Federal Court  Cour fédérale

Date: 20190621

Docket: IMM-3296-18

Citation: 2019 FC 845

Ottawa, Ontario, June 21, 2019

PRESENT: Madam Justice McDonald

BETWEEN:

SHIRE FARAH ISMAIL

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of the decision of a Canada Border Services Agency (CBSA) Inland Enforcement Officer (Officer), dated July 18, 2018, denying the Applicant's request to defer his removal to Somalia. For the reasons that follow this judicial review is granted as the Officer failed to consider the short term best interests of the, then unborn, child (BIOC).

Relevant Facts

[2] The Applicant, Shire Farah Ismail, is a 24-year-old Somali national who entered Canada in 2012 on a Swedish travel document and made a claim for refugee protection. The Applicant was found to be excluded from refugee protection due to serious criminality under paragraph 36(1)(b) of the *Immigrant and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for previous attempts to seek refugee status in Europe using forged documentation.

[3] The Applicant's application for permanent residence status on humanitarian and compassionate (H&C) grounds and his Pre-Removal Risk Assessment (PRRA) application were both refused. However, as he did not have the requisite travel documentation he was prevented from being removed from Canada.

[4] He married in January 2018 and in April 2018 the couple submitted a sponsorship application and an application for permanent residence for the Applicant as a member of the Spouse or Common-Law Partner in Canada Class. The Applicant has requested an exemption from criminal inadmissibility on H&C grounds. The Applicant's wife is a protected person from Somalia who arrived in Canada in 2016 as a permanent resident.

[5] In June 2018 the Applicant was informed that the CBSA had obtained a Somali travel document and his removal was scheduled for July 22, 2018. The Applicant failed to report for removal and was arrested in July 2018. During the arrest it was determined that the Applicant was in possession of a valid Somali passport that he had previously withheld.

[6] The Applicant sought a deferral of his removal pending the first level decision on the spousal sponsorship application. The Applicant's then pregnant 19 year old wife is a student who is financially dependent on the Applicant. Once their child is born if the Applicant is removed she would be forced to seek social assistance to support herself and their child. His wife's financial dependence on the Applicant also extends to the child. The Applicant raised the issue of the circumstances that his wife and child would face in the event of his removal. As well, being in receipt of social assistance benefits would render her ineligible to sponsor the Applicant. Finally, as Applicant's wife is a protected person from Somalia, she would be unable to travel there to be with the Applicant.

[7] On July 18, 2018, the Officer denied the Applicant's request and found that the case did not present exigent personal circumstances warranting a deferral of the Applicant's removal.

[8] By Order of this Court of July 18, 2018, Justice Roussel stayed the Applicant's removal pending the determination of this judicial review.

Issue and Standard of Review

[9] While the Applicant raises a number of issues with the Officer's decision, in my view, the determinative issue is the failure of the Officer to properly consider the short term BIOC. I therefore decline to consider the other issues raised.

[10] The standard of review of an enforcement officer's decision is reasonableness (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 [*Lewis*] at para 43). A

decision is reasonable if it demonstrates "justification, transparency, and intelligibility within the decision-making process" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

Analysis

Short Term BIOC

[11] The Applicant acknowledges that the Officer is not obligated to conduct a full blown BIOC analysis, however, he argues that in this case the Officer failed to undertake even a short term BIOC analysis consistent with *Lewis*. The Applicant argues that in the circumstances, the Officer needed to consider that the short term BIOC are inextricably linked to the social and economic circumstances of the (then unborn) child's mother. The Applicant argues that the Officer failed to consider these factors.

[12] The key points in the evidence before the Officer contained in the Affidavit of the Applicant's wife included: she is 19 years old; attending high school; does not speak English; is a Somolian refugee with protected status in Canada; she is not employed; and she and the child are financially dependent on the Applicant. Her immediate family are her parents and her 9 minor siblings all of whom reside in a two-bedroom house. She states that they are unable to provide financial support or accommodations to her and her child.

[13] The Officer's consideration and assessment of this evidence is best reflected by reproducing the following from the decision:

> I further acknowledge the challenges and difficulties Mr. Ishmael's removal will place on his spouse, both emotionally and

> financially, especially as she prepares for the birth of her child. I note that Mr. Ishmael's spouse is a permanent resident of Canada, and as such, she is entitled to the array of social services available to all Canadians, including access to healthcare and social assistance, should she require access to the services. I further note that Mr. Ishmael's spouse has a large immediate family in Ottawa, Canada. I further note that the information available indicates that she has an uncle in Toronto, with whom the couple lived with when they both moved to Toronto. I know counsel's assertion that Saynab's family will be unable to provide support to her because her parents are overburdened by the care and financial support required by the nine other siblings who were all minors and the insufficient living conditions for the entire family. I note that Saynab was living and dependent on her parents until she married Mr. Ishmael only six months ago. I find that insufficient evidence was presented to indicate that Saynab's family will be unable or unwilling to provide some measure of care and support, including financial and providing for accommodations, be it long term or temporary, for both her and her child, once born. I also note that Saynab is an adult, at 19 years of age, and I find that insufficient evidence was presented to indicate that she will be unable to find unemployment [*sic]* in the short term or even after her child is born. I find that counsel submits insufficient evidence to demonstrate, in the short-term, Mr. Ishmael spouse will be unable to cope.

[14] The applicant argues that the Officer's conclusions are contradicted by and irreconcilable with the evidence on the record. He highlights in particular that it is not reasonable for the Officer to assume that his spouse will be able to move back with her parents who reside in a two-bedroom house already occupied by 12 people. Further, there was evidence that her uncle in Toronto is not supportive and therefore that was not an option.

[15] The Officer "acknowledging" and "noting" the evidence is not sufficient. The Officer must analyze the evidence. The Officer does not come to grips with the reality that the Applicant's wife and child are wholly dependent on the Applicant for financial support and his

deportation will result not only in harm to the family unit but also create an "endless cycle of destitution and poverty" (*Acevedo v Canada (MPSEP)*, 2007 FC 401 at para 35).

[16] By failing to analyze the evidence, the Officer failed to consider the short-term best interests of the child. Even accepting that the duty to consider BIOC factors is on the low end of the spectrum for removals officers (*Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 at para 16), they still have to be "alert, alive and sensitive" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75) to the short-term best interests of the child (*Lewis* at para 61).

[17] Further, the fact that the child was unborn at the time of the deferral request does not negate the obligation of the Officer to undertake the BIOC analysis (*Hamzai v Canada (MCI)*, 2006 FC 1108 at para 33).

[18] This case is similar to *Douglas v Canada (MPSEP)*, 2017 FC 1148 [*Douglas*], where the applicant was a Jamaican citizen who arrived in Canada using fraudulent documents and was found to be inadmissible to Canada before applying for a spousal sponsorship application due to which a deferral request for a removal order was denied. Justice Gleeson in *Douglas* determined that the officer's decision was unreasonable noting that it was not sufficient for the officer to simply summarize evidence that, on its face, was not consistent with the conclusions the officer reached.

[19] The same reasoning from *Douglas* applies here where the Officer "acknowledges" and "notes" the evidence but then goes on to find that the Applicants wife and child can seek assistance from family. This conclusion stands in stark contrast to the evidence before the Officer.

[20] Finally, I note that notwithstanding the decision of the Chief Justice in *Forde v Canada (MPSEP)*, 2018 FC 1029 that a removals officer is not entitled to defer removal where a decision on an outstanding application is unlikely to be imminent (at paras 40-41), the Officer was still required to properly assess the short term BIOC on the unique circumstances of this case.

[21] The failure of the Officer to assess the short term BIOC results in a decision that is lacking in "justification, transparency and intelligibility" and must therefore be fully reconsidered.

Certified Question

[22] The Applicant seeks to certify a question in relation to section 48(2) of *IRPA* and the *Forde* decision and the overarching principle espoused in that case that a "decision must be imminent" to form the basis of a deferral request. However, given my finding that the Officer here failed on the BIOC analysis, the decision in *Forde* is not dispositive of this case (*Lunyamila v. Canada* 2018 FC 22). I therefore decline to certify a question.

JUDGMENT in IMM-3296-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of the Deferral Officer is set aside and the matter is remitted for redetermination by a different officer; and

2. I decline to certify a question.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3296-18
STYLE OF CAUSE:	SHIRE FARAH ISMAIL v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 9, 2019
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	JUNE 21, 2019

APPEARANCES:

Anthony Navaneelan	FOR THE APPLICANT
Kevin Doyle	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Refugee Law Office Legal Aid Ontario Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Department of Justice Canada Ontario Regional Office Toronto, Ontario	FOR THE RESPONDENT