Federal Court Cour fédérale

Date: 20200225

Docket: IMM-2811-19

Citation: 2020 FC 298

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, February 25, 2020

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

BORHIS VIVIAN DJIDJOHO TAKPA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

Borhis Takpa, the applicant, is seeking judicial review of the decision dated May 1, 2019, by which an enforcement officer of the Canada Border Services Agency [Agency] rejected the applicant's request to defer his removal scheduled for May 6, 2019.

I Background

[1] The applicant is a citizen of Benin. He arrived in Canada as a permanent resident in October 2015, having been sponsored by his father. He was 17 at the time. In May 2017, he was arrested after communicating with a 13-year-old teenager on social media and inciting her to send him photographs and a video of a sexual nature. He pleaded guilty to the luring charge, prosecuted by summary conviction, and was sentenced to the minimum punishment of six months' imprisonment (paragraphs 172.1(1)(b) and (2)(b) of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]), following the joint recommendation of his counsel and the Crown attorney.

[2] The applicant submits that he was never informed of the consequences of a guilty plea on his status as a permanent resident or the possibility of appealing a potential removal order, considering the offence to which he pleaded guilty carries a finding of inadmissibility to Canada on grounds of serious criminality pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Thus, the right to appeal a potential removal order is restricted by subsections 64(1) and 64(2) of the IRPA, which prohibit permanent residents or foreign nationals who are inadmissible on grounds of serious criminality from appealing an Immigration Division [ID] decision before the Immigration Appeal Division [IAD].

[3] On February 17, 2018, the applicant was released after serving two thirds of his sentence. The Agency immediately executed an arrest warrant and released the applicant with conditions. On April 26, 2018, the ID confirmed that the applicant was a person described in paragraph 36(1)(a) of the IRPA and issued a deportation order against him. The applicant filed an appeal from the deportation order before the IAD despite the provisions in section 64 of the

IRPA, but on November 6, 2018, the IAD confirmed that the applicant was precluded from appealing his inadmissibility finding. As a result, the applicant lost his permanent resident status.

[4] The applicant submitted an application for permanent residence for humanitarian and compassionate considerations. He also submitted an application for a temporary resident permit, an application for a work permit, and an application for a study permit. All these applications are being processed. He was also offered the chance to present a pre-removal risk assessment application, but he did not do so.

[5] In conjunction with the proceedings undertaken by the applicant with immigration authorities, the Superior Court of Québec granted him leave to appeal the sentence he served, thereby seeking to have the minimum sentence under paragraph 172.1(2)(b) of the *Criminal Code* declared unconstitutional. The Superior Court stated that it was of the opinion that the applicant had serious grounds for appeal, considering the overall context of the case.

[6] The applicant's case before the Superior Court was removed from the court roll while awaiting an impending decision by the Supreme Court of Canada on the constitutionality of the minimum sentence imposed under paragraph 172.1(2)(b) of the *Criminal Code*, but in a March 15, 2019 case, the Supreme Court abstained from ruling on this issue: *R v Morrison*, 2019 SCC 15 [*Morrison*].

[7] The applicant was informed on April 4, 2019, that his removal would take place on May 6, 2019. A few days prior to his scheduled removal date, on April 26, 2019, the applicant informed the Agency that he intended to request an administrative stay of the removal. He submits that he wants to exhaust his remedies against the imprisonment sentence he received.

Moreover, he submits that his removal is inappropriate because of his mental health issues, in particular his suicidal ideations, noted by the psychologist Marie-Rosaire Kalanga Wa Tshisekedi, considering that the care needed for his condition and psychological follow-up are not available in Benin. He shared the report prepared by Dr. Kalanga in July 2018, as well as the update to this report by Dr. Kalanga on April 26, 2019.

[8] On May 1, 2019, the officer dismissed the request to defer the removal pursuant to subsection 48(2) of the IRPA. In regard to the appeal proceeding for the applicant's sentence before the Superior Court of Québec, the officer was not satisfied that this ground was sufficient to defer the applicant's removal, considering it relied on several speculative elements not supported by credible documentation. The officer noted that no decision had been rendered, that the applicant's file was progressing slowly before the Superior Court and that nothing indicated a decision would be rendered quickly.

[9] With regard to the applicant's suicidal ideations, the officer did not accept the findings in Dr. Kalanga's report. First, she stated she was of the opinion that the applicant's suicidal ideations as reported by Dr. Kalenga seemed speculative and based on a review of the literature rather than on a genuine desire by the applicant to end his life. The officer also noted that the report did not indicate that the applicant was or should be receiving psychotherapy, or even that he was taking medication. The officer added that, during the interview with the escort officers, the applicant did not report that he did not want to return to Benin and would rather die than return.

[10] Regarding the lack of psychological care in Benin, the officer notes that with no documentation showing that the applicant suffered from a mental illness that required treatment,

and that he was being treated by a psychologist or was taking medication, the lack of care in Benin is of no relevance.

[11] The officer decided that there were no grounds to defer the removal, and considering the wording of subsection 48(2), which states that "the [removal] order must be enforced as soon as possible", she upheld the removal scheduled for May 6, 2019.

[12] The applicant then received a stay from this Court on May 6, 2019. Justice Bell concluded that there was a serious issue to be tried since the applicant was not advised of the consequences of his guilty plea to the offence on which his inadmissibility was based, and the applicant had established that there would be irreparable harm if the removal were not postponed.

[13] The applicant is seeking judicial review of the officer's decision.

II Issues and standard of review

[14] The only issue is whether it was unreasonable for the officer to dismiss the applicant's request to defer the applicant's removal. The applicable standard of review of an enforcement officer's refusal to defer the removal is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *Crawford v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 743 at para 18.

[15] As for the content itself of the reasonableness standard according to *Vavilov*, the Supreme Court of Canada summarized it in *Canada Post Corporation v Canadian Union of Postal Workers*, 2019 SCC 67, at paragraph 31:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which the decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).

III Analysis

[16] The applicant submits that the officer's decision is unreasonable for two main reasons: (i) the officer did not consider the applicant's right to exhaust all his avenues of appeal regarding his criminal case before his removal; and (ii) the officer did not consider the risk to the applicant's life due to his psychological state.

[17] Before addressing these issues, the analysis must first consider the legal context. This case involves the application of subsection 48(2) of the IRPA. The most relevant decisions are: *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*]; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130; [*Lewis*]; *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 [*Shpati*] ; and *Forde v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1029 [*Forde*].

[18] In *Toney v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1018 [*Toney*], Justice Walker summarized the case law involving the nature and scope of this discretionary power (at para 50):

> 1. An enforcement officer's discretion to defer removal is very limited and, ultimately, an officer is required to enforce a removal order in accordance with subsection 48(2) of the IRPA (*Baron* at paras 51, 80: *Lewis* at para 54; *Forde* at para 36);
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> 2. In the exercise of their discretion, an officer cannot defer removal to an indeterminate date (*Baron* at para 80: *Forde* at paras 36, 37 and 43);
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> 3. An officer's discretion is not only limited temporally but is also focused on serious, short-term issues relating to the safety of an applicant, ability to travel, immediate medical issues, impending births and deaths and, in the case of children, such considerations as finishing the school year, whether care has been arranged if they are remaining in Canada, or the need for special medical care in Canada (*Baron* at para 51: *Lewis* at paras 55, 83; *Forde* at para 36). The often-quoted language from *Baron* (at para 50) which situates the tone of the inquiry is that deferral should be reserved for those situations involving "the risk of death, extreme sanction or inhumane treatment" to the applicant
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> 4. The existence of an outstanding H&C or spousal application in Canada is not a bar to removal absent special considerations. Both the timeliness of filing and the imminence of any decision on the application are important considerations for an officer (*Baron* at paras 51, 80: *Lewis* at paras 55-58, 80; *Forde* at paras 35-40). As stated in *Forde* (at para 36), even "in such 'special situations,' as discussed below, there are important temporal limits on a removal officer's discretion to defer removal".

[19] Moreover, since deferrals are intended to be temporary, the considerations that could justify a deferral must also be temporary (*Shpati*, at para 45; *Newman v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 888, at para 33; *Forde*, at para 40).

(i) The issue of the exhaustion of remedies

[20] The applicant submits that the decision is unreasonable because the officer prevented him from exhausting his remedies on appeal. He was granted leave by the Superior Court of Québec to continue his appeal to challenge the constitutional validity of the minimum sentence set out in

paragraph 172.1(2)(b) of the *Criminal Code*. The applicant argues that enforcing the removal order would be premature and contrary to the principles of natural justice, considering the issues he raised in his appeal in Quebec are serious. He submits that enforcing the removal order would have a prejudicial and irreparable effect because it would make it impossible for his status as a permanent resident to be re-established. A removal order that has been enforced cannot be appealed.

[21] The respondent submits that the decision is reasonable because the applicant was not entitled to an administrative stay while waiting for all his remedies to be exhausted. Additionally, the respondent submits that the officer did not err by concluding that the applicant's proceedings to reduce his sentence in order to obtain a right to appeal before the IAD were not sufficient to defer this removal, as the right to appeal relies on several speculative elements.

[22] It was not questioned that the applicant pleaded guilty to an offence that has a minimum sentence, and that he was not informed of the legal consequences of this plea with regard to immigration. As noted by Justice Bell in the decision granting the applicant a stay:

> [TRANSLATION]
> Considering the current case law, the constitutionality of the minimum sentence provided under paragraph 172.1(2)(b) of the Criminal Code is being questioned. Nobody, including the trial judge and counsel for the applicant at the time advised the applicant of the consequences of his guilty plea to the offence on which his inadmissibility is based.

[23] The Supreme Court of Canada, in *R v Wong*, 2018 SCC 25 [*Wong*], acknowledged that an accused who is not informed of the immigration consequences of a guilty plea is the victim of a miscarriage of justice (see *R v Cerna*, 2020 MBCA 18). In passing, I note that the issue of the constitutionality of the minimum sentence set out in paragraph 172.1(2)(b) is a serious issue,

considering recent Supreme Court of Canada decisions (see *R. v Nur*, 2015 SCC 15; and *Morrison*).

[24] Established case law indicates that a reasonable ground to defer a removal according to subsection 48(2) of the IRPA arises where the applicant is awaiting a decision in an immigration process. If the application for an immigration status is not filed at the last minute, and there is reason to believe that the decision will be issued relatively soon or the applicant is not responsible for the delay, the officer has discretion to defer removal (*Baron*, at paras 51, 80, *Lewis*, at paras 55-58, *Forde*, at paras 35-40).

[25] I submit that the same considerations apply in the present case. Enforcing the removal order renders the applicant's potential appeal before the IAD entirely moot; this appeal is tied to the rights protected by the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c11, as noted by the Supreme Court of Canada in *Wong*.

[26] The officer's decision was unreasonable because she did not consider this aspect, despite the applicant's arguments. By applying the *Vavilov* factors, I submit that the officer's decision does not reflect the required justification, and in particular does not indicate that the officer considered "the central issues and concerns raised by the applicant" (*Vavilov*, at para 127). Moreover, I note that the officer did not consider the legal context surrounding the decision, including the protection of his fundamental rights and the impact of the removal order, as explained in *Strungmann v Canada (Citizenship and Immigration)*, 2011 FC 1229.

[27] I note that the present case is an unusual one, and considering all the circumstances and unique facts of the case, the decision is not reasonable.

[28] Given my conclusion on this issue, there is no reason to address in detail the second issue regarding the risks related to the applicant's psychological state should he return. I would merely add a few comments about the way the officer addressed this issue, for the benefit of the officer who will review this case.

[29] Considering the report on the applicant's mental health, including his risk of suicide—a risk that is accepted by the case law as a sufficient ground to support a finding of irreparable harm (*Tiliouine v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1146; *Konaté v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 703)—the officer was required to assess and consider the applicant's specific tests and results, and not focus on the references to the academic literature.

[30] In conclusion, for all these reasons, the application for judicial review is allowed. There is no question of general importance to certify.

JUDGMENT in IMM-2811-19

THIS COURT ORDERS as follows:

1. The application for judicial review is allowed.

2. There is no question of general importance to certify.

"William F. Pentney"
Judge

Certified true translation
This 16th day of April 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

ANDREY LESHYNER	FOR THE APPLICANT
SUZANNE TRUDEL	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Hugues Langlais - Avocats Montréal, Québec	FOR THE APPLICANT
Attorney General of Canada Montréal, Québec	FOR THE RESPONDENT