Federal Court  Cour fédérale

Date: 20180913

Docket: IMM-807-18

Citation: 2018 FC 914

Ottawa, Ontario, September 13, 2018

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

AIDER ABDEL KADDER

Applicant

and

THE MINISTER OF PUBLIC SECURITY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On February 20, 2018, the Applicant filed an Application for Leave and for Judicial Review [ALJR] challenging the decision of a Canada Border Services Agency [CBSA] officer [Enforcement Officer] dated February 14, 2018, refusing to defer the Applicant's removal to Iraq [Decision]. Despite last minute pleas by counsel, the Applicant was removed on February 27, 2018 through Baghdad airport.

[2] The Applicant acknowledges that his removal may "technically" have rendered judicial review of the Decision moot. However, he maintains that there remains a live controversy between the parties as he is not only seeking a review of the Decision, but also a declaration that the "manner of the removal" was contrary to his common law and *Charter* rights. By way of remedy, the Applicant seeks an order compelling the Respondent to return the Applicant to Canada.

[3] For the following reasons, I conclude that the application should be dismissed.

II. Background Facts

[4] It is important to lay out, in some detail and in a chronological order, the complex procedural history of this case in order to place the present application for judicial review in proper context.

[5] The Applicant is a 40 year old citizen of Iraq. He arrived in Canada in August 2001 and made a refugee claim based on his fear of persecution at the hands of the Baath Party. The Applicant's claim for protection was rejected by the Refugee Protection Division [RPD] on the basis of absence of credibility. An application for judicial review of the RPD decision was dismissed by Mr. Justice Luc Martineau on June 15, 2005: *Kadder v Canada (Minister of Citizenship and Immigration)*, 2005 FC 837.

[6] The Applicant later applied for permanent residence based on humanitarian and compassionate grounds [H&C application]. The H&C application was accepted in principle, but

the Applicant was eventually found to be inadmissible pursuant to s 36(1)*(a)* of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] by reason of his criminal convictions in 2012 relating to his then girlfriend of assault causing bodily harm and criminal harassment and threats.

[7] In October 2013, the Applicant initiated a Pre-Removal Risk Assessment [PRRA] application, alleging that he feared death from his family members because he had tarnished his family's honour. He also claimed that he could not return to Iraq because he was a Kurd and a Sunni Muslim and he could not live in the non-Kurdish areas of Iraq. The PRRA application was refused in July 2015. An application for judicial review of the negative PRRA decision was dismissed by Mr. Justice Richard Bell on April 21, 2016: *Kadder v Canada (Citizenship and Immigration)*, 2016 FC 454.

[8] In December 2016, the Applicant filed a second PRRA application in which he raised essentially the same fears as in his previous application. A senior immigration officer dismissed the application on September 2017, concluding that the Applicant's evidence was insufficient to demonstrate that he is personally at risk in Iraq. The Applicant filed an ALJR against the negative decision on December 11, 2017 in Court File No. IMM-5279-17.

III. Deferral Requests by the Applicant

[9] On January 30, 2018, counsel for the Applicant was informed that her client would be removed on February 27, 2018. She immediately sent an email to the United Nations High Commissioner for Refugees [UNHCR] for assistance. Counsel briefly described the Applicant's circumstances and pending applications, his fear of being a victim of an honour killing, and his

fear of the remnants of ISIS based on his profile of being a Westernized, non-observant Muslim and a Kurd. Counsel also expressed concern about the logistics of the removal, stating that the Applicant was told that since Erbil Airport was closed to international flights, he would be removed via Baghdad Airport. Counsel wrote that she believed that this would be very dangerous since the UNHCR had taken the position that Baghdad was not a viable place for Sunnis because of the Shia militias operating there.

[10] On February 6, 2018, counsel for the Applicant submitted a letter to the Enforcement Officer requesting that his removal be deferred pending disposition of his outstanding H&C application filed in December 2016, his appeal of the criminal convictions before the Quebec Court of Appeal, and the ALJR in IMM-5279-17. The Applicant also expressed concern of personal risk arising from his removal on an expired passport. While recognizing that the temporary stay of removal in effect for Iraq did not apply to the Applicant given his criminal convictions, counsel urged the Enforcement Officer to consider the context of the convictions and the possibility that they could soon be vacated as a result of a case that was under reserve before the Supreme Court of Canada. The Applicant also drew to the Enforcement Officer's attention paragraph 47 of a document by the UNHCR dated November 14, 2016 entitled *Position on Returns to Iraq*, which states as follows:

> 47. Under the present circumstances, UNHCR urges States to refrain from forcibly returning any Iraqis who originate from areas of Iraq that are affected by military action, remain fragile and insecure after having been retaken from ISIS, or remain under control of ISIS. Such persons, including persons whose claims for international protection have been rejected, should not be returned either to their home areas, or to other parts of the country…

[11] By letter dated February 14, 2018, the Enforcement Officer refused the deferral request. This is the Decision which is the subject of the present application. The Enforcement Officer pointed out that CBSA has an obligation to enforce the removal order as soon as possible, as stipulated in section 48 of the IRPA and that her discretion in considering a deferral of removal was short term and temporary measure. She addressed each of the grounds raised by the Applicant and concluded that the period of deferral sought by the Applicant did not meet the definition of "short term" and that none of the deferral grounds could be precisely determined in time. The Enforcement Officer noted that the information provided by the Applicant aligned with the matters raised before the PRRA officer, including the UNHRC position on returns to Iraq, and that she would not revisit them. In terms of arrangements for the Applicant's removal, she found that there was insufficient evidence to indicate that the Applicant fit or could be perceived as fitting any of the profiles targeted by the Islamic State of Iraq and Syria [ISIS]. She was satisfied based on consultation with colleagues and a review of various websites that the Applicant could safely travel with an expired passport on a single journey travel document and would not be refused entry to Iraq.

[12] The same day the Enforcement Officer rendered the Decision, the Applicant brought a motion in IMM-5279-17 seeking a stay of the removal to Iraq pending the determination of his ALJR challenging the negative PRRA decision. The Applicant raised a number of issues in his motion, including "the potential danger of being a Kurd and Sunni Muslim being removed to Iraq without a valid travel document". The stay motion was heard by Mr. Justice Peter Annis on February 20, 2018.

[13] The day the stay motion was heard, counsel for the Applicant presented a second deferral request to the Enforcement Officer based on information she received from the UNHRC that an agreement in principle had been reached to reopen the Erbil Airport. In her letter dated February 20, 2018, counsel submitted that this was "new and more hopeful information" that removal through Erbil Airport, as opposed to Baghdad, would be possible in the near future. Counsel requested that the Applicant's current itinerary be cancelled and that removal be deferred for a short time to allow for what appeared to be the imminent reopening of Erbil Airport. Counsel also wrote that she just learned from the UNHRC that the Iraqi Government objected to forcible returns of its nationals. She therefore sought confirmation that Iraq had agreed to take back the Applicant. According to counsel, it would not be safe to remove the Applicant without an advance agreement, particularly given that he did not have a valid travel document. Counsel concluded her letter by asking that precautions be taken if removal through Baghdad must take place. She asked that "whatever steps are necessary" be taken to ensure that the Applicant safely passes through security procedures at Baghdad Airport and that he safely boards a plane to Erbil.

[14] The Enforcement Officer refused the second deferral request in a detailed letter dated February 21, 2018. She noted that the reopening of Erbil Airport was not imminent in the short term. She then explained that she had liaised with colleagues in Canada and the Middle East and visited various websites to satisfy herself that it would be safe for the Applicant to be removed through Baghdad Airport on an expired passport. In response to counsel's request that precautions be taken, the Enforcement Officer indicated that she had interviewed the Applicant on February 2, 2018 about the possibility of being met by Canadian personnel in Baghdad in

order to facilitate his travel. The Applicant reportedly stated that he did not want to be assisted as it would draw more attention to himself.

[15] On February 22, 2018, Justice Annis dismissed the Applicant's motion for a stay of removal, concluding that the Applicant did not demonstrate that there was a serious issue in the PRRA decision.

[16] On the day of his removal, the Applicant made a further deferral request, claiming that he would likely be detained upon arrival at the Baghdad airport. The third deferral request was refused the same day and the Applicant was removed from Canada.

[17] On March 1, 2018, the Applicant contacted his counsel. According to notes taken by counsel of the conversation, appended as an exhibit to the affidavit of the secretary working in counsel's office, the Applicant reported that he had had difficulty passing security screening at the Baghdad airport. He claimed that during his time at Baghdad airport, he was extremely frightened because he was kept in a holding area and interrogated for three to four hours by the Iraqi authorities as to why he was traveling on an expired passport and why he was deported from Canada. The Applicant was ultimately let go. He then boarded a plane to Erbil where he went through security unhindered.

[18] On April 24, 2018, Justice Annis dismissed the ALJR of the negative PRRA decision.

IV. Position of the Parties

[19] The Applicant submits that there are three issues to be determined in this application. The first issue is whether the Enforcement Officer's decisions refusing to defer the removal on February 14, 2018, February 21, 2018 and February 27, 2018 are unreasonable. In short, the Applicant claims that the Enforcement Officer exercised her discretion to defer removal in an unreasonable manner by applying an unduly restrictive interpretation of short term deferral, by misconstruing documentary evidence from the UNHRC, by failing to properly consider the outstanding H&C application and by determining that it was safe to remove the Applicant to Iraq on an expired passport and through Baghdad Airport instead of his home airport of Erbil.

[20] The second issue is whether the Enforcement Officer breached a duty of care owed to the Applicant. He submits that CBSA owed him a duty of care as a person under its control. He claims that CBSA breached the duty of care since it knew or should have known that the lack of a travel document would subject him to heightened security screening and the inherent risks, given the Iraqi authorities' poor human rights record and Iraq's general instability. According to the Applicant, CBSA showed insufficient concern for the Applicant's personal safety when removing him to Iraq.

[21] The third issue is whether the Applicant's rights under section 7 and 12 of the *Canadian Charter of Rights and Freedoms*, [*Charter*] were violated by the manner in which his removal was carried out. The Applicant essentially repeats the same arguments that the manner of removal recklessly endangered his life, in violation of section 7, and subjected him to cruel and unusual treatment or punishment, thereby infringing his section 12 rights.

[22] The Respondent submits that the only decision at issue in this application is the one dated February 14, 2018. Although the decisions dated February 21, 2018 and February 27, 2018 concern the Applicant's removal and were rendered by the same officer, the Respondent points out that these are separate decisions based on different facts and that they ought to have been challenged by way of separate applications. The Respondent submits that the proceeding is moot given that the Applicant has been removed from Canada. As for the Applicant's allegations of violation of his *Charter* rights and breach of duty of care, the Respondent submits that the matter should not be entertained as there is no evidence properly presented before this Court to support the claim. The Respondent adds that the Applicant's removal was executed in accordance with the immigration legislation and the principles of fundamental justice.

V. Analysis

[23] This application for judicial review raises a number of issues, including whether the Court should exercise its discretion to allow the Applicant to challenge more than one decision, whether the issues raised in the application have been rendered moot given the Applicant's removal from Canada, and whether the Court should entertain the Applicant's request for relief that is not contained in the originating pleading.

A. *Preliminary Issue – Admissibility of the Affidavit Evidence Filed by the Applicant*

[24] As a preliminary issue, the Respondent objects to certain documents being admitted into evidence. The documents are attached as exhibits to the affidavits of Elizabeth Dhamasiri, a secretary in the offices of the Applicant's counsel. Attached to Ms. Dhamasiri's first affidavit sworn March 14, 2018 is an email that the Applicant's counsel received from the Applicant on

March 1, 2018 which reads as follows: "*Hi Pia. I'm in Baghdad airport now. the give me hard time than they let me go. I'm going flight to Erbil airport*" [Punctuation, spelling and grammar are reproduced as in original text].

[25] Exhibits to her second affidavit sworn June 15, 2018 include two file memos concerning telephone calls which the Applicant's counsel had with the Applicant on March 23, 2018 and May 10, 2018, as well as news articles dated in mid-March 2018 concerning the reopening of the Erbil Airport to international flights.

[26] The Respondent points out that the Applicant has not filed a personal affidavit. Rather, the Applicant's evidence consists solely of two bald affidavits of Ms. Dhamasiri attaching various documents as exhibits. The Respondent submits that the email from the Applicant to his counsel and counsel's notes of her telephone conversation with the Applicant are hearsay evidence and cannot be presumed as reliable or the best evidence available. The Respondent also objects to the introduction of the news articles on the grounds that they were not before the Enforcement Officer when the Applicant was returned to Iraq.

[27] Rule 81(1) of the *Federal Courts Rules*, SOR/98-106 [*FCR*] states that, other than on motions, affidavits shall be confined to the facts within the deponent's personal knowledge. Rule 12 of the *Immigration and Refugee Protection Rules*, SOR/93-22, addresses affidavits filed in relation to leave applications, requiring that they be confined to such evidence as the deponent could give if testifying as a witness before the Court.

[28] Ms. Dhamasiri does not state that she was a party to the telephone calls between counsel and the Applicant. Nor does she state that she has any basis to believe that counsel's notes fairly and accurately reflect the information conveyed by the Applicant.

[29] The information contained in the email and notes clearly involves hearsay evidence, if not double or triple hearsay. The Applicant does not contest this. He makes no attempt to explain why he could not file a personal affidavit, or otherwise establish that the evidence falls within an exception to the hearsay on the principled approach of reliability and necessity.

[30] Moreover, Rule 82 of the *FCR* states that, except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit. Here, Ms. Dhamasiri is essentially deposing to information provided to her by the Applicant's counsel, giving the impression counsel is testifying via proxy, which is improper practice: *Williams v Canada (Citizenship and Immigration)*, 2018 FC 100 at para 56.

[31] Although Ms. Dhamasiri's two affidavits attach some non-controversial documents, they also include information that goes to the heart of the Applicant's allegations that the manner of his removal to Iraq violated his common law and *Charter* rights. Neither Ms. Dhamasiri nor Applicant's counsel have had any personal information about any of this.

[32] For the above reasons, I find that no probative value should be given to the email from the Applicant to his counsel as well as counsel's notes of her conversations with the Applicant.

[33] As for the documents relating to the reopening of the Erbil Airport, it is trite law that judicial review of any administrative decision should proceed on the basis of the evidentiary record that was before the decision-maker. These documents, which post-date the Applicant's removal, were clearly not before the Enforcement Officer when she refused the deferral requests. In the circumstances, they will be disregarded.

B. *Leave to challenge more than one decision*

[34] It bears repeating that the proceeding instituted before this Court on February 19, 2018 is an ALJR of the Decision of the Enforcement Officer dated February 14, 2018 refusing to defer the Applicant's removal. The Applicant never moved for leave to amend his pleading to encompass the two subsequent decisions rendered by the Enforcement Officer. Nor did the Applicant seek leave to amend the prayer for relief to request a declaration that his rights under sections 7 and 12 of the *Charter* were violated or an order allowing him to return to Canada under section 52 of the IRPA pending redetermination of the Enforcement Officer's decision. These matters were raised well after the Applicant was removed to Iraq.

[35] Rule 302 of the *FCR* provides that an application for judicial review shall be limited to a single order in respect of which relief is sought. While the decisions that the Applicant seeks to challenge concern the Applicant's removal and were rendered by the same officer, all within a short timeframe, it remains that they are separate decisions, based on different facts.

[36] The Applicant does not suggest that he was somehow impeded by the short timeframes from bringing a separate application to challenge the Enforcement Officer's decision dated

February 21, 2018. To the contrary, he had ample time to bring a motion for a stay of removal in IMM-5279-17 and was before this Court immediately after the first decision was rendered, raising the same arguments that had been put forward on two separate occasions before the Enforcement Officer, including that there were potential dangers in the "manner of removal". Justice Annis concluded that there was no serious issue warranting a stay of removal. As for the decision rendered by the Enforcement Officer on the date of the Applicant's removal, the Applicant has failed to establish the existence of any new and significant information that would bring into question the previous decisions or justify deferral.

[37] Instead of providing all of his arguments and evidence when first requesting deferral of removal, the Applicant proceeded in a piecemeal manner. He repackaged readily available information and refined his arguments when faced with a negative decision, a clear example of creating a "moving target".

[38] In the circumstances, I agree with the Respondent that it would be unjust and unfair to entertain more than one decision. In the circumstances, I decline to exercise the jurisdiction conferred on me by Rule 55 of the *FCR* to allow the Applicant to dispense in compliance with Rule 302.

C. *Mootness of the Application*

[39] In my view, the mootness issue is the threshold question.

[40] Removal is usually the very last step in what can be a very lengthy process and must be executed as soon as possible: section 48 of the IRPA. The discretion that an enforcement officer may exercise is very limited, and in any case, restricted to when a removal order will be executed. The mere existence of an H&C application or other pending litigation does not constitute a bar to the execution of a valid removal order: *Baron v Canada (Minister of Public Safety and Emergency Preparedness),* 2009 FCA 81, [2010] 2 FCR 311 [*Baron*]. Absent special considerations, such matters will not justify deferral unless based on a threat to personal safety. No such threat has been established in the present case.

[41] On its face, the application is moot. Judicial review cannot grant a practical benefit to the Applicant because he has already been removed. Even if a reviewable error was established in the Decision, there would be little point in sending the matter back for redetermination by a different enforcement officer, because the Applicant is no longer in Canada.

[42] The Applicant submits that the application should be heard notwithstanding as he is seeking a declaration that the manner of his removal was contrary to his common law and *Charter* rights. However, the Applicant already had an opportunity when he moved for a stay of removal to present evidence and to argue that his rights were or would be violated. Justice Annis concluded that removal of the Applicant without a valid passport did not raise a serious issue.

[43] The onus was on the Applicant to prove the violation of his rights on a balance of probabilities. He failed to do so. The Applicant did not produce any admissible and reliable evidence to demonstrate the dangers he claims to have faced upon his arrival at Baghdad Airport.

Instead, the only evidence before me is an email from the Applicant lacking any detail or context and his counsel's sparse handwritten notes of two telephone conversations.

[44] Notwithstanding, given that the matter was heard on its merits, I would add the following. The standard of review applicable to a decision not to defer removal is reasonableness. The Court will only interfere with such a decision if it falls outside the range of possible, acceptable outcomes which are defensible on the facts and the law or if it otherwise lacks transparency, intelligibility and justification (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 42; *Baron* at para 25). It is clear from reading the Decision that the Enforcement Officer properly weighed all of the relevant facts and arguments advanced by the Applicant. She considered the possibility that the Applicant obtain a valid travel document, the possibility that CBSA officers escort the Applicant to Baghdad, the possibility that the Applicant might be refused entry to Iraq and that travel by plane to Erbil Airport might not be possible. She concluded that there was no evidence that the Applicant might face any danger or risks should he be returned to Iraq via the Baghdad Airport. No reviewable error has been established in her analysis and conclusion.

[45] For the above reasons, the application for judicial review is dismissed.

[46] After the hearing of the application, counsel for the Applicant proposed three questions for certification:

> (1) Does CBSA owe a duty of care to a person who is being removed from Canada during the course of the execution of said removal?

(2) Does the removal of a person under section 230(3) of the IRPA regulations on a Single Journey Travel Document and without a valid and subsisting travel document violate sections 7 and 12 of the *Canadian Charter of Rights and Freedoms* where there is no consideration of possible complications arising from this manner of removal and no balancing of criminality and any personal risk arising from such complications?

(3) To the extent that a removals officer can grant "short term" deferrals of removal, what are the parameters of the notion of "short term"?

[47] In order to be certified, a question must be one which transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application. In this case, I am of the view that the proposed questions do not meet the test as the first two cannot be assessed in a factual vacuum and none of them would be determinative of this application.

JUDGMENT in IMM-807-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no questions are certified for appeal.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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