Federal Court  Cour fédérale

Date: 20090622

Docket: IMM-4599-08

Citation: 2009 FC 649

Ottawa, Ontario, June 22, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

MATTHEW DAVID LOWELL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Lowell's application for permanent residence from within Canada on humanitarian and compassionate grounds was refused by a Pre-Removal Risk Assessment Officer's decision of September 12, 2008, and communicated to the applicant on October 9, 2008. He is asking that the decision be set aside.

Background

[2] Mr. Lowell is an American citizen. He enlisted in the United States Army after he turned 18, in July of 2002. After communicating with friends serving in Iraq and researching information on the conflict there, he became opposed to American involvement in Iraq and decided he would have no part of it. In October of 2003, he went Absent Without Official Leave (AWOL) for the first time. He returned to his unit in June of 2004, at his mother's insistence. He was not sanctioned - in fact he was promoted. Upon learning that he was to be deployed in Iraq despite having asked for a discharge, he went AWOL for a second time in October of 2004. He was arrested and jailed for four days in September of 2005 by civil authorities, and ordered to report to his former unit. He did so and was charged with desertion with the intent to avoid hazardous duty (Article 85) and missing movement (Article 87) contrary to the Uniform Code of Military Justice (UCMJ). He says that when he reported back to his unit, he was kicked and punched and spat at by both his peers and commanding officers, and was told that he bore responsibility for the deaths of his company members in Iraq. He was prevented from sleeping for more than four hours at a time. Before the Court Martial proceedings on the charges against him, Mr. Lowell again went AWOL. On November 11, 2005, he crossed into Canada and claimed refugee protection shortly thereafter.

[3] The claim for refugee protection was rejected by the Refugee Protection Division of the Immigration and Refugee Board of Canada in December of 2006. Mr. Lowell did not seek judicial review of that decision. In March 2006 he filed an application for Pre-Removal Risk Assessment (PRRA) as well as an application for inland processing of his application for permanent residence, on humanitarian and compassionate grounds (H&C application). Both were denied. An application for

leave and judicial review of the PRRA decision was dismissed by this Court on February 11, 2009. Leave was granted to review the H&C decision.

[4] In support of his application for humanitarian and compassionate relief, Mr. Lowell stated that he believes that if he returns to the United States of America, he will suffer unusual and undeserved, or disproportionate hardship. This hardship arises from three risks he identified in his application and supporting materials: Harm arising from risks associated with punishment by the military for desertion and missing movement (judicial punishment); harm arising from treatment by those in the military apart from any judicial punishment (non-judicial punishment); and harm arising from receiving a dishonourable discharge (other punishment).

[5] With respect to judicial punishment, he submits that he will receive a longer prison sentence than others would receive if convicted for a similar offence because he has spoken out publicly against the war in Iraq. With respect to non-judicial punishment he submits that he will suffer arbitrary, cruel and unusual non-judicial punishments at the discretion of his former unit commander and other soldiers. With respect to other punishment he submits that he will receive a dishonourable discharge which will negatively impact his prospects of employment and his ability to obtain bank financing, thus negatively impacting his ability to support his family.

[6] The Officer in her decision set out the factors at issue in the H&C application in some detail. This section, entitled “Consideration” includes a detailed account of the hardships and sanctions alleged by Mr. Lowell and a description of the evidence adduced in support of these allegations.

This evidence included Mr. Lowell's military Charge Sheet; affidavits from other soldiers who have gone AWOL from the U.S. military, some of whom claimed conscientious objector status; an affidavit from Eric Seitz, an American expert in military law; and a declaration from a Canadian citizen and former American soldier regarding the likelihood that Mr. Lowell would face uncharacteristically harsh treatment if returned to the U.S.

[7] The Officer's reasons for refusal are eight pages in length. At the outset, the Officer writes that "the applicant bears the onus of satisfying me that his personal circumstances, including the best interest of any child directly affected by my decision, are such that the hardship of not being granted the requested exemption would be i) unusual and undeserved or ii) disproportionate." She further writes: "I recognize that the threshold is one of hardship for an H&C application and not section 96 or 96 of the *Immigration and Refugee Protection Act.* This H&C application has been assessed on the basis of unusual and undeserved, or disproportionate hardship."

[8] On the evidence before her, and with reference to the decision of the Federal Court of Appeal in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 F.C.R. 561, 2006 FC 420, the Officer concluded that the judicial punishment to which the applicant would be subject upon return to the United States would not amount to an unusual, undeserved, or disproportionate hardship. She noted that Mr. Lowell is facing lawful charges under a law of general application, and that there was insufficient evidence to conclude that the UCMJ would be applied in a disproportionately harsh manner to Mr. Lowell.

[9] With respect to non-judicial punishment, the Officer examined Army Regulation 27-10, which provides for the imposition of non-judicial punishment by commanders, and noted that the regulation prescribes the circumstances under which such punishment may be administered, sets limits on its exercise, and provides for an appeal process where a soldier believes that a punishment is excessive or should be mitigated. She also noted that discharges for conscientious objection are governed by uniform standards, and that Mr. Lowell provided no evidence that he had sought conscientious objector status. While acknowledging Mr. Lowell's submission concerning abuse at the hands of his peers in 2005, as well as affidavit evidence of same from a former Marine who sought refuge in Canada (which she found to be one-sided), the Officer noted that there was no evidence that Mr. Lowell had availed himself of the appeal provisions of Regulation 27-10 or that he had reported the mistreatment to superior officers. She wrote "I find the authority of commanders under Army Regulation 27-10 to impose non-judicial punishment to be a law of general application under which the applicant would be afforded due process should it be improperly imposed."

[10] With respect to other, largely financial, hardships flowing from a dishonourable discharge the Officer found there to be no evidence that the applicant's family would be negatively impacted, as there was no evidence that he has family members who rely on him for support. She further found that alleged difficulties in finding or obtaining employment or financing, to the extent they are sanctioned, are based on laws of general application in the U.S. and that there was no evidence that the applicant would be disproportionately impacted by them. Lastly, she recognized that he may receive "unwelcome comments and attention from groups and individuals who disagree with his

political opinions about the war in Iraq" but found that the evidence did not support a conclusion that these would reach the level of unusual and undeserved or disproportionate hardship.

Issues

[11] The applicant raises three issues:

1. Whether the officer assessed the applicant's H&C application under thresholds applicable to sections 96 and 97 of the *Immigration and Refugee Protection Act* and erred by failing to assess the hardship the Applicant would face if returned to the United States;

2. Whether the officer failed to provide sufficient reasons for her finding that the applicant would not be subject to greater punishment for having been a vocal opponent to the war in Iraq; and

3. Whether the officer failed to have regard to the totality of the evidence before her, ignored contradictory evidence, and failed to address the risk of physical and psychological hazing.

Analysis

[12] H&C applications are assessed based on the claims and information applicants place before H&C officers. In this case the applicant's submission was transmitted to the respondent under cover of letter dated April 4, 2008 from the Special Assistant to Glen Pearson, Member of Parliament for London North. The letter was copied from that transmitting the PRRA dated February 29, 2008. The writer states that "Our office believes that this man deserves a single decision maker to assess

the Humanitarian and Compassionate application along with the PRRA because of the aforementioned risks in returning to the USA." The letter raises two potential harms to the applicant: judicial punishment and other punishment. The issue of non-judicial hardship was raised in the supporting affidavits submitted with the PRRA application and in the affidavit of the applicant sworn March 19, 2008 which he submitted for both applications. In his affidavit he attests to the following:

> The Army has enacted a regulation that outlines their policy regarding non-judicial punishment. That regulation, to the best of my understanding, indicates that a commanding officer has full and complete discretion to determine what punishments a soldier should receive.
>
> I fear if I am returned to the United States, that I will suffer arbitrary and cruel and unusual punishment in the form of non-judicial punishments administered at the discretion of my former unit command. This would be even worse that an unfair court-martial proceeding and the resulting sentence of imprisonment for my political opinion.
>
> I do not believe that it is right that I would be subject to hazing and other non-judicial punishments by the United States military simply because I chose to adhere to my moral convictions and go AWOL instead of deploying to Iraq.

1. Whether the Officer applied the correct test.

[13] The applicant submits that the Officer failed to properly consider the hardship he would experience upon return to the United States and limited her analysis to whether he would be afforded state protection there, and whether he had exhausted all domestic avenues of state protection prior to making the H&C Application.

[14] The applicant acknowledges that the Officer, many times, stated the test correctly – unusual and undeserved, or disproportionate hardship – but maintains that she failed to actually apply that test. He relies, in particular, on the following passage from the Officer's decision:

> As the Court of Appeal declined to answer the certified question because the applicants in *Hinzman* had not exhausted all avenues of state protection, this H&C decision considers whether the applicant in this case exhausted all avenues of state protection, and the availability of state protection to him, in the context of unusual and undeserved or disproportionate hardship.

[15] The applicant correctly submits that, unlike a refugee claim, as in *Hinzman*, there is no requirement on an H&C applicant to rebut a presumption of state protection, or to exhaust all avenues of state protection prior to being successfully granted humanitarian and compassionate relief.

[16] This Court has frequently found that an officer considering an H&C Application has erred in conducting a PRRA analysis by applying the tests in sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27. This is an error because risk considerations under an H&C assessment have a lower threshold than under a PRRA or under a section 96 or 97 analysis: See for example *Pinter v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 296; *Sha'er v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 231; *Gaya v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 989; *Ramirez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404; *Melchor v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1327, *Siddiqui v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 989.

[17] The hardship alleged by the applicant arises directly from having gone AWOL, being charged, held in custody, prosecuted under the UCMJ, and subsequently released from the military. Having raised these circumstances as the hardship warranting humanitarian and compassionate relief, the applicant cannot fault the Officer for examining those circumstances completely, including whether there are protections available to the applicant to alleviate those alleged hardships. The case law referred to in the preceding paragraph is distinguishable. It does not follow from the Officer's attention to factors which normally arise in PRRA assessments that she was importing PRRA risk thresholds.

[18] One must not lose sight of the purpose of the H&C exemption. Applications for permanent residence must, as a general rule, be made from outside Canada, pursuant to subsection 9(1) of the Act. The existence of compassionate or humanitarian considerations may justify a departure from the rule, but that is the exception. Humanitarian and compassionate grounds will exist if unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada and apply for permanent residence from abroad.

[19] Generally, issues of state protection will not arise in an H&C application; however, hardship cannot be assessed in a vacuum and with no reference to measures available in the country of origin that can be accessed to address and moderate that hardship. For example, if an applicant alleges that he will suffer hardship if returned to his country of origin because of a medical condition, the evidence would have to show that acceptable treatments for the condition are unavailable in the country of origin (leaving aside questions of medical inadmissibility to Canada). If there are medical

services readily available in the country of origin that the applicant could access, that fact cannot be ignored when conducting an analysis of hardship. The applicant cannot refuse to access those services in order to support his claim for hardship in the H&C application – the hardship must be assessed by the Officer based on all of the evidence of services available to the applicant.

[20] The applicant alleges that the treatment he will receive as a consequence of his military charges amounts to hardship. It is fully appropriate, and indeed necessary that the Officer examine what measures are available to the applicant to moderate those alleged hardships. In the circumstances of this case, those may generally be described as protective services, as the applicant is alleging physical and psychological harm as a consequence of his detention and punishment. The harm the applicant alleges is reproduced in the Officer's decision, as follows:

> - In an affidavit signed on 18 March 2008, the applicant states: *"What I fear if returned to the United States is a minimum sentence of 7 years confinement in a military prison, or possibly receiving the death sentence as it is still a viable option due to the fact that it remains as a maximum punishment for desertion…I believe that if I am returned to the United States I will likely be charged with desertion and subjected to a court-martial proceeding. I do not believe that I will receive a fair hearing at my court-martial proceeding. I fear receiving a longer prison sentence than others would receive if convicted for deserting for the same length of time that I have been away from my unit, because I have chosen to speak out publicly in Canada against the war in Iraq."* In addition, the applicant also states that he will suffer arbitrary and cruel and unusual punishment in the form of non-judicial punishment. He fears that because he left an elite unity that he will be targeted as a scapegoat and suffer psychological and physical harm.
>
> - The applicant's affidavit also states that: *"A dishonourable discharge from the United States military would have a lasting negative impact on my ability to support my family. Potential*

> *employers usually ask candidates if whether they have served in the Military, and if they have what sort of discharge they received. Financial institutions also inquire as to the nature of one's dishonourable discharge from the Army when preparing loans or mortgages. I believe that a dishonourable discharge from the Army will prevent me from finding adequate employment and from being able to finance anything through a bank, such as a house or car."*

[21] Based on my review of the Officer's decision I am satisfied that the Officer did not apply the wrong test. The Officer applied the proper test – unusual and undeserved or disproportionate hardship - but in considering whether the harm alleged by the applicant met that test, she properly considered whether these alleged hardships would or could be alleviated by the protections in place in the military and under general laws in the USA. Accordingly, the Officer did not err, as alleged; she applied the proper test.

2. Whether the Officer's reasons were sufficient.

[22] The applicant submits that the Officer erred in providing insufficient reasons for her finding that he would not be subject to greater punishment as a consequence of his vocal opposition to the war in Iraq. In his affidavit the applicant attested that he feared that he would receive a minimum sentence of 7 years confinement or possibly the death sentence.

[23] The Officer's finding in this regard was as follows: "I find that objective evidence does not support that the applicant will be subjected to a disproportionate punishment should he be charged and convicted in a court-martial proceeding upon his return to the United States." A close reading of the decision indicates that the Officer made that finding based on the following:

(a) The evidence filed by the applicant from soldiers who believed that they were treated differently and more harshly due to their vocal opposition to the war indicates that they were convicted of varying offences and received varying prison sentences, demotions, pay forfeiture, fines and bad conduct discharges;

(b) Independent research shows that prison sentences imposed were up to 15 months in length;

(c) No-one has received the death penalty since 1945, and prior to that since the U.S. Civil War;

(d) That soldiers charged under the UCMJ would receive due process and access to counsel; and

(e) That the UCMJ is a law of general application for soldiers in the military.

[24] The applicant relies on the Court's Endorsement in the Order staying the execution of removal in *Hinzman v. Canada (The Minister of Citizenship and Immigration)*, IMM-3813-08, dated September 22, 2008. Justice Mosley, wrote, when considering whether the applicant had shown irreparable harm if the stay was not granted:

> There is no suggestion in the material before me that the principal male applicant will be denied due process by the US Military justice system. However, the evidence indicates that the laws relating to the punishment of desertion by the US military are applied differently in the exercise of prosecutorial discretion based on the individual deserter's profile as an opponent or critic of the US war effort. The majority of deserters are released from the military without prosecution and receive at most, a dishonourable discharge. A small number who are on public record for their criticisms abroad are prosecuted and jailed.

[25] In my view, this comment does not assist the applicant in establishing that he will suffer unusual and undeserved or disproportionate hardship. Justice Mosley's comment was made in the context of whether Mr. Hinzman, if returned to the U.S. prior to his application for judicial review being heard, would suffer irreparable harm. The point my colleague was making was that Mr. Hinzman faced a likely possibility of being jailed – thus the irreparable harm if the removal were not stayed. However, that endorsement cannot be said to go so far as to indicate that the treatment soldiers such as Mr. Lowell will receive amounts to unusual and undeserved or disproportionate hardship. In this respect, the comments of Justice Lamer, writing for a majority of the Supreme Court of Canada on this point in *Smith v. Her Majesty the Queen,* [1987] 1 S.C.R. 1045, are particularly helpful. In that case, section 12 of the Charter, which provides that "Everyone has the right not to be subjected to cruel and unusual treatment or punishment", was at issue:

> The numerous criteria proposed pursuant to s. 2(*b*) of the *Canadian Bill of Rights* and the Eighth Amendment of the American Constitution are, in my opinion, useful as factors to determine whether a violation of s. 12 has occurred. Thus, to refer to tests listed by Professor Tarnopolsky, the determination of whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles, and whether there exist valid alternatives to the punishment imposed, are all guidelines which, without being determinative in themselves, help to assess whether the punishment is grossly disproportionate.

[26] The fact that there is prosecutorial discretion involved, such that those in the applicant's circumstances may receive a jail term while others may not, does not in itself establish that he will be subject to hardship of the sort that is contemplated in a positive H&C application. The fact is that there is a range of possible sentences to which the applicant may be exposed. As the Officer noted, the evidence indicates that he is not likely to serve more than 15 months and only then after receiving

due process. Her finding that this does not amount to a hardship sufficient to warrant a positive H&C decision falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" as described by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9. It cannot be upset by this Court.

3. Whether the Officer failed to address the risk of physical and psychological hazing.

[27] The applicant submits that the Officer erred in failing to consider the harm he would experience from what was described as "psychological and physical hazing". He submits that this harm differs from the non-judicial punishment captured by Army Regulation 27-10 which, he submits, was the only sort of non-judicial punishment the Officer considered.

[28] The respondent denies that the Officer limited her examination of non-judicial punishment only to those punishments falling under Army Regulation 27-10. In the alternative, the respondent submits that if the Officer did conflate these two types of hardship, it was based on the applicant's own submissions. The respondent points to the applicant's affidavit filed in support of his H&C application in which he attests that " I do not believe that it is right that I would be subject to hazing and other non-judicial punishments…" and "[I will] suffer hardship as a result of the lasting psychological and potentially physical ramifications of either judicial or non-judicial punishment… (emphasis added)."

[29] In my view the respondent is correct. The applicant did not distinguish between "authorized" non-judicial punishment and unauthorized hazing. He cannot now complain that the Officer did the

same. In any event, the Officer's decision does deal with both sorts of punishments. The Officer writes:

> The applicant's affidavit indicates that he fears he will suffer arbitrary and cruel and unusual punishment in the form of non-judicial punishment. Submissions indicate that the applicant was subjected to physical and psychological hazing by his peers and commanding officers when he returned to Fort Lewis. The applicant does not indicate whether he exercised any of his appeal rights under Regulation 27-10 or explored any other avenues of protection, such as reporting the treatment to superior officers.

[30] Appealing treatment under the Regulation refers to "authorized" non-judicial punishment; however, the reporting to superior officers, in my view, clearly relates to the unauthorized hazing the applicant and others alleged would occur. As such, the Officer did consider that allegation and concluded that it would not amount to hardship because, while the applicant had previously been the victim of such treatment, there was no evidence showing whether he had done anything about it. There was evidence before the Officer that others have addressed hazing outside the Regulation procedures. Stephen Funk, in his affidavit sworn in support of the H&C application, says that while awaiting court-marshal he was regularly harassed by other Marines. He references one specific incident following which he informed his commander that if it ever happened again he would tell the media and hold him responsible. There was no evidence offered by the applicant that appeals such as this failed to stop the hazing. The Officer observes: "While I recognize that complaining about such treatment places a soldier in a difficult position and potentially subjects him to unwelcome comments by fellow soldiers, I do not find that the hardships associated with exploring appeal options for non-judicial punishment to be unusual and undeserved, or disproportionate."

[31] There being no evidence that such appeals would not alleviate the hardship and there being nothing unusual and undeserved, or disproportionate about engaging those appeal processes, it cannot be said that the Officer erred or that her decision was unreasonable.

[32] Neither party proposed a question for certification and there is none.

JUDGMENT

THIS COURT ORDERS that this application for judicial review is dismissed and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4599-08
STYLE OF CAUSE:	MATTHEW DAVID LOWELL *v.* THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 18, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	June 22, 2009

APPEARANCES:

Alyssa Manning	FOR THE APPLICANT
Asha Gafar Nur Muhamammed-Ally	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Vandervennen Lehrer Barristers & Solicitors Toronto. Ontario	FOR THE APPLICANT
JOHN H. SIMS Deputy Attorney Generasl of Canada Ottawa, Ontario	FOR THE RESPONDENT