Federal Court  Cour fédérale

Date: 20200210

Docket: IMM-4615-19

Citation: 2020 FC 221

Ottawa, Ontario, February 10, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

FABRIZIO SALTARELLI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] The Applicant seeks judicial review pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision of an Inland Enforcement Officer [Officer] dated July 23, 2019 [Decision], refusing to grant a second deferral of removal to the Applicant for an indefinite period. The Officer concluded that the Applicant had provided insufficient

evidence to show that Immigration, Refugees and Citizenship Canada [IRCC] will render a decision imminently on his permanent residence application.

II. BACKGROUND

[2] The Applicant is a 55-year-old Italian citizen who arrived in Canada on June 26, 1965, at the age of 16 months with his parents and 7 other siblings. He became a permanent resident at that moment and has lived in Canada since.

[3] In 1976, the Applicant's family applied for Canadian citizenship. However, his parents did not add him in their citizenship application and, although eligible, the Applicant never presented his own application.

[4] The Applicant obtained a high school diploma from an English language school in Montreal and has worked a variety of jobs, including business owner, cleaner and materials coordinator.

[5] The Applicant is currently unemployed and, since 2016, he has lived with his common-law partner, his two stepdaughters and his son. He also has 78 other family members living in Canada.

[6] On November 13, 2003, the Applicant was charged with fraud exceeding $5,000. The Applicant was operating a company with two other partners and the company issued several

cheques totalizing about $75,000, for which there were insufficient funds. On January 31, 2008, the Applicant pled guilty to the charges as one of the principal managers of this company.

[7] On August 24, 2010, the Immigration Division [ID] issued a Deportation Order against the Applicant for criminality, which he appealed. On April 4, 2013, the ID granted the Applicant a stay of removal with conditions for 1 year, returnable on March 6, 2014. However, on August 4, 2014, the Immigration Appeal Division [IAD] dismissed the stay and determined that the Applicant had abandoned the appeal under s 168(1) of the *IRPA*. The Applicant submits that this situation occurred because of his then counsel's professional incompetence.

[8] On November 17, 2016, a Canadian Border Service Agency [CBSA] officer initiated a Pre-Removal Risk Assessment [PRRA], which the Applicant waived.

[9] On December 7, 2017, the IAD refused the Applicant's application to reopen the appeal and found that the Applicant had failed to establish incompetence by counsel that led to a breach of natural justice.

[10] On April 6, 2018, the Applicant applied for permanent residence based on a spousal sponsorship.

[11] On May 1, 2018, the Applicant requested a deferral of removal based on a second application to reopen the IAD appeal, the best interests of his stepchildren, and the harm he would face if removed to Italy. On May 3, 2018, a CBSA officer denied this request and the

Applicant's counsel filed an application for a judicial review of that decision along with a motion to stay his removal.

[12] On May 8, 2018, the Federal Court granted a stay of removal to the Applicant pending a judicial review of the CBSA's decision dated May 3, 2018, refusing to defer removal.

[13] On May 29, 2018, the Applicant filed an application for a temporary resident permit and a work permit.

[14] On June 28, 2018, the IAD dismissed the Applicant's second application to reopen his appeal. On October 18, 2018, the Federal Court dismissed the Applicant's application for leave and judicial review of the IAD's decision.

[15] On December 19, 2018, the Federal Court granted the judicial review of the CBSA's deferral decision dated May 3, 2018, and sent it back before another CBSA officer for redetermination.

[16] On March 19, 2019, IRCC issued a Procedural Fairness letter to the Applicant concerning his spousal sponsorship application for permanent residence. In this letter, IRCC informed the Applicant that he might not meet the requirements for membership in the family class. Therefore, the Applicant added submissions to request an exemption from inadmissibility for criminality and lack of status based upon humanitarian and compassionate [H&C] grounds.

[17] On March 20, 2019, the Applicant's application for a Temporary Resident Permit and a work permit were refused.

[18] On April 5, 2019, a CBSA officer granted a deferral of removal to the Applicant until May 1, 2019, to allow IRCC to evaluate his sponsorship application. The lock-in date for the Applicant's sponsorship was April 6, 2018. In addition, the information contained on IRCC's website indicated an average processing time of 12 months.

[19] On May 10, 2019, IRCC informed the Applicant that his sponsorship application was being transferred to Edmonton for further processing in accordance with the Inland Processing Manual (IP) because the Applicant was criminally inadmissible and was seeking H&C relief.

[20] On May 14, 2019, the CBSA inquired about the status of the Applicant's sponsorship application. The CBSA officer was advised that the Applicant's file had been transferred to Edmonton and that such cases take about 12 to 18 months to process.

[21] On July 16, 2019, an Inland Enforcement Officer convoked the Applicant to a pre-removal interview and provided him with his removal instructions and travel itinerary to Italy. The removal to Italy was scheduled to take place on July 29, 2019. However, on July 19, 2019, the Applicant requested another deferral of his removal until IRCC makes an eligibility decision on his outstanding inland spousal sponsorship. On July 23, 2019, this request to defer removal was refused, which is the impugned Decision before the Court.

III. DECISION UNDER REVIEW

[22] Before the Officer, the Applicant requested a deferral of his removal to Italy until he receives an eligibility decision (a stage one decision) on his permanent residence application. However, the Officer concluded that the Applicant had provided insufficient evidence to show that IRCC would render a decision before May 2020 as indicated by the Applicant.

[23] The Officer noted that removal of the Applicant had previously been deferred. The Officer also noted that IRCC had transferred the Applicant's application from Mississauga to Edmonton as the Applicant had applied for H&C relief because he was criminally inadmissible for permanent residence. The Officer was informed that the processing time for this type of case was between 12 and 18 months.

[24] As part of the H&C analysis, the Officer had to assess the short-term best interests of the Applicant's stepdaughters. The Officer noted that the two stepdaughters were aged 15 and 17 and maintained a close relationship with the Applicant. However, the Officer noted that both children have a good domestic and educational foundation with their mother and are doing well in school. In addition, the Applicant began to reside with them about 3 years ago. Therefore, the Officer concluded that there was insufficient evidence to prove that the Applicant's stepdaughters would suffer if the Applicant was removed from Canada.

[25] With regards to irreparable harm, the Officer acknowledged that the Applicant has lived in Canada since the age of 16 months and that he is currently 55 years old. The Officer noted that

employment conditions in Italy are difficult, particularly for older people. However, the Officer also noted that the Applicant has maintained Italian language skills that would help him to resettle in Italy.

[26] Finally, the Officer noted that the Applicant acquired three criminal convictions between 2001 and 2008. The Officer also acknowledged that the Applicant had complied with the conditions imposed on him by the Immigration authorities.

[27] Nonetheless, the Officer concluded that the Applicant had provided insufficient evidence to outweigh his statutory obligations to enforce a valid removal order.

IV. ISSUES

[28] The issue before the Court is whether the Decision is reasonable.

V. STANDARD OF REVIEW

[29] This application was argued following the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. However, the Applicant's memoranda were provided prior to these decisions. The Applicant's written submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. However, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at para 144, this Court found that it was not necessary to ask any of the

parties to make additional written submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application and it does not change the applicable standard of review in this case nor my conclusions.

[30] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52), and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[31] In this case, both the Applicant and the Respondent submitted that the standard applicable to this Court's review of the Decision was reasonableness. I agree.

[32] There is nothing to rebut the presumption that the standard of reasonableness applies in this case. The application of the standard of reasonableness to this issue is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*. See, for example, *Forde v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1029 at para 28 [*Forde*] and *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 43.

[33] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para 99). Reasonableness is a single standard of review that varies and "takes its colour from the context" (*Vavilov*, at para 89 citing *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). These contextual constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov*, at para 90). Put in another way, the Court should intervene only when "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the decision-maker's reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it" (*Vavilov*, at para 101).

VI. STATUTORY PROVISIONS

[34] Paragraph 48(2) of the *IRPA* reads as follows:

Effect	**Conséquence**
48 (2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.	**48(2)** L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

VII. ARGUMENTS

A. *Applicant*

[35] The Applicant alleges that the Officer fettered his discretion by refusing to grant removal on the basis that his deferral request was for an indefinite period. The Applicant contends that he requested a deferral until IRCC makes an eligibility (stage 1) decision on his outstanding inland spousal sponsorship. The Applicant adds that he presented sufficient evidence to demonstrate that a decision was imminent. The period requested, he asserts, was not indefinite.

[36] In support of his argument, the Applicant submits that this Court in *Forde* has held that an officer is entitled to make a deferral when a decision is likely imminent.

[37] The Applicant adds that a deferral is also warranted when a timely application has been made and there is a backlog in processing (*Simmons v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1123, at para 8; *Forde*, at para 38). In the present case, the Applicant alleges that the Officer did not determine whether there was such a backlog. In this matter, the Applicant submits that operational limitations are beyond his control and may indicate a backlog in the system. Even if the processing time for an inland spousal sponsorship is listed as 12 months, the Applicant says that his file had been in process for over 16 months at the time he requested for the deferral.

[38] Regarding his H&C request, the Applicant submits that his overall situation made it unreasonable for the Officer to overlook the possibility that a decision may be rendered within 12 months when the Applicant's file was transferred to Edmonton.

[39] Moreover, the Applicant says that it was unreasonable that the Officer did not consider and take into account his functional illiteracy in Italian. Also, given that the Applicant is 55 years old and has no occupation and no post-secondary training, the Officer's conclusions about the possibility of his finding work in Europe are insensitive and unrealistic.

[40] Finally, the Applicant argues that the Officer's assessment of the best interests of his stepdaughters is superficial and requires a more robust review regarding the short-term factors (*Barco v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 421 at paras 14-16). In this matter, the Applicant says that the Officer only considered academic tutoring, whereas the children also need support and guidance from him on an emotional level as they transition into the first year of university and final years of high school respectively.

B. *Respondent*

(1) Spousal sponsorship is not a bar to removal

[41] The Respondent says that the Decision is reasonable because it considers the lock-in date of April 6, 2018, along with the information on the IRCC website that indicated a 12 month processing time for inland spousal sponsorship applications, and the fact that the Applicant has already been granted a deferral on April 5, 2019.

[42] However, the Respondent adds that the Officer also considered that the Applicant's application had been transferred from Mississauga to Edmonton on May 9, 2019, for further processing and a final decision. At this moment, the Respondent says that a supervisor advised the Officer that when a file is transferred locally, such cases could take 12 to 18 months to process.

[43] Therefore, the Respondent argues that this delay is not caused by a delay in processing, but rather because the Applicant requested H&C relief to overcome his criminal inadmissibility. Consequently, the Respondent says it was reasonable for the Officer to conclude that no decision on the sponsorship was imminent.

(2) The Imminence of a Decision

[44] The Respondent alleges that there is no evidence of any hard deadline for a stage 1 eligibility decision. If the Officer had granted the deferral, he would have had to grant it until the H&C component of the application was assessed, which amounts to a request for an indefinite deferral.

[45] In addition, the Respondent finds it puzzling that the Applicant relies upon *Forde*, above, since this case makes it clear that an enforcement officer cannot defer removal simply because there is a pending spousal sponsorship application. A deferral of 9 months or more does not fall within the definition of "few months" and concluding otherwise would be inconsistent with the spirit of s 48(2) of the *IRPA*.

[46] Moreover, the Respondent alleges that IRCC transferred the sponsorship application to Edmonton because the Applicant requested H&C relief to his criminal inadmissibility, and not because there is a backlog in the processing.

[47] The Respondent also submits that this Court should consider the *Instrument of Designation and Delegation*, which was issued under the *IRPA* and signed by the Minister of Citizenship and Immigration on June 25, 2019, to determine whether the Decision is unreasonable. The Respondent refers the Court to Item 65-66, where the document indicates that, when an applicant applies for H&C relief to overcome inadmissibility for permanent residence because of serious criminality, a local processing office may finalize a decision on the application if the decision is to refuse the applicant. On the other hand, if the H&C application has merit, it must be referred to a decision-maker at the Headquarters/Case Management Case in Ottawa for a final determination.

(3) Short Term Best Interests of Children Considered

[48] The Officer's treatment of the best interests of the children was reasonable. The Respondent adds that the stepdaughters are 15 and 17 years old respectively, and they will remain with their mother to pursue High School and University education. The Respondent points out that the Officer considered the submissions and the evidence of emotional and academic support and took this into account.

[49] In addition, the Respondent says that the Officer's functions are limited to a fair and sensitive consideration of the immediate short-term interests of the child (*Kampemana v Canada*

(Public Safety and Emergency Preparedness), 2015 FC 1060 at para 34; *Ally v Canada (Citizenship and Immigration)*, 2015 FC 560 at paras 21-23). The Officer could not have made an H&C decision, nor could he conduct a full-scale best interests of the children assessment (*Shpati v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 286 at para 45; *Lewis v Canada*, 2017 FCA 130 at paras 60-61).

(4) H&C Factors: Age and Linguistic Abilities

[50] The Respondent says that the Officer considered the Applicant's establishment in Canada, his age, his linguistic ability, as well as the unemployment rate in Italy. However, s 48(2) of the *IRPA* does not provide discretion to the Officer to defer removal because the quality of life is better in Canada; nor was it the Officer's role to conduct a full H&C analysis.

[51] The Officer noted that the Applicant was not authorized to work in Canada. Therefore, the Respondent says that it was reasonable for the Officer to conclude that the Applicant would be better able to work legally in Italy and in other countries of the European Union given his Italian citizenship. In addition, the Respondent argues that the Officer did not err in concluding that the Applicant was fluent in Italian.

[52] Finally, the Respondent alleges that the jurisprudence is clear that hardship in removal is inevitable, including employment uncertainty and family separation (*Tesoro v Canada (Citizenship and Immigration)*, 2005 FCA 148; *Melo v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16251 (FC)).

C. *Applicant's Reply*

[53] As regards the timing for a stage 1 eligibility decision, the Applicant submits that his counsel contacted a Supervisor from the Domestic Network IRCC, who informed him on July 18, 2019, that the processing time for this type of file is about 12 months, so the file would likely be looked at around May 9, 2020.

[54] The Applicant agrees with the Respondent that there is no hard deadline for an immigration decision to be made. However, he submits that the information given by the Supervisor is similar to the processing times as listed online for an inland spousal sponsorship, which are 12 months. The Applicant says that there is no indication that the Officer considered this information from the Supervisor. Hence, the Officer fettered his discretion by refusing to grant a deferral of removal for an indefinite period.

[55] Furthermore, the Applicant specifies that he never stated that his file was transferred to Edmonton because of a backlog; it was his H&C application that necessitated the transfer. However, the Applicant submits that his file was locked-in on April 6, 2018, and it was only transferred on May 9, 2019, which exceeds the listed processing time of 12 months. This situation indicates a backlog, and the Officer should have considered these factors.

VIII. ANALYSIS

[56] The Applicant's circumstances are unfortunate but they are not dire. He and his partner are not excluded from pursuing a spousal sponsorship if he is outside Canada. In addition, the

record shows that the Applicant has not been as diligent as he could have been in legitimizing his status in Canada.

[57] The Applicant says that the Officer unreasonably fettered his discretion, but the Decision and the evidence does not suggest that this is the case. Under s 48(2) of the *IRPA*, the discretion of a removal officer to defer removal is extremely limited.

[58] Case law tells us that a pending H&C application or spousal sponsorship is not a ground for deferral although, if a decision on such an application is imminent, then an officer may defer until the decision is made. See *Forde,* at paras 38-43. In the present case, it appears that the Officer did not fully understand the procedures for spousal sponsorship applications where serious criminality and H&C factors have to be considered. The Officer concluded that insufficient evidence had been provided to show that a decision by IRCC will be rendered "any sooner than the estimated timeframe (May 2020) that you ascertained in your emailed inquiry." The Officer made his own inquiries with an IRCC supervisor who advised him that processing times were 12-18 months for this type of case. It may be that, in fact, an even longer period will be required because of the criminality and H&C factors at play in this case. But even if we simply look at the Officer's finding of no sooner than May 2020, this does not mean that a decision was imminent in this case when the request was made. See *Forde*, at para 43. The Canadian Oxford Dictionary defines "imminent" to mean an event that is "impending" or "about to happen." I don't think that a decision that could only happen, at best, some 9 months in the future is impending or about to happen, and the Applicant has pointed to no jurisprudence to suggest that it could.

[59] In my view, there was nothing unreasonable about the Officer's conclusion that a decision on the spousal sponsorship application was not imminent so that he could not exercise his discretion to defer on this ground. This is even more so when the Applicant has been granted prior deferrals.

[60] There is also no evidence to support that it was a backlog in the system that was holding up the spousal sponsorship decision. The length of time was a function of the kind of application made by the Applicant and the processing times that were currently applicable to his particular circumstances.

[61] The Applicant also says that the Officer fails to address his functional illiteracy in Italian when looking at the hardship he will face in Italy. The Officer certainly does look at the hardship issue but he is not conducting either a PRRA or an H&C assessment. The Officer's discretion only allows him to defer under s 48(2) if an applicant faces death, extreme sanction or inhumane treatment if deported (see *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81). This degree of hardship is not even alleged in the request for deferral or the Applicant's evidence. The Officer concluded that the Applicant did not face "irreparable harm" and I think it is clear that, by this, he meant the Applicant was not facing death, extreme sanction or inhumane treatment, so that he could not defer for the reasons requested by the Applicant.

[62] The Applicant also says that the best interests of the children analysis was superficial, but there was really no evidence to suggest that the short-term best interests of the children required a deferral. The Applicant is a loving and supportive father to his stepdaughters and they will

certainly miss his immediate presence. But there is nothing in this case that raises it above the usual consequences of deportation (see *Melo v Canada (Minister of Citizenship and Immigration)*, 188 FTR 39, [2000] FCJ No 403 (QL)). Given the submissions and the evidence, the Officer's analysis and conclusions were reasonable.

[63] It is unfortunate that the Applicant will have to be physically separated from his new family for some time, but I cannot find anything unreasonable in this Decision that would justify setting it aside.

[64] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-4615-19

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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