Cour fédérale  Federal Court

Date: 20090617

Docket: IMM-3486-08

Citation: 2009 FC 641

Ottawa, Ontario, June 17, 2009

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

OSAZEE DONALD ENABULELE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS and THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant, Mr. Osazee Donald Enabulele, is a citizen of Nigeria married to a Canadian citizen. He applied for permanent residence under the Spouse or Common-law Partner in Canada Class, pursuant to the Ministerial Policy, released in February 2005, and contained in Appendix H of the Citizenship and Immigration Canada's Operation Manual for Inland Processing IP 8. This policy is designed to allow spouses or common-law partners in Canada to apply for permanent

residence from within Canada in accordance with the same criteria as members of the Spouse or Common-law Partner in Canada class regardless of their immigration status. The Applicant awaits

determination on his application for permanent residence. In the meantime, he was advised that, by reason of having been charged with two counts of sexual assault, he was not entitled to a 60 day administrative deferral of removal under the policy. The Applicant seeks to challenge the policy on the basis that it violates his section 7 and 11(*d*) Charter rights.

II. Facts

[2] The Applicant arrived in Canada on July 14, 2006 and claimed refugee status on the same day.

[3] The Applicant's claim for refugee protection was denied on September 24, 2007. His application for leave and judicial review of that decision was dismissed on January 30, 2008.

[4] On February 7, 2008, the Applicant was arrested and charged with 2 counts of sexual assault. He was released on his own recognizance. The Applicant's trial for these charges has not yet been held.

[5] On April 5, 2008, the Applicant married a Canadian citizen. His spousal sponsorship application for permanent residence under the Spouse or Common-law Partner in Canada class, as permitted by the Minister's policy enunciated in IP8, was received by the Canadian Border Services Agency (CBSA) on April 17, 2008.

[6] The Applicant was issued a notice dated July 3, 2008 for his PRRA and was requested to attend an interview at the CBSA. The Applicant attended the interview on July 25, 2008 where a

CBSA Officer (the Officer) informed the Applicant that he was eligible to apply for a PRRA; that he should do so by August 8, 2008, and that, failure to do so could result in arrangements being made for his removal from Canada. He was also informed that he was not entitled to an administrative deferral of removal by reason of his pending criminal charges.

[7] On August 6, 2008, the Applicant filed the within application for judicial review challenging the Minister's policy under IP8 and the Officer's refusal to defer removal.

[8] On August 13, 2008, CBSA updated its Field Operating Support System (FOSS) entries to indicate that no application for a PRRA had been received by the Applicant and that the Applicant no longer benefited from the stay of removal as per section 163 of the *Immigration and Refugee Protection Regulations* (IRPR).

[9] On August 25, 2008, the Applicant brought a motion for an order staying the commencement of the PRRA until this application for leave and for judicial review is determined. The motion was dismissed on August 27, 2008, on the basis that, a removal date not yet having been set, the Applicant had failed to establish irreparable harm should he be subjected to the PRRA process.

III. Decision Under Review

[10] The Officer found that the Applicant was not entitled to benefit from the administrative deferral of removal under the "Public Policy under s. 25(1) of the *Immigration and Refugee Protection Act* (IRPA) to Facilitate Processing in accordance with the Regulations of the Spouse or

Common-law Partner in Canada Class" (the Policy). The Policy is contained in Appendix H of the Citizenship and Immigration Canada's Operation Manual for Inland Processing IP 8. The Officer found that the Applicant was not eligible for the administrative deferral under the Policy by reason of the outstanding criminal charges against him.

[11] It is alleged that the Officer violated a duty to ensure that the Policy does not violate any of the Applicant's Charter rights. The existence of such a duty was raised as an issue in this application; however both the Applicant and the Respondent failed to make any submissions on the issue. Without argument I can only assume this issue has been abandoned.

[12] There are no allegations before me that the Officer erred in refusing to grant the administrative deferral to the Applicant. The Applicant challenges only the constitutionality of the Policy.

[13] While the issue of the Court's jurisdiction was not raised by the parties, on May 14, 2009, I directed the parties to file written submissions on the issue of whether the Court has jurisdiction to consider the Charter issues raised in the within application without prior notice to the Attorneys General having been served pursuant to section 57 of the Federal Courts Act.

[14] Upon reading the submissions of the parties and the relevant authorities, I am satisfied that the application does not question the constitutional validity, applicability or operability of an Act or regulation made under such an Act. As a result, notice pursuant to section 57 is not required. *Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038; *Mikisew Cree First Nation v.*

Canada (Minister of Canadian Heritage), [2004] 2 C.N.L.R. 74; *Trevor Jacobs v. Sports Interaction*, 2006 FCA 116; *Bekker v. Canada*, 2004 FCA 186; *Gitxsan Treaty Society v. Hospital Employees Union*, [2000] 1 F.C. 135 (C.A.); *Giagnocavo v. Canada*, [1995] F.C.J. No. 1355 (QL); *Husband v. Canada (Canadian Wheat Board)*, 2006 FC 1390; *Canada (Information Commissioner) v. Canada (Prime Minister)* 1993 1 F.C. 427.

[15] I am therefore satisfied that the Court has the jurisdiction to hear the issues raised in this application.

IV. Impugned Policy

[16] I reproduce below the pertinent provisions of the Policy:

F. ADMINISTRATIVE DEFERRAL OF REMOVAL The Canada Border Services Agency has agreed to grant a temporary administrative deferral of removal to applicants who qualify under this public policy. The deferral will not be granted to applicants who: • Are inadmissible for security (A34), human or international rights violations (A35), serious criminality and criminality (A36), or organized criminality (A37); • Are excluded by the Refugee Protection Division under Article F of the Geneva Convention; • Have charges pending or in those cases where charges have been laid but dropped by the Crown, if these	F. SUSPENSION ADMINISTRATIVE DU RENVOI L'Agence des services frontaliers du Canada (ASFC) a accepté d'accorder, aux demandeurs qui sont visés par cette politique d'intérêt public, une suspension administrative du renvoi. La suspension ne sera pas accordée aux demandeurs : • qui sont interdits de territoire pour raison de sécurité (L34), pour atteinte aux droits humains et internationaux (L35), pour criminalité et grande criminalité (L36) ou pour crime organisé (L37); • qui sont exclus par la Section de la protection des réfugiés aux termes de la section F de l'article premier de la Convention de Genève; • qui font l'objet d'accusations en instance ou contre qui des

charges were dropped to effect a removal order;
- Have already benefited from an administrative deferral of removal emanating from an H&C spousal application;
- Have a warrant outstanding for removal;
- Have previously hindered or delayed removal; and
- Have been previously deported from Canada and have not obtained permission to return.

accusations ont été portées, mais que la Couronne a retirées, si ces accusations ont été abandonnées pour procéder au renvoi;
- qui ont déjà profité d'une suspension administrative découlant d'une demande CH de conjoint;
- qui sont visés par un mandat non exécuté en vue du renvoi;
- qui ont déjà entravé ou retardé le renvoi;
- qui ont déjà été expulsés du Canada et n'ont pas été autorisés à y revenir.

For those applicants who are receiving a pre-removal risk assessment (PRRA), the administrative deferral for processing applicants under this H&C public policy will be in effect for the time required to complete the PRRA (R232). Applicants who have waived a PRRA or who are not entitled to a PRRA will receive an administrative deferral of removal of 60 days.

Dans le cas des demandeurs qui font l'objet d'un examen des risques avant renvoi (ERAR), la suspension administrative pour le traitement des demandes présentées en vertu de cette politique d'intérêt public sera en vigueur le temps qu'il faudra pour effectuer l'examen en question (R232). Les demandeurs qui ont renoncé à l'ERAR ou qui n'y ont pas droit se verront accorder une suspension administrative de 60 jours.

Applicants who apply under this public policy after they are deemed removal ready by CBSA will not benefit from the administrative deferral of removal except in the limited circumstances outlined below (transitional cases).

Les demandeurs qui présentent une demande aux termes de cette politique d'intérêt public après avoir été jugés prêts au renvoi par l'ASFC ne bénéficieront pas de la suspension administrative du renvoi, sauf dans les circonstances limitées énoncées ci-dessous (cas visés par les dispositions transitoires).

[17] The stated objective of this policy is to "facilitate family reunification and facilitate processing in cases where spouses and common-law partners are already living together in Canada."

The effect of the policy is to enable spouses or common-law partners in Canada, for whom an undertaking of support has been submitted, to apply for permanent residence from within Canada in accordance with the same criteria as members of the Spouse or Common-law partner in Canada class regardless of their immigration status. Applicants who qualify under the Policy, other than those exempted under Appendix H, section F, will also benefit from an administrative stay of removal. For those receiving a PRRA, the deferral is in effect until the completion of the PRRA. Those who are not entitled to a PRRA, or who have waived their right to a PRRA, will receive a deferral of 60 days.

V. Issues

[18] The following issues are raised in this application:

(1) Is the Applicant's application moot?

(2) Does the Policy violate the rights of the Applicant as enshrined in sections 7, and 11(*d*) of the *Canadian Charter of Rights and Freedoms* (the Charter)?

(3) Is the Policy saved by section 1 of the Charter?

VI. Analysis

Issue 1: Is the Applicant's application moot?

[19] The Respondent submits that for the following reasons, the application is moot:

(a) the Applicant benefited from a regulatory stay by virtue of his PRRA being initiated;
(b) any administrative deferral of his removal would have run simultaneously to the regulatory stay he received when his PRRA was initiated;
(c) he currently benefits from a statutory stay of his removal because of the pending criminal charges against him (section 50(*a*) of the IRPA); and
(d) more than 60 days have lapsed since his pre-removal interview on July 25, 2008, and so even if he had received an administrative deferral under the policy, that period would have already run.

[20] I accept the Respondent's submission that the administrative deferral under the Policy sought by the Applicant would already have expired even if the Officer had found that the Applicant was eligible to it. Notwithstanding this finding, I will nevertheless consider the Charter issues raised in this application. Based on the principles set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, in the exercise of my discretion, I am satisfied that it is in the interest of justice that the issues be decided. I note also that, notwithstanding the Respondent's above stated arguments in oral submissions, counsel for the Respondent invited the Court to decide the Charter questions.

Issue 2: Does the Policy violate the rights of the Applicant as enshrined in Sections 7, and 11(d) of the Canadian Charter of Rights and Freedoms (the Charter)?

(a) Section 7

Section 7 of the Charter provides that:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[21] The Applicant argues that the Policy compromises his security in that it does not allow him to defend his innocence of the charges laid against him. He says that the Policy stigmatizes those charged but not convicted of criminal charges.

[22] For the reasons that follow, I find that the Applicant's argument is without merit. His section 7 Charter rights are not engaged in the circumstances.

[23] The impugned Policy renders the Applicant ineligible for an administrative deferral by reason of his criminal charges. It does not follow, however, that the Applicant will be removed without a proper risk assessment. The PRRA process, to which the Applicant is entitled, is designed to assist foreign nationals who may be required to leave Canada. It is the means by which the Applicant can have his risk assessed prior to his departure. It is the very process which provides for consideration of the Applicant's life, liberty and security interest in a pre-removal context. The Applicant's access to that process is in no way affected by the Policy. Here, the Applicant not only allowed his initial opportunity to apply for a PRRA to expire, he took out an application to stay the initiation of a PRRA. In the circumstances, the Applicant cannot argue that his section 7 rights to life, liberty and security of the person are affected by reasons of the Policy.

[24] Further, the Applicant's removal is currently stayed by law by reason of his pending criminal charges. By virtue of this stay, a PRRA may be decided before a scheduled removal date, should the Applicant apply for one. He could also seek a judicial stay following a negative PRRA determination. Access to these procedures is available to the Applicant and serves to protect his section 7 rights.

[25] For the above reasons, I find that the Applicant's section 7 interests under the Charter are not engaged by reason of the Policy.

(b) Section 11(d)

[26] Section 11(*d*) of the Charter reads as follows:

11. Any person charged with an offence has the right	11. Tout inculpé a le droit :
d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;	*d*) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

[27] The Applicant submits that by being excluded from the benefit of the administrative deferral on the basis of his pending criminal charges without any means to establish his innocence, he has been denied his section 11(*d*) Charter right to be presumed innocent. The Applicant argues that the presumption of innocence enshrined in section 11(*d*), which protects the fundamental liberty and human dignity of any and every person, not only applies in criminal proceedings, but also to government policies especially where such policies rely on the criminal process to define its criteria.

[28] The Applicant also argues that section 11(*d*) creates a regime that enjoins government bodies and agencies not to differentiate between persons on the basis of unsubstantiated allegations. He says that his exclusion from the Policy portrays him as a "culprit or guilty". The Applicant claims that the Policy violates his section 11(*d*) Charter rights and contends that his pending

criminal charges should not be a criterion for non-qualification under a government policy or regulation.

[29] For the following reasons, I find that the Applicant's section 11(*d*) right to be presumed innocent is not engaged in the circumstances. As such, any differentiating treatment cannot violate section 11(*d*).

[30] The jurisprudence has clearly established that although the Applicant has a constitutionally protected right to be presumed innocent in the context of his prosecution on outstanding criminal charges, he has no such corresponding right in administrative proceedings. *Giroux v. Canada (National Parole Board)*, [1994] F.C.J. no. 1750, at para. 20 (Lexis). The Supreme Court held that the presumption of innocence extends only to the judicial proceedings in which the innocence of the Applicant is at stake. It does not extend to unrelated administrative proceedings. *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at 560. The rights protected in section 11(*d*) of the Charter apply to courts and tribunal charged with trying the guilt of persons charged with criminal offences. *Re application under s. 83.28 of he Criminal Code*, 2004 SCC 42, paras. 80-81.

[31] Here, we are clearly dealing with the application of an administrative policy. It cannot be said to be a judicial proceeding in which the innocence of the Applicant is at stake. Nor can it be said that the Applicant's ability to defend himself has been impaired by the operation of the Policy. A statutory stay of removal currently allows him to remain in Canada and defend the pending charges against him. It follows that the Applicant's section 11(*d*) rights are not engaged or violated by the Policy.

[32] I also hold the view that the Applicant is not subjected to a differential treatment in violation of his section 11(*d*) Charter rights as alleged. I note the Applicant did not argue a section 15 violation, nor did he conduct the required analysis for a claim of discrimination under section 15(1) of the Charter as set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. I find therefore that the arguments advanced regarding the allegation of differential treatment are made in the context of the Applicant's section 11(*d*) claim.

[33] Having found that the Applicant's section 11(*d*) right to be presumed innocent is not engaged, there can be no impermissible differential treatment based on his criminal charges under this section. Further, the jurisprudence teaches that section 11(*d*) rights are to be interpreted narrowly in the sense that they relate to criminal and penal proceedings and cannot be read to offer individuals a broad protection against any adverse opinions or prejudices drawn against them by individuals or organizations outside the state's criminal proceedings. *Tadros v. Peel Regional Police Service, and Attorney General of Ontario*, 87 O.R. (3d) 563, at para. 35 (Ont. Superior Court).

[34] A review of the Policy indicates that applicants under the Spouse in Canada Class can be ineligible for an administrative deferral for reasons other than pending criminal charges, such as:

(a) those who have already benefited from a prior administrative deferral of removal emanating from and H&C spousal application;
(b) those who have a warrant outstanding for removal
(c) those who have previously hindered or delayed removal; and
(d) those who were removal ready prior to making their application for permanent residence

[35] In my view, it is open to the Minister to adopt policies which facilitate and expedite the processing of certain classes of applicants. The Minister may also establish conditions under which applicants within that class are rendered ineligible under the policy. As mentioned above, ineligibility by virtue of pending criminal charges does not violate the presumption of innocence nor does it result in an impermissible differential treatment.

Issue 3: Is the Policy saved by section 1 of the Charter?

[36] Having decided that there is no violation of the Applicant's Charter rights in this case, there is no need to conduct a section 1 analysis.

VII. Conclusion

[37] For the above reasons, this application for judicial review will be dismissed.

VIII. Certified Question

[38] The Applicant proposed the following question for certification as an important question of general application:

> Whether the Minister of Citizenship and Immigration's policy on administrative deferral of removal found under IP8 spouse or common-law partner in Canada Class contravenes the *Canadian Charter of Rights and Freedoms*. Alternatively, whether the Minister's policy under IP8 offends the Applicant's section 11(*d*) rights of the Charter?

[39] The test for the certification of a question of general importance was articulated in *Zazai v. Canada (Minister of Citizenship and Immigration),* 2004 FCA 89, at paras. 11-12:

> … the threshold for certifying a question remains the same. Is there a serious question of general importance which would be dispositive of an appeal? That principle is well established in the jurisprudence of the Federal Court itself. See *Bath v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1207 (Reed J.) at para. 15; *Gallardo v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 52 (Kelen J.) at para. 35.
>
> The corollary of the fact that a question must be dispositive of the appeal is that it must be a question which has been raised and dealt with in the decision below. Otherwise, the certified question is nothing more than a reference of a question to the Court of Appeal. If a question arises on the facts of a case before an applications judge, it is the judge's duty to deal with it. If it does not arise, or if the judge decides that it need not be dealt with, it is not an appropriate question for certification.

[40] I am satisfied that the following proposed question raises a question of general importance which could be dispositive of the appeal, namely:

> "Does the Minister's policy on administrative deferral of removal
>
> found under IP8 offend the Applicant's sections 7 and 11(*d*) rights of
>
> the *Canadian Charter of Rights and Freedoms*?

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

2. The following question is certified:

> "Does the Minister's policy on administrative deferral of removal found under IP8 offend the Applicant's sections 7 and 11(*d*) rights of the *Canadian Charter of Rights and Freedoms*?"

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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