Federal Court  Cour fédérale

Date: 20200416

Docket: IMM-2471-19

Citation: 2020 FC 523

Ottawa, Ontario, April 16, 2020

PRESENT: Madam Justice McDonald

BETWEEN:

XIAOXUE GUO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ms. Guo, is a citizen of China who seeks judicial review of the refusal of her request for a deferral of her removal from Canada. She successfully obtained a stay of removal from this Court pending the hearing of this judicial review.

[2] For the reasons that follow, this judicial review is dismissed as the decision of the enforcement officer (the "Enforcement Officer" or the "Officer") is reasonable when assessed

against the indefinite nature of the Applicant's deferral request and the limited discretion the Officer can exercise.

Relevant Background

[3] The Applicant arrived in Canada in August 2013 on a visitor visa that was valid until February 2014. Her request to extend her visitor status was denied, but she did not leave Canada.

[4] On November 21, 2017, an exclusion order was issued against her, but she was granted a 60-day deferral to apply for permanent residence being sponsored by her spouse. Her two applications for permanent residence status under the spousal class were returned because they were incomplete.

[5] She applied for a pre-removal risk assessment, which was denied on February 6, 2019, and she was advised that the removal order against her was in force and she needed to arrange her exit from Canada. She was also informed that if she intended to take her Canadian-born daughter with her, she would need to arrange for a visa for China.

[6] The Applicant presented her ticket to China for April 18, 2019, as well as a visa for her child that was valid from November 8, 2017 to November 8, 2019. On April 5, 2019, she made a request to defer her removal; her deferral request was denied on April 16, 2019. The refusal of the deferral request is the subject of this judicial review.

[7] The Applicant was not removed from Canada as she successfully obtained a stay of removal from this Court.

Decision Under Review

[8] The Officer noted the Applicant's reasons for wanting to stay in Canada, being that she was applying for a Temporary Resident Permit (TRP), she planned to submit a spousal application, she has ongoing family law issues, her spouse needed time to resolve his debts, and it was in the best interests of her daughter to stay in Canada.

[9] The Officer found that there was no evidence that a decision on a spousal application was imminent, and that she had ample time to submit a TRP application, but had not done so. The Officer further noted that even if she had submitted a TRP application, it still would not be an impediment to removal. The Officer also found that the Applicant had time to sort out custody of her daughter before her removal and that her explanation why she could not was insufficient.

[10] Regarding the best interests of the child (BIOC), the Officer found that although she would be separated from her father, she would remain in the care of her mother and that this would "attenuate the period of adjustments". The Officer further noted that as the Applicant's daughter is young she would adjust to her new situation naturally and with ease. The Officer states that she would be able to acquire Chinese citizenship through her mother even though she is Canadian.

Issues

[11] The Applicant raises two issues with the Officer's decision:

1) Was the Applicant "removal ready"?

2) Was the BIOC analysis reasonable?

Standard of Review

[12] There is a rebuttable presumption that the standard of reasonableness applies to substantive review of administrative decisions (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]).

[13] 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). Decisions must be both justifiable and justified by way of reasons; "…an otherwise reasonable outcome …cannot stand if it was reached on an improper basis" (*Vavilov* at para 86).

Analysis

1) Was the Applicant "Removal Ready"?

[14] The Applicant argues that the Officer's finding that she was "removal ready" is unreasonable and not in keeping with the wording of the operations manual. She argues that she

applied for permanent residence through the spousal sponsorship program on two occasions, therefore, she should have the benefit of the administrative deferral provided by the policy.

[15] The policy relied upon by the Applicant states as follows:

> … by the time an applicant attends a pre-removal interview, he/she is generally removal ready. This means that a client who has been called to a pre-removal interview by any means (letter, call etc.) and who has not already applied as a spousal H&C applicant or a Spouse or Common-law Partner in Canada class applicant, cannot, from the point they are called to the interview forward, benefit from an administrative deferral of removal as outlined in this public policy except in the limited circumstances…

[16] The Applicant's arguments on this issue are misguided. At the time of her request for a deferral there was no outstanding application and therefore no imminent decision pending. The two applications that were denied do not qualify as outstanding applications.

[17] The fact that the Applicant has applied for a third spousal sponsorship does not assist her. As Chief Justice Crampton noted in *Forde v Canada (Public Safety and Emergency Preparedness),* 2018 FC 1029 [*Forde*] at para 40:

> … [t]o permit a person to avoid removal from Canada by filing a spousal sponsorship or an H&C application shortly before the scheduled removal, or indeed well after being notified that he or she is subject to removal, would be contrary to the principles articulated in *Lewis* and the jurisprudence cited therein. Pursuant to that case law, a removals officer is not entitled to defer removal where a decision on an outstanding application is unlikely to be imminent.

[18] As there is no outstanding application, in effect the Applicant was seeking a deferral of removal on an indeterminate basis and such a request was "beyond the scope of the discretion of the Officer" (*Forde* at para 42).

2) Is the BIOC Analysis Reasonable?

[19] The Applicant argues that the Officer made assumptions and ignored facts with respect to her Canadian-born daughter. She argues that the Officer assumed the child would go to China with her, but that there was no basis for this conclusion. She also argues that the Officer speculated about the issue of custody.

[20] In my view, the Applicant's arguments on this issue are without merit. Any speculative statements on the part of the Officer arose because of the conflicting and incomplete information provided by the Applicant. The Officer noted that the Applicant only applied for custody shortly before her removal date and that she provided an "insufficient explanation" for the timing of the custody application. This was a reasonable conclusion for the Officer to make. Additionally, given that the Applicant obtained a visa for her daughter on November 8, 2017, and it was presented to the Enforcement Officer, it was reasonable for the Officer to assume that her daughter would be travelling with the Applicant.

[21] The Applicant also argues her daughter suffers from a skin condition that will worsen if she has to go to China. The Applicant provided a note from a doctor that states that the skin condition requires her mother to bath and apply cream, and that the stress of her changing environment in China would worsen the rash.

[22] In *Lewis v Canada (Public Safety and Emergency Preparedness*), 2017 FCA 130, at para 55 [*Lewis*], the Federal Court of Appeal reiterated that the discretion of an officer to grant a deferral request is quite limited, but they may consider "factors such as illness, other impediments to travelling, and pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system." Further, the Court instructed that enforcement officers may look at the short-term best interests of the child whose parent is being removed from Canada, but they cannot engage in a full-blown analysis that would act as a "pre-H&C" application dealing with the long-term best interests of the child (*Lewis* at paras 59-61).

[23] In my view, the Applicant's reasons for the deferral request are not exceptional and did not merit the exercise of discretion by the Officer. An enforcement officer's discretion to defer a removal order "…is restricted to deferring for a short period of time 'where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment'" (*Forde* at para 36). When this is considered along with the limited BIOC mandate for an enforcement officer, it is apparent that a worsening rash is not a medical condition that would merit a deferral of removal. Based on the information on record, the condition appears to be minor, and the treatment does not appear to be with prescription medication. Treatment is the application of "regular cream" and regular bathing. Accordingly the risk to the Applicant's daughter appears to be minimal.

[24] In the circumstances, and considering the limited discretion of the Officer, the BIOC finding of the Officer is reasonable.

[25] This judicial review is dismissed. There is no question for certification.

JUDGMENT IN IMM-2471-19

THIS COURT'S JUDGMENT is that this judicial review is dismissed. There is no question for certification.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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