Federal Court  Cour fédérale

Date: 20201105

Docket: IMM-5709-19

Citation: 2020 FC 1035

Ottawa, Ontario, November 5, 2020

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

DERRICK WESLEY BERNARD

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of a Canadian Border Services Agency [CBSA] Enforcement Officer [the Officer], dated September 24, 2019 [the Decision], refusing to defer removal of the Applicant, Derrick Wesley Bernard, from Canada pursuant to s 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Applicant was

scheduled for removal on September 27, 2019. On September 25, 2019, Justice Campbell stayed the removal pending the outcome of this judicial review.

[2] As explained in greater detail below, this application is dismissed, as the applicable standard of review is reasonableness, and the Applicant's arguments do not establish that the Decision is unreasonable.

II. **Background**

[3] The Applicant is a citizen of Trinidad and Tobago who first entered Canada in 2001 as a seasonal agricultural worker through the Temporary Foreign Worker program. He traveled back and forth annually between Trinidad and Tobago and Canada until 2007, when he entered Canada and then remained after his work term as a seasonal agricultural worker concluded.

[4] In 2005, the Applicant met the woman who is now his wife. She is a Canadian citizen. They began a relationship and moved in together in 2007. The Applicant's wife had two sons from a previous relationship (now 12 and 15 years old), whom the Applicant has raised as his own children. The couple also have a son together, who is now 2 years old. The Applicant's wife is currently the breadwinner in the family, and the Applicant is responsible for housework and childcare.

[5] The Applicant initiated a refugee claim in Canada in 2011, at which time the CBSA seized his passport. The claim was refused in 2013. In February 2014, the Applicant attended a pre-removal interview with a CBSA officer who granted him a deferral of removal so that he

could submit an application for permanent residence under spousal sponsorship. He submitted his spousal sponsorship application to Citizenship and Immigration Canada [CIC] in October 2014.

[6] On April 11, 2016, CIC sent the Applicant a letter informing him that he was eligible for permanent residency but that, in order for CIC to continue processing his application and make a final decision regarding his application, he was required to submit within 30 days a copy of a valid or renewed passport from Trinidad and Tobago and a newly completed Schedule A Background Declaration form, bearing an original signature, without any gaps in the dates provided therein.

[7] The Applicant wrote to CIC on May 6, 2016, stating that for financial reasons he was unable to provide the requested information at that time, but would send everything by the end of May. The letter also explained that the Applicant could not provide a copy of his passport, because it was being held by immigration authorities. On September 20, 2016, CIC (then renamed Immigration, Refugees, and Citizenship Canada [IRCC]) refused the Applicant's application for spousal sponsorship, because the Applicant had failed to provide the required documentation.

[8] On February 1, 2017, the Applicant submitted a request for reconsideration of his spousal sponsorship application, which was subsequently refused by IRCC. The Applicant applied for a pre-removal risk assessment in July of 2019, but that application was also refused. On September 21, 2019, the Applicant submitted another request for his spousal sponsorship application to be

reconsidered. This request included a newly completed Schedule A Background Declaration form and an explanation that CBSA was in possession of the Applicant's passport and that it therefore could not be renewed.

[9] The Applicant's removal was scheduled for September 27, 2019. On September 11, 2019, the Applicant's counsel sent submissions to the CBSA, followed by supplementary submissions later in September, in support of a request that the CBSA defer the Applicant's removal from Canada. This request was refused on September 24, 2019, by the Officer in the Decision that is the subject of this application. On September 25, 2019, Justice Campbell granted a stay of the Applicant's removal to remain in effect until the present application for judicial review is finally determined.

[10] On October 21, 2019, the IRCC informed the Applicant that his application for further consideration of his spousal sponsorship application was denied. He was invited to submit a fresh application.

III. **Decision under Review**

[11] In the Decision at issue in this application, the Officer considered arguments advanced by the Applicant as to why his removal should be deferred: (1) the Applicant intended to submit an application for permanent residence on Humanitarian and Compassionate [H&C] grounds; (2) the Applicant had submitted a request for reconsideration of the negative spousal sponsorship application; and (3) deferral would be in the best interest of the children [BIOC].

[12] The Officer was not persuaded to defer the Applicant's removal based on his intention to submit an H&C application. The Officer noted that submitting such an application does not stay or delay removal. The Officer noted that the Applicant had had plenty of time to submit an H&C application from within Canada before the date of his removal and there was no evidence that the Applicant could not submit his application from outside Canada.

[13] Turning to the Applicant's request to defer his removal pending reconsideration of his spousal sponsorship application, the Officer concluded that the reconsideration request was not an impediment to removal. The Officer noted that IRCC had sent the Applicant multiple letters, requesting that he provide the required documentation, before his sponsorship application was refused. Also, he had previously submitted an unsuccessful application for reconsideration of the negative spousal sponsorship decision.

[14] On the subject of the best interests of the children that would be impacted by the Applicant's removal from Canada, the Officer noted the scope of authority to consider this issue, stating that it was beyond the Officer's authority to perform a full H&C evaluation and that deferral of removal is intended to obviate or address temporary practical impediments to removal.

[15] The Officer noted that the Applicant is the main caregiver to the children when his spouse is at work and recognized that the Applicant would like to stay and continue to care for the children as a father figure. The Officer also considered evidence provided by the Applicant regarding particular challenges the family had faced, as well as material speaking to the effects

of separation of a father from his family. However, the Officer found that the children will have the love and support of their mother, which may attenuate the period of adjustment for them after the Applicant's departure and noted that, as Canadian citizens, the children will have access to social and education benefits in Canada. Recognizing that it may be difficult for the Applicant and the children to separate, the Officer was not prepared to defer the removal on that basis.

[16] The Decision concludes by stating that the Officer had considered the Applicant's past attempts to regularize his status, the public policy consideration of implied status during the period of the spousal sponsorship application, the difficulty of processing an application without legal representation, the seizure of the Applicant's passport, the fact that his spouse has taken over the breadwinner role in the family, the fact that the children are Canadian born, and the limited economic means of the family. The Officer acknowledged that it may be difficult for the Applicant to separate from his family, but concluded that the Applicant had submitted insufficient evidence to show that his separation from his family would be indefinite or that it would cause irreparable harm to the family.

IV. **Issues and Standard of Review**

[17] The Applicant's Memorandum of Fact and Law articulates the following issues for the Court's consideration:

A. Whether the Officer's findings were reasonable;

B. Whether the Officer erred in fact or law; and

C. Whether the procedure followed was fair.

[18] Both parties stated in their written Memoranda that the applicable standard of review is reasonableness. I therefore asked the Applicant's counsel at the hearing whether it was her intention, as suggested by the above articulation of the issues, to raise a procedural fairness issue (which would have a different standard of review). She explained that it is the Applicant's position that there was unfairness inherent in the process by which he was required to advance his spousal sponsorship application. In particular, in connection with the requirement to provide a passport and an updated Schedule A, the Applicant submits that it is daunting for an unrepresented applicant to: (a) understand how to obtain and/or provide to CIC a passport that has previously been seized by CBSA; and (b) understand the meaning of the "gaps" that must be avoided in the completion of Schedule A. The Applicant also notes that the pursuit of his sponsorship application coincided with a period when CIC was closing offices and making services available only online or by telephone, thereby exacerbating the challenges faced by unrepresented applicants, some of whom do not have a computer at home.

[19] The Respondent submits that these arguments relate to the fairness of the process surrounding the spousal sponsorship application, not to the fairness of the process through which the Applicant sought a deferral of his removal. The only decision that is under review in the current application for judicial review is the Decision refusing the deferral. If the Applicant wished to challenge the fairness of the sponsorship application, that would have required an application for judicial review of the decision refusing the sponsorship.

[20] I agree with the Respondent's position. The Applicant has not raised any procedural fairness arguments surrounding the Decision presently under review. The Applicant's arguments challenging the Decision are all reviewable on the reasonableness standard.

V. **Analysis**

A. *H&C Application*

[21] The Respondent notes that the Applicant's Memorandum of Fact and Law does not raise any arguments challenging the Officer's reasons for not deferring his removal to allow him to submit an H&C application. As the Applicant's oral arguments at the hearing did briefly touch on this aspect of the Decision, the Respondent requested an opportunity to provide further written submissions in the event that the Court's decision turned on these arguments.

[22] I do not require further submissions on this point, as the Applicant's arguments surrounding the intended H&C application do not demonstrate any reviewable error in the Decision. The Applicant notes that, under s 25(1) of IRPA, when a foreign national who is present in Canada applies for permanent residence status and requests H&C consideration, the Minister of Citizenship and Immigration must give the application such consideration. In contrast, s 25(1) provides that the Minister "may" give such consideration when the application is made by a foreign national outside Canada.

[23] This point does not support a conclusion that the Decision is unreasonable. As the Respondent submits, the Federal Court of Appeal held in *Baron v Canada (Public Safety and*

Emergency Preparedness), 2009 FCA 81 [*Baron*] at para 51 that, absent special considerations, H&C applications will not justify deferral unless based upon a threat to personal safety. In *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 [*Lewis*], the Federal Court of Appeal followed *Baron*, holding that the fact that an H&C application has been made shortly before a removal date by those subject to being removed does not mean that a deferral is warranted (at para 57).

[24] In my view, the Officer's treatment of the Applicant's submission that he intended to file an H&C application is consistent with this jurisprudence. The Officer noted that no H&C application had yet been filed, that the Applicant had had plenty of time to file such an application, and that an H&C application is not considered an impediment to removal. The Officer also stated that there was no evidence that this application could not be submitted from outside Canada. While I understand the Applicant's point, that s 25(1) treats an application submitted from outside Canada differently, the Officer's statement does not suggest that the Officer was labouring under any error of fact or law that would undermine the reasonableness of the Decision.

[25] The Applicant also notes the Officer's statement that H&C applications may take 32 months. He submits that this time frame varies and that approval in principle may only take 12 months. However, the Applicants have not referred the Court to evidence suggesting the time frame referenced by the Officer was inaccurate. Moreover, regardless of the time frame that may apply, taking into account the jurisprudence described above surrounding the effect of pending H&C applications on deferral requests, I find no reviewable error in this aspect of the Decision.

B. *Spousal Sponsorship Application*

[26] The Applicant's principal argument, related to his request for reconsideration of his spousal sponsorship application, surrounds the Applicant's explanation in his deferral request that, in his communications with CIC/IRCC in 2016 and 2017, he explained that his passport was not available to him because it had been taken by immigration authorities. He argues that, being unsophisticated and unrepresented in the spousal sponsorship application, he did not understand the distinction between CIC/IRCC, which was processing the application, and CBSA, which had possession of the passport. The Applicant also relies on an IRCC Operational Bulletin, dated October 17, 2013 [the Operational Bulletin], which provides instructions for IRCC for retrieving passports in the custody of CBSA, as well as guidelines for officers' discretion to waive passport requirements.

[27] The Respondent argues that the failure to provide a passport was not the only impediment to successful processing of the Applicant's sponsorship application. The Applicant also failed to provide an updated Schedule A and made no submissions in his deferral request explaining this deficiency. As identified in IRCC's September 20, 2016 letter denying the sponsorship application, a Schedule A is required to assess whether an applicant may be inadmissible for security reasons. The Respondent notes that the Operational Bulletin contemplates CBSA responding to passport requests only when all medical, criminality and security clearances have been passed and the passport is the last impediment to the processing of an application for permanent resident status.

[28] I understand the Respondent's point to be that, because of the impact of the missing Schedule A when his sponsorship application was rejected, the Applicant's arguments surroundings his efforts to obtain his passport from CBSA do not present a compelling case for reopening the sponsorship application. At the hearing, the Applicant's counsel made submissions that: (a) the Applicant did not understand the meaning of the requirement to complete a new Schedule A, free of gaps; and (b) he did attempt to send a new Schedule A. Neither of these points assists the Applicant's position The Applicant's submissions to the Officer did not identify difficulty understanding how to complete Schedule A, and the Applicant did not send an updated Schedule A prior to the decision refusing the sponsorship application.

[29] More importantly, this Court has rejected the position that the "special considerations," which *Baron* recognizes can warrant a deferral of removal even in the absence of a threat to personal safety, include the strength or compelling nature of a pending application for permanent residence (see *Newman v Canada (Minister of Public Safety and Emergency Preparedness),* 2016 FC 888 at paras 29 and 34). The Officer noted that the Applicant had already submitted a request for reconsideration of his sponsorship application and that such request had been rejected. I find nothing unreasonable in the Officer's conclusion that the renewed submission of the reconsideration request did not warrant a deferral.

C. *Best Interests of the Children*

[30] The Applicant submits that, while the Decision states that the Officer is alert, alive and sensitive to the children's situation, the Decision does not demonstrate this to be the case. The Applicant relies heavily on *Inniss v Canada (Citizenship and Immigration),* 2015 FC 567

[*Inniss*], in which Justice Campbell held that a BIOC analysis requires that an officer first determine which result would be in the best interests of the children (at para 17) and that there is no "hardship threshold" which must be met in order for BIOC considerations to carry the day (at para 22). The Applicant argues the Decision conflicts with these principles.

[31] However, as the Respondent submits, *Inniss* involved a judicial review of a negative H&C decision, not a decision on a request for a deferral of removal. The Respondent submits that *Baron* is the governing authority on the role of a CBSA officer when presented with BIOC submissions supporting a deferral request. In *Baron*, the Federal Court of Appeal confirmed that an officer is not required to perform a substantive BIOC review before executing a removal (at para 50). To similar effect, *Canada (Citizenship and Immigration) v Varga*, 2006 FCA 394 explained that removal officers' obligations, if any, to consider BIOC is at the low end of the spectrum in contrast with the requirements on an H&C application (at para 16).

[32] More recently, following the decision of the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], which addressed the requirements for a BIOC analysis in the context of an H&C application, the Federal Court of Appeal in *Lewis* considered the implications of *Kanthasamy* when BIOC arguments are raised in support of a deferral request. *Lewis* confirmed that enforcement officers may look at the short term best interests of children whose parents are being removed from Canada but cannot engage in a full blown H&C analysis of such children's long term best interests (at paras 61 and 74). Such short terms interests can include matters such as finishing a school year, maintaining access

to specialized ongoing medical care, or ensuring there will be someone to care for the child after removal of a parent (at para 83).

[33] Against this jurisprudential backdrop, I find no reviewable error in the Officer's BIOC analysis. The Decision demonstrates that the Officer was aware of the BIOC evidence and arguments advanced by the Applicant but concluded that, because the children would remain with their mother in Canada, their interests did not warrant a deferral of the Applicant's removal.

[34] The Applicant also argues that, in arriving at this conclusion, the Officer speculated that their mother's love and support may attenuate their period of adjustment. The Applicant submits that this analysis demonstrates the Officer did not consider peer-reviewed social science evidence submitted with the deferral request, which identified detrimental effects upon children caused by separation from their fathers.

[35] The Respondent submits that this argument seeks a reweighing of the evidence, which is not the Court's role in judicial review. I agree with the Respondent's position on this issue. The Decision states that the Officer has considered the social science material provided by the Applicant's counsel. It is therefore not possible to conclude that the Officer overlooked this evidence.

VI. **Conclusion**

[36] Having considered the parties' respective submissions, I find no basis to conclude that the Decision is unreasonable. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-5709-19

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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