

[23] The Applicant further submits that the Officer's conclusion that Mr. Poshtchman could adequately care for Benjamin is in clear contradiction with the expert evidence since Dr. Pezzot-Pearce indicated that when Mr. Poshtchman had to care for Benjamin on his own, he was left "utterly exhausted and overwhelmed" and was "truly struggling to parent adequately".

[24] The hearing of the present judicial review application was held on June 5, 2017. On June 21 (2017), the Federal Court of Appeal, in *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 [*Lewis*], clarified the law as to how enforcement officers are to apply the best interests of the child principle in the context of a request to defer removal. At issue in *Lewis* was whether *Kanthasamy* had overtaken the Federal Court of Appeal's jurisprudence regarding the depth of consideration enforcement officers are required to give to the best interests of children in deciding whether to defer removal under section 48 of the Act (*Lewis*, at para 45). That jurisprudence stands for the proposition that enforcement officers have very limited discretion in considering a request to defer removal, meaning, among other things, that they are not entitled to conduct what would amount to a full-blown consideration of an applicant's interests, including where the interests of a child are invoked, as would occur in an H&C application made pursuant to section 25 of the Act, although they may be required, in

appropriate cases, to engage in a "truncated consideration of the short-term best interests of children who might be affected by their parents' removal" (*Lewis*, at para 54 to 58 and 61).

[25] The Federal Court of Appeal held that *Kanthasamy* only applied in the context of applications brought under section 25, which, contrary to those made pursuant to section 48, explicitly requires that the best interests of the child be assessed. As a result, it found its jurisprudence regarding the limited role of enforcement officers in considering these interests when deciding whether to defer removal to be still good law.

[26] It also confirmed that this interpretation of the role of enforcement officers was consistent with subparagraph 3(3)(f) of the Act which requires all decision-makers under the Act to comply with the *United Convention on the Rights of the Child* (*Lewis*, at para 74 and 81). In contrast to assessments conducted under section 25 of the Act, the Federal Court of Appeal, quoting from previous cases, indicated that the short-term bests interests of a child had been found to include matters such as (i) the need for a child to finish a school year during the period of the requested deferral, (ii) maintaining the well-being of children who require specialized ongoing medical care in Canada or (iii) ensuring that there will be someone to care for the child after his or her parent(s) are removed if the child is to remain in Canada (*Lewis*, at para 83).

[27] As indicated previously, the Applicant submits that the Officer failed to meaningfully consider the severity of the impact her removal from Canada would have on the psychological well-being of Benjamin as evidenced by the way he reacted during her period of incarceration (frequent crying, lack of sleep and appetite and daily soiling). She further contends

that the Officer's determination that Benjamin's father, Mr. Poshtchaman, could adequately care for him if she is removed is in clear contradiction with Dr. Pezzot-Pearce's evidence.

[28] However unfortunate and painful the situation might be for Benjamin, I am unable to find that the Officer's refusal to defer the Applicant's removal is unreasonable in this respect. Jurisprudence is clear that illegal immigrants cannot avoid the execution of a valid removal order simply because they are the parents of Canadian-born children (*Baron* at para 57). Given that the Respondent is bound by law to execute a valid removal order as soon as possible, any deferral policy has to reflect this imperative (*Baron*, at para 51). As such, family hardship, which can be remedied by readmission if the H&C application is successful (*Baron*, at para 69), will normally not amount, without more, to sufficient harm or special considerations to warrant a deferral of removal.

[29] While the evidence adduced by the Applicant demonstrates that being separated from his mother during her detention affected Benjamin, there is no evidence, as the Officer observed, that he is receiving treatment of any kind for mental health issues arising from his mother's detention and related separation or that he suffers from a pre-existing condition requiring ongoing specialized medical care in Canada. I note that Dr. Pezzot-Pearce's evidence is the only expert evidence – or medical evidence of any kind for that matter - on record and that it was prepared in October 2016 at the request of the Applicant's counsel for the purposes of the Applicant's H&C application and up-dated at the end of October for the purposes of the stay motion.

[30] The Officer recognized that family separation is difficult and it is fair to say, I believe, that the removal process is bound to be upsetting for any six-year old child about to be separated from one of his/her parents. However, as the Federal Court of Appeal and this Court have stated on many occasions, family separation, how unfortunate and disruptive it may be, is part of the inherent consequences of deportation (*Baron*, at para 69; *Ghanaseharan v Canada (Citizenship and Immigration)*, 2004 FCA 261, at para 13; *Atwal v Canada (Citizenship and Immigration)*, 2004 FCA 427, at para 17; *Wang v Canada (Citizenship and Immigration)*, [2001] 3 FC 682, at para 48).

[31] As I have said before, what is now clear from *Lewis* is that the Officer did not have an obligation to substantially review Benjamin' best interests and thus conduct a full scale assessment in this regard. She had no duty to investigate the H&C factors put forth by the Applicant as enforcement officers are not meant to act as last minute H&C tribunals (*Newman v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 888, at para 19). Her obligation was to be alive, alert and sensitive to his short-term interests, a duty which is at the low end of the spectrum of her overall responsibilities under section 48 of the Act (*Canada (Citizenship and Immigration) v Varga*, 2006 FCA 394, at para 16). I am satisfied that she was, especially in respect of what mattered the most in the circumstances of the case, that is ensuring that there would be someone to care for Benjamin here in Canada after his mother's removal.

[32] On that point, the case law on which the Applicant relies to support her claim that the Officer's finding that Benjamin's father would not be able to care for him once the Applicant's departs for Jamaica in unreasonable, must be distinguished.

[33] In *Shase v Canada (Public Safety and Emergency Preparedness*), 2011 FC 1257 [*Shase*]) the Court held that the officer's denial of deferral pending the H&C application was unreasonable as the officer had failed to consider that the applicant's removal would result in his spouse, who was deemed unstable and suicidal, caring for their young children on her own. While there is evidence that caring for Benjamin alone might require some adjustments for Mr. Poshtchaman, there is nothing in the record indicating that he is unstable and unable to care for his son.

[34] In *Pegito*, the Court found that the officer had failed to enquire whether the affected children would be adequately looked after following the applicant's removal. This conclusion was however rooted in the fact that the officer's decision was silent on the interests of the three children. In the present matter, the Officer did consider the child's short-term best interests in reaching her decision and followed jurisprudential guidelines requiring her to be satisfied that provisions have been made for leaving the child in the care of others and that the child will be adequately looked after upon the Applicant's removal from Canada.

[35] On this issue, it must be stressed that Benjamin is living and has always been living with his father, Mr. Poshtchaman, and that, as pointed out by Dr. Pezzot-Pearce, they are surrounded by a "large family and many friends providing a strong network for Benjamin" (Applicant's Record, at p 116). Benjamin himself indicated in his interview with Dr. Pezzot-Pearce that he sees his family (grandparents, uncles, aunts and cousins) regularly. Furthermore, as stressed by the Officer, various provincial and federal support programs are available to both

Mr. Poshtchaman and Benjamin to assist them in the adjustment period following the Applicant's removal.

[36] Finally, the present matter must also be distinguished from this Court's decisions in *Danyi v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 730 [*Danyi 1*] and *Danyi v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 112 [*Danyi 2*]. The Applicant reliance on those decisions is misplaced. First, the Court was dealing with a Roma family who had escaped persecution and sought protection in Canada. Second, the Court found in both cases that the officer has failed to consider that the applicants' five-year old son, who was also to be removed with his parents, was suffering from childhood post-traumatic stress disorder [PTSD] due to the discrimination and societal abuse he suffered and witnessed in Hungary. Not only are those facts easily distinguishable from the case at bar, but in these two cases, the Court felt that the officer was to conduct an assessment of the child's best interests in the manner prescribed by *Kanthasamy*. However, as we have seen, *Lewis* has now made it clear that enforcement officers do not have that obligation.

[37] Parliament did not see fit to provide for the staying of removal orders when an H&C application is pending or when the interests of a child are engaged by the removal. It did not see fit either to expressly require enforcement officers to take into account the best interests of a child directly affected when considering a request to defer removal. Such interests are surely to be considered but they are to be so in the context of the very limited discretion conferred on enforcement officers to defer removal and only on the short-term, the assessment of the long-

term interests of a child directly affected by removal being left to a different decision-maker pursuant to a separate and distinct statutory process.

[38] Here, I am satisfied that the Officer's findings regarding the short-term best interests of Benjamin, fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at para 47).

B. The Officer's conclusion with regards to the Applicant's risks of suicide is reasonable

[39] The Applicant also submits that the Officer's decision was unreasonable with respect to her risk of suicide as the Officer failed to address Dr. Pezzot-Pearce's evidence that the Applicant's removal to Jamaica would likely place her at risk of becoming depressed and suicidal again.

[40] While deferral may be justified in cases where the removal poses a risk to the Applicant's personal safety (*Baron*, at para 51), I believe the Officer's decision in this regard is reasonable.

[41] First, it must be stressed that the Applicant indicated to the Officer in her initial removal interview held on October 24, 2016 not currently having thoughts of injuring herself or committing suicide.

[42] Second, while the Applicant argues that the Officer disregarded Dr. Lezzot-Pearce's conclusion that the Applicant's removal to Jamaica would likely place her at risk of

becoming depressed and suicidal, such statement needs to be nuanced. Dr. Lezzot-Pearce's diagnosis was made on the presumption that the Applicant would have no supportive network in Jamaica and would likely be at loss as to how to reside there. However, as pointed out by the Officer, the Canada Border Services Agency has made arrangements for the Applicant upon her arrival in Jamaica which includes access to shelter, health care and mental help support for as long as she needs it. Therefore, I am satisfied that Officer's conclusion that a deferral was not warranted due to risks to the Applicant's personal safety falls within a range of possible acceptable outcomes.

C. The Officer's conclusion with regards to the length of the deferral is reasonable

[43] Finally, the Applicant argues that the Officer's conclusion that she was seeking an indeterminate deferral is unreasonable. First, she contends there is no limit to the length of deferral an enforcement officer may grant. Second, she submits that her request was not indeterminate but rather very specific. She wanted the deferral to last until a decision on her H&C application had been rendered.

[44] The Applicant went on to explain that H&C applications are processed in two stages. First, Immigration, Refugees and Citizenship Canada (IRCC) decides whether an exemption is warranted. If it believes that it is, the applicant is then permitted to remain in Canada for the second-stage processing which includes medical and background checks. Ultimately, if no additional inadmissibility issue arises, a Confirmation of Permanent Residence [COPR] is issued.

[45] The Applicant submits that the first stage of the H&C process is 4-6 months whereas the complete process, from the application to the issuance of the COPR, takes a total of 35 months. Given this, she believes her request for deferral does not amount to an "indeterminate deferral" - such request was reasonable and should have been granted.

[46] The Applicant's entire argument on this point is based on her assertion that the first stage of the H&C process, which is the determination of whether an exemption applies, takes about 4-6 months. As such, the Applicant submits that the Officer's conclusion that the H&C process takes 35 months (based on the information provided on CIC website) and that, consequently, her request for deferral is for an indefinite period of time, is unreasonable.

[47] The Federal Court of Appeal reiterated in *Lewis* that timely H&C applications which are still pending due to a backlog in processing may warrant a deferral (*Lewis*, at para 55; *Baron*, at para 49). However, the Applicant's H&C application was not made in a timely fashion. As such, I believe that the Officer's conclusion on this issue, given the present circumstances, was reasonable and in line with the Federal Court of Appeal's reasoning in *Baron*, where it is stated:

> [80] By virtue of section 48(2) of the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 29 (IRPA), once 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." I agree with my colleague that jurisprudence is conclusive that the enforcement officer's discretion is limited. However, ultimately an enforcement officer is intended to do nothing more than enforce a removal order. While enforcement officers are granted the discretion to fix new removal dates, <u>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,</u>

> the enforcement officer was being asked to delay removal indeterminately. An indeterminate deferral was simply not within the enforcement officer's powers.
>
> (My emphasis.)

[48] Indeed, given that the Applicant had filed her H&C application less than two weeks prior to her request for a deferral, it is evident that the date of the H&C decision was unknown and far from being imminent. Thus, the Officer made no reviewable error.

[49] Finally, as pointed out be the Respondent, the Court, in reviewing the reasonableness of the Officer's decision, must also consider the Applicant's past history of non-compliance as this element should always be high on the list of relevant factors considered by an enforcement officer. The Federal Court of Appeal has recognized that the Respondent is definitely authorized to refuse the exception requested by a person if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada (*Baron*, at para 64; *Canada (Citizenship and Immigration) v Legault*, 2002 FCA 125, at para 19).

[50] While the Applicant seems to have turned her life around in the last few years, she nevertheless defied and evaded immigration authorities for over seven years and to such extent that her name was added to the Canadian Border Services Agency's "Most Wanted List". The Officer was thus entitled to give considerable weight to the Applicant's past- history of non-compliance in exercising her discretion not to defer removal.

[51] For all these reasons, the Applicant's judicial review application will be dismissed. Neither party proposed a question of general importance for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed;

2. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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