Federal Court Cour fédérale

Date: 20100311

Docket: IMM-4097-09

Citation: 2010 FC 277

Ottawa, Ontario, March 11, 2010

PRESENT: The Honourable Frederick E. Gibson

BETWEEN:

FREDERIK BALIGNOT REYES

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

<u>REASONS FOR ORDER AND ORDER</u>

Introduction

[1] These reasons and this order follow the hearing at Toronto, on the 10th of February, 2010, of an application for judicial review of a decision of an Enforcement Officer in the Canada Border Services Agency (the "Officer"), dated the 6th of August, 2009, wherein the Officer rejected the Applicant's request for an administrative deferral of his removal to Manila, Philippines, scheduled for the 28th of August, 2009.

Background

[2] The Applicant is a citizen of the Philippines and of no other country. He arrived in Canada on the 17th of July, 2002 on a visitor's visa valid to the 30th of July, 2002. His status in Canada was extended to the 16th of January, 2003. Apparently after his status had expired, the Applicant filed a Convention refugee claim. That claim was denied on the 3rd of March, 2004. The Applicant sought judicial review of the denial of his Convention refugee claim. Leave on the judicial review application was denied on the 3rd of February, 2005.

[3] On the 25th of October, 2006, the Applicant submitted a spousal sponsorship application for permanent residence. On the 23rd of November, 2006, a call-in notice was sent to the Applicant advising him that he must attend an interview on the 12th of December, 2006. Although not noted in the call-in notice, the scheduled interview was a pre-removal interview including an opportunity to advise the Applicant of his right to initiate a pre-removal risk assessment. At interview, the Applicant was advised that it was "his luck day" and he left the interview without being requested to consider initiating a pre-removal risk assessment, apparently by reason of the outstanding spousal application, although that reason was apparently not communicated to the Applicant. The Applicant was required to return for a further interview on the 12th of January, 2007.

[4] At the interview on the 12th of January, 2007, the Applicant provided the Respondent's officials with copies of his marriage certificate and a receipt as proof that he had submitted a spousal sponsorship application.

[5] On the 2nd of December, 2008, the Applicant's spousal sponsorship application was withdrawn at his request as his relationship with his spouse had apparently broken down.

[6] On the 19th of December, 2008, a second spousal sponsorship application submitted by the Applicant was received by the Respondent.

[7] A further call-in-notice was sent to the Applicant and in response he attended an interview on the 19th of March, 2009. On this occasion, the Applicant was advised of his right to submit an application for a pre-removal risk assessment and he availed himself of that opportunity. On the 29th of June, 2009 the Applicant's pre-removal risk assessment application was rejected.

[8] On the 16th of July, 2009, a call-in-notice was sent to the Applicant advising him to attend an interview on the 5th of August, 2009. On the 22nd of July, 2009, through counsel, the Applicant requested an administrative deferral of his removal. On the 5th of August, 2009, at interview, the Applicant was served with his negative pre-removal risk assessment decision. On the 6th of August, 2009, the refusal to defer decision, the decision here under review, was made.

[9] The Applicant left Canada to return to Manila, the Philippines, on the 28th of August, 2009, after a motion for a stay of his removal based on this application for judicial review was denied.

The Decision Under Review

[10] The denial of the Applicant's request for an administrative deferral of his removal was based on the allegation that he was not entitled to an administrative deferral based on the public policy set out in Inland Processing Manual 8, Spouse or Common-law Partner in Canada Class, Appendix H, by reason of a limitation in section 5F of that policy. The relevant portions of that policy are set out below in these reasons.

[11] In the decision under review, the Officer wrote:

> Mr. Reyes [the Applicant] submitted his first In-Canada Spousal Application for Permanent Residence on October 25, 2006. Shortly thereafter, Mr. Reyes was scheduled to attend a pre-removal interview at the Greater Toronto Enforcement Centre (GTEC) on December 12, 2006 for PRRA (Pre-Removal Risk Assessment) initiation. During the interview on December 12, 2006, Mr. Reyes provided a receipt to the Immigration Officer as proof that he had made a Spousal application before he was called in for his pre-removal interview. At that time, the Officer suspended the PRRA initiation and granted Mr. Reyes the one-time administrative deferral of removal pursuant to the public policy as set out in Appendix H of IP 8.
>
> Mr. Reyes submitted a second In-Canada Spousal Application for Permanent Residence on December 19, 2008. On March 19, 2009, Mr. Reyes was scheduled to attend GTEC for a pre-removal interview. At that interview, the Officer initiated PRRA as Mr. Reyes had already benefited from the administrative deferral of removal emanating from his previous spousal application and as such does not qualify for a second deferral of removal.
>
> [emphasis added]

IP 8 – Appendix H

[12] As noted earlier, Immigration Policy 8 is entitled Spouse or Common-law Partner in Canada Class. Appendix H to IP 8 is entitled Public Policy Under 25(1) of IRPA to Facilitate Processing in accordance with the Regulations of the Spouse or Common-law Partner in Canada Class.

[13] Paragraph 1. of the Policy, entitled Purpose, reads as follows:

> The Minister has established a public policy under subsection 25(1) of the *Immigration and Refugee Protection Act* (IRPA), setting the criteria under which spouses and common-law partners of Canadian citizens and permanent residents in Canada who do not have legal immigration status will be assessed for permanent residence. The 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.
> [emphasis added]

[14] Paragraph 3, under the heading "Policy" states in part:

> "CIC [Citizenship and Immigration Canada] is committed to family reunification and facilitating processing in cases of genuine spouses and common-law partners already living together in Canada. CIC is also committed to preventing the hardship resulting from the separation of spouses and common-law partners together in Canada, where possible.
> ...

[15] That paragraph continues:

> A25 [section 25 of IRPA] is being used to facilitate the processing of all genuine out-of-status spouses or common-law partners in the *Spouse or Common-law Partner in Canada* class where an undertaking has been submitted. Pending H&C spousal applications with undertakings will also be processed through this class. ... [emphasis added]

[16] Paragraph 4, under the heading Public Interest, provides in part:

> The Minister has determined that it is in the public interest to assess all foreign nationals, regardless of status (in spousal or common-law relationships with Canadian citizens or permanent residents), under the provisions of the *Spouse or Common-law Partner in Canada* class if they meet the following:
>
> - Have made an application for permanent residence either on H&C grounds or via the *Spouse or Common-law Partner in Canada* class;
>
> ...

[17] Paragraph 5F of the Policy, under the heading Administrative Deferral of Removal, provides in part as follows:

> 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:
> ...
> - Have already benefited from an administrative deferral of removal emanating from an H&C spousal application;
>
> ...
> 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 ... . Applicants who have waived a PRRA or who are not entitled to a PRRA will receive an administrative deferral of removal of 60 days.
> ... [emphasis added]

It is these elements of the Appendix H – Public Policy that give rise to the issue here before the Court.

The Issues

[18] Counsel for the Respondent has raised, as a preliminary issue, the question of mootness, given the fact that the Applicant in fact left, or was removed from, Canada prior to the hearing of this application for judicial review.

[19] Counsel for the Applicant raises only one issue in his Memorandum of Fact and Law, that issue being stated in the following terms:

> Whether the Removal Officer erred in law by finding that the Applicant had already benefited from a previous administrative deferral of removal under the Public Policy emanating from a previous SCLPIC [Spouse or Common-law Partner in Canada Class] application, and thus refusing to grant an administrative deferral of removal under the Public Policy.

[20] The Court is satisfied that a third issue arises on this application for judicial review if the Applicant is successful, that being, what is an appropriate remedy in favour of the Applicant if this application for judicial review were granted? I will turn to the issues in the order in which I have listed them.

Analysis

Mootness

[21] It was not in dispute that the overriding authority on mootness is *Borowski v. Canada (Attorney General)*[1]. The test for mootness involves a two-stage analysis. The question at the first stage is whether the Court's decision would have any practical effect on resolving some live controversy between the parties. Where the issues between the parties have become "academic" or the "tangible and concrete dispute has disappeared", the proceedings are technically moot.

[22] The second stage focuses on whether, notwithstanding that the matter is technically moot, the Court should exercise its discretion to decide the case. The Court's exercise of discretion should be guided by the three policy rationales underlying the doctrine of mootness: the presence of an adversarial context; the concern for judicial economy; and the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.

[23] Counsel for the Respondent urges that an application for leave and judicial review of a decision refusing to defer removal is technically moot in two situations: first, where the basis for the deferral request is resolved prior to deciding the application for leave and judicial review; and second, where the Court grants no stay of removal and the applicant is removed prior to

deciding the application for leave and judicial review.

[24] Counsel for the Respondent urges that both situations are applicable here. He notes that the basis for a deferral request is resolved since the Applicant left Canada in late August, 2009 and secondly, here, as earlier noted, there was an application to this Court for a stay of removal based upon this application for judicial review and the Court denied that application. The Applicant's In-Canada Spousal Sponsorship application was itself refused on the 9th of November, 2009, after this application was instituted.

[25] Counsel for the Applicant urges that this application for judicial review is not moot since there remains a "live controversy" between the parties, that being essentially the second issue on this application for judicial review that is described above.

[26] Counsel for the Applicant further urges that, in any event, if this application for judicial review is moot, the Court should nonetheless exercise its discretion to decide the case because there is indeed the presence of an adversarial context which outweighs any concern for judicial economy and any need for the Court to be sensitive to its role as only the adjudicative branch in our political framework.

[27] I am satisfied that the issue of exercise of the Court's discretion is, generally speaking, determined in favour of the applicant in the majority reasons of the Federal Court of Appeal in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*[2], and that I should

---

1 [1989] S.C.R. 342 at 3532356.
2 2009 FCA 81, March 13, 2009.

exercise my discretion to hear the substance of this application for judicial review because, indeed, there continues to exist an adversarial context between the parties and determination of that adversarial context outweighs the concern for judicial economy, and at the same time dealing with the substance of this application is properly within the adjudicative function of this Court.

Had the Applicant Benefited from a Previous Administrative Deferral Under the Spouse or Common-law Partner in Canada Class Policy at the Time the Decision here Under Review Was Made

[28] It is trite law that, under subsection 48(2) of the *Immigration and Refugee Protection Act*[3], where a removal order is enforceable against a foreign national such as the Applicant, he or she must leave Canada immediately and the order must be enforced as soon as is reasonably practical. The discretion of a Removals Officer such as the decision-maker whose decision is here at issue is extremely narrow. In *Baron*, *supra*, the Federal Court of Appeal characterized the discretion of an Enforcement Officer considering a request for deferral by citing from *Wang v. Canada (Minister of Citizenship and Immigration)*[4] where Justice Pelletier wrote:

> In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.

[29] Counsel for the Applicant, while acknowledging that none of the circumstances described in the foregoing quotation apply, nonetheless urged that the Removals Officer erred in a

---

3 S.C. 2001, c. 27.
4 [2001], 3 F.C. 682 (F.C.).

reviewable manner in failing to respect the Spouse or Common-Law Partner in Canada Class policy which provided, he urged, a public interest stay, since the Applicant was the subject of a Spouse or Common-law Partner in Canada Class application that was outstanding when the request to defer came before the Officer and that that deferral applied to the Applicant since none of the conditions under which such a deferral would not be granted under the policy applied. In particular, counsel for the Applicant urged that the Applicant had not previously benefited from an administrative deferral emanating from an "H&C grounds" application for permanent residence but rather from a "Spouse or Common-law Partner in Canada Class application for permanent residence". The policy at issue provides that a deferral will not be granted to persons such as the Applicant who earlier benefited from an administrative deferral of removal emanating from an "H&C Spousal Application".

[30] With great respect, I reach a different conclusion from that urged by counsel for the Applicant. I acknowledge that the language of the policy at issue leaves something to be desired. For ease of reference, I repeat the relevant language here: "The Minister has determined that it is in the public interest to assess all foreign nationals, regardless of status (in spousal or common-law relationships with Canadian citizens or permanent residents) under the ... policy if they meet one of ..." two conditions including if they have made an application for permanent residence either "... on H&C grounds or via the Spouse or Common-law Partner in Canada Class;". The deferral does not apply to an applicant who has already benefited from an administrative deferral for removal emanating from an H&C Spousal Application. I am satisfied that the reference to an "H&C Spousal Application" is a reference to an application for permanent residence via the Spouse or Common-law Partner in Canada Class, which is the class under which the Applicant's

first application for permanent residence was made and not to simply an application for permanent residence on H&C grounds.

[31] What is at issue here is an interpretation of ministerial policy, not an interpretation of legislation or subsidiary legislation. I am satisfied that the appropriate principle of interpretation here is to interpret the policy and its provisions in a manner that best coincides with the purpose and objective of the policy, as stated in the policy itself. I am satisfied that the limitation on the administrative deferral provided for by the policy should apply, and is capable of being applied without doing a disservice to the terminology of the policy, to circumstances such as those that apply to the Applicant at the time his request for deferral from a Removals Officer was denied.

[32] In the result, I find that there is no merit in this application for judicial review.

Remedy

[33] In light of my determination that I must dismiss this application for judicial review, the issue of remedy itself is moot. I will, nonetheless, turn briefly to that issue.

[34] In the Applicants Memorandum of Fact and Law, the Applicant seeks the following remedies:

1. An order quashing and setting aside the decision of the Officer that is under review and remitting the matter of the Applicant's application for a deferral of removal back to a different panel or Officer;
2. An order declaring the removal of the Applicant on the 28th of August, 2009 to have been unlawful or invalid; and

3. Finally, an order requiring the Respondent "... to undertake all costs and efforts to return the Applicant to Canada forthwith so that he might remain in Canada while his Spouse or Common-law Partner in Canada Class application for landing that was pending at the time the Applicant's Memorandum was filed is determined.

[35] Subsection 18.1(3) of the *Federal Courts Act*[5] sets out the powers of this Court on an application for judicial review. The reliefs sought on behalf of the Applicant are not fully consistent with that provision of law. Further, given the fact that the Applicant is no longer in Canada and that his Spouse or Common-law Partner in Canada Class application has now been determined against him, they appear, in part at least, to not be in keeping with common sense. Reconsideration of the Applicant's application for a stay of removal is outdated. Return of the Applicant at the Respondent's expense is not contemplated as a remedy under subsection 18.1(3) and is also outdated unless the decision on the Applicant's Spouse or Common-law Partner in Canada Class application is reopened by reason of the judicial review that is pending with respect to that decision. A declaration that the removal of the Applicant, if indeed he was removed and did not leave voluntarily on the 28th of August, 2009, is within the contemplation of subsection 18.1(3). Finally, costs on an application for judicial review in an immigration matter requested by counsel for the Applicant at hearing may only be awarded where "special reasons" exist.[6] I am not satisfied that special reasons here exist.

Conclusion

---

5 R.S.C. 1985, c. F-7.

6 *Federal Courts Immigration and Refugee Protection Rules*, section 22, SOR/2002-232, s. 11.

[36] For the foregoing reasons, this application for judicial review will be dismissed. At the close of hearing, counsel were advised of the foregoing result. They were consulted on the issue of certification of a question. Counsel for the Applicant requested an opportunity to formulate a question or questions. A brief interval was allowed for that purpose. During that interval, counsel advised the Court that he will not be proposing a question or questions for certification. At the same time, he did propose questions in the event that the Court, of its own motion, determined to certify a question or questions. Counsel for the Respondent proposed no question and urged against certification of a question. The Court is satisfied that this matter turns entirely on its relatively unique facts. In the circumstances, the Court itself is satisfied that no serious question of general importance arises that would be determinative on an appeal from the decision herein. No question will be certified.

ORDER

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

"Frederick E. Gibson"

Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4097-09
STYLE OF CAUSE:	FREDERIK BALIGNOT REYES v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 10, 2010
REASONS FOR ORDER AND ORDER:	Gibson D.J.
DATED:	March 11, 2010

APPEARANCES:

Rafael Fabregas	FOR THE APPLICANT
Margherita Braccio	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MAMANN SANDALUK Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT