Federal Court  Cour fédérale

Date: 20100422

Docket: IMM-4496-09

Citation: 2010 FC 437

Ottawa, Ontario, April 22, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ALLI YUSSUF KHAMIS
AND INDAH MARWATI

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, 387 N.R. 278, Justice Marc Nadon summarized the law regarding deferrals of removal:

> [51] … After a careful and thorough review of the relevant statutory provisions and jurisprudence pertaining thereto, Mr. Justice Pelletier circumscribed the boundaries of an enforcement officer's discretion to defer. In Reasons which I find myself unable to improve, he made the following points:
>
> – There are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths.

− The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act. In considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission.

− 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.

− Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application.

…

[80] By virtue of section 48(2) of the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 29 (IRPA), once a "removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable." I agree with my colleague that jurisprudence is conclusive that the enforcement officer's discretion is limited. However, ultimately an enforcement officer is intended to do nothing more than enforce a removal order. While enforcement officers are granted the discretion to fix new removal dates, they are not intended to defer removal to an indeterminate date. On the facts before us, the date of the decision on the H&C application was unknown and unlikely to be imminent, and thus, the enforcement officer was being asked to delay removal indeterminately. An indeterminate deferral was simply not within the enforcement officer's powers…

[81] Over the years, the duties of enforcement officers have not changed, and yet, the bases upon which applicants rely to obtain deferrals have dramatically increased. I am of the view that the scope of the enforcement officer's discretion cannot be changed by virtue of the requests made. An enforcement officer's role is not to assess the best interests of the children or the probability of success of any application. An enforcement officer's role should remain limited and deferral should be contemplated in very limited circumstances.

> [82] The legislation has not, to my knowledge, provided a new step to claimants who desire yet another assessment of their circumstances. Claimants already have the refugee application process, the pre-removal risk assessment (PRRA) process and the H&C application in addition to judicial reviews of those processes and the stay before removal.
>
> [83] In this case, it appears that the claimants want to open yet another avenue of review by asking the enforcement officer to reassess information that has already been examined by administrative tribunals and that was the subject of judicial review. For the enforcement officer to comply with this request for reassessment would be akin to the enforcement officer making a quasi-judicial order without the benefit of hearing from opposing counsel. It's time to stop this abusive cycle.

[2] In respect to the matter of the possibility of insufficient reasons which the Court itself considered:

> [23] As noted by Mr. Justice Pinard in *Gaoat*, above at paragraphs 10-11, the rule in *Marine Atlantic* applies where the reasons given may be insufficient. The applicant is required to request further reasons before he can complain in Court that they are inadequate: see also *Hayama v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1305, [2003] F.C.J. No. 1642.

(*Tran v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1078, [2009] F.C.J. No. 1332 (QL)).

II. Judicial Procedure

[3] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of a removals officer refusing the Applicants' request to defer their removal until the determination of their humanitarian and compassionate grounds (H&C) application.

III. Background

[4] Mr. Alli Yussuf Khamis is a citizen of Tanzania who came to Canada from the United States on March 1, 2001 and made a refugee claim. Ms. Indah Marwati is a citizen of Indonesia who came to Canada from the United States on June 5, 2001 and made a refugee claim. In 2002, both Applicants had their separate refugee claims rejected.

[5] While in Canada, the Applicants began a romantic relationship. Their first child, Sameer, was born on February 17, 2003 and they were married on November 13, 2003.

[6] On November 19, 2004 the Applicants filed a joint H&C application. This application was rejected on May 17, 2006. The Applicants sought judicial review of the rejection and received a stay of removal while their application for leave and for judicial review was determined. Although leave was granted on January 5, 2007, the judicial review was dismissed on April 3, 2007. The Applicants submitted a new H&C application on May 7, 2007. On May 13, 2007 the Citizenship and Immigration Canada (CIC) office in Edmonton entered the H&C application into its queue and estimated that it will be assessed in July 2010.

[7] On August 4, 2009 counsel for the Applicants requested deferral of removal until the determination of the H&C application. This request was denied on August 11, 2009.

[8] On August 24, 2009 the Applicants made a second request for deferral of removal. This request was denied two days later and forms the basis of this application.

IV. Decision under Review

[9] The removals officer declined to consider the Applicants' H&C submissions when determining whether to defer removal on the grounds that she lacked the jurisdiction to do so. The removals officer stated that the Applicants' H&C application would be assessed by CIC "in due course" and held that the existence of an H&C application does not outweigh her duty to enforce valid removal orders as soon as is reasonably practicable.

[10] The officer also advised the Applicants regarding the procedure for including their children in their travel arrangements (Applicants' Record (AR) at p. 6).

V. Issues

[11] (1) Did the removals officer err by failing to defer the Applicants' removal date until after the determination of their H&C application?

(2) Did the removals officer err by inadequately consider the best interests of the Applicants' Canadian children?

VI. Relevant Legislative Provisions

[12] Removals officers must comply with section 48 of the IRPA:

Enforceable removal order	Mesure de renvoi
48. (1) A removal order is enforceable if it has come into	**48.** (1) La mesure de renvoi est exécutoire depuis sa prise

force and is not stayed.	d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
Effect	Conséquence
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

VII. Positions of the Parties

Applicant's Position

[13] The Applicants submit that section 48 gives a removals officer discretion to decide when a removal order will be enforced (Applicants' Reply at para. 2). If a long-standing H&C application has not been determined due to backlogs, then, the Applicants contend, a removals officer may use this as a basis to exercise her discretion to defer removal (AR at p. 76). The Applicants also submit the deferral requested is for a specific purpose and to a specific time, when the outstanding H&C application will be determined (Applicants' Written Submissions at p. 78).

[14] The Applicants accept that the fact that an outstanding H&C application exists does not, on its own, constitute grounds for the deferral of a removal order; however, the Applicants submit this case presents two factors which warrant a deferral. First, the H&C application has been outstanding since May 2007. The Applicants do not contend that the removals officer ought to have substantively considered the merits of their H&C application, but instead submit that the evidence of the length of time it has been outstanding is relevant to the determination of a removal date.

Second, the case of *Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 682, 2001 FCT 148 held that an outstanding H&C application which contains allegations of risk to personal safety, as the Applicants contends, may be sufficient as a ground for deferral of removal until after that application has been considered (AR at p. 79).

[15] The Applicants summarize their position by stating "the removals officer in the case at bar erred in failing to consider whether deferral was warranted pending a decision on the Applicants' long outstanding H&C application" (Applicants' Reply at para. 12).

[16] With respect to the second issue, the Applicants acknowledge that a removals officer is not required to undertake a full substantive analysis of the best interests of the children as performed at the stage of H&C. The Applicants instead cite the case of *Munar v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1448 (QL), [2006] 2 F.C.R. 664 for the proposition that the best interests of the child should be seen as a continuum with a complete examination being required at the stage of H&C and a less thorough analysis being required when making other determinations, such as whether to defer a removal (AR at p. 80). The Applicants also cite *Munar*, above, for the proposition that a removals officer ought to consider the short-term best interests of the child (AR at p. 81).

[17] The Applicants submit the removals officer erred because she made no findings with respect to the impact of a removal on the children. The Applicants contend that the removals officer needed to make a determination as to what the children's best interests were, and then determine whether

they were outweighed by other considerations. The Applicants also cite the case of *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165, 323 F.T.R. 181 and contend that a removals officer must be "alert, alive and sensitive" to the best interests of the child (AR at p. 82).

Respondent's Position

[18] The Respondent submits that section 48 obliges removals officers to effect removal "as soon as reasonably practicable"; therefore, an officer's discretion to defer removal is very limited and should only be used when exceptional circumstances such as those relating to travel arrangements, personal safety or health are present (Memorandum of Argument of the Respondent at para. 31).

[19] The Respondent submits that jurisprudence has established that the existence of a second H&C application is, in and of itself, not a bar to removal and has no effect on the enforceability of the removal order (Memorandum of Argument of the Respondent at para. 37).

[20] The Respondent submits the officer considered the Applicants' request for deferral and reasonably found no compelling basis to exercise her discretion (Memorandum of Argument of the Respondent at para. 39).

[21] With respect to the second issue, the Respondent submits removals officers are not required to consider the ultimate impact of removal of the Applicants on their children. Instead, the Respondent contends the officer is only under a duty to consider whether the children will be cared

for when the parents are removed or whether there is an impediment to their travel with their parents, should they so choose (Memorandum of Argument of the Respondent at para. 41).

VIII. Standard of Review

[22] In the case of *Baron*, above, the Federal Court of Appeal held that an officer's decision refusing deferral is reviewable on the standard of reasonableness (*Baron* at para. 25).

[23] In the case of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 the Supreme Court of Canada held that the standard of reasonableness is "concerned mostly with the existence of justification, transparency and intelligibility with the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

IX. Analysis

> Did the removals officer err by failing to defer the Applicants' removal date until after the determination of their H&C application?

[24] The case of *Baron*, above, makes it clear that section 48 of the IRPA gives very limited discretion to officers to defer removal orders (*Baron* at para. 49). The existence of an H&C application, in and of itself, does not constitute grounds for deferral of a valid removal order (*Baron* at para. 50).

[25] In Baron, above, Justice Nadon summarized the law regarding deferrals of removal:

> [51] … After a careful and thorough review of the relevant statutory provisions and jurisprudence pertaining thereto, Mr. Justice Pelletier circumscribed the

> boundaries of an enforcement officer's discretion to defer. In Reasons which I find myself unable to improve, he made the following points:
>
> – There are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths.
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> – The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act. In considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission.
>
> – 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.
>
> – Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application.

[26] As is stated above, the Applicants submit that the removals officer erred by failing to consider their outstanding H&C application when she denied deferral (Applicants' Reply at para. 13). The Court concludes that the officer was reasonable in not considering the substance of the Applicants' H&C materials, as the jurisprudence is clear that removals officers should not perform a "pre-H&C" analysis which overlaps with the jurisdiction provided by section 25 of the IRPA.

[27] In making this submission, the Applicants seek to distinguish *Baron*, above. The Applicants contend that this case involves a long-standing H&C application, whereas *Baron*, above, involved a last-minute request for deferral after a sudden H&C application had been made.

[28] It is apparent that the removals officer was aware of the outstanding H&C application and made the following finding: "[t]he existence of an H&C application does not outweigh my statutory duty under Subsection 48(2) of the *Immigration and Refugee Protection Act* to enforce the applicants' removal orders as soon as is reasonably practicable" (AR at p. 6). Although the removals officer was aware that an outstanding H&C application existed, it is important to note Justice Nadon's emphasized statement that H&C applications will not justify deferral in the absence of "special considerations".

[29] The Applicants submit the removals officer erred by failing to give consideration to the evidence of the H&C application. The Court rejects this argument, as it is clear from the decision that the removals officer was aware of the outstanding H&C application and weighed that circumstance within the jurisdiction of his/her legislative mandate.

Did the removals officer err by inadequately considering the best interests of the Applicants' Canadian children?

[30] The question of how thoroughly a removals officer must consider the best interests of the child was canvassed in *Munar*, above. Justice Yves de Montigny held:

> [40] This is obviously not the kind of assessment that the removal officer is expected to undertake when deciding whether the enforcement of the removal order is "reasonably practicable." What he should be considering, however, are

> the short-term best interests of the child. For example, it is certainly within the removal officer's discretion to defer removal until a child has terminated his or her school year, if he or she is going with his or her parent. Similarly, I cannot bring myself to the conclusion that the removal officer should not satisfy himself that provisions have been made for leaving a child in the care of others in Canada when parents are to be removed. This is clearly within his mandate, if section 48 of the IRPA is to be read consistently with the *Convention on the Rights of the Child*. To make enquiries as to whether a child will be adequately looked after does not amount to a fulsome H&C assessment and in no way duplicates the role of the immigration officer who will eventually deal with such an application (see *Boniowski v. Canada (Minister of Citizenship and Immigration)* (2004), 44 Imm. L.R. (3d) 31 (F.C.)).
>
> [41] In the present case, the two kids of the applicant are very young, and nobody seems prepared to care for them besides their mother. Yet, she cannot take them with her since her application for an order seeking sole [page680] custody has not yet been dealt with. Therefore, I conclude that the applicant has raised a serious question, even on the more probing standard required in a case like this one, when claiming that the removal officer failed to exercise her discretion appropriately and was not "alert, alive and sensitive" to the childrens' best interests.

[31] Several aspects of the removals officers' role are noted in the above two paragraphs. It is clear that removals officers ought to examine the best interests of the child when deciding whether to defer the removal of parents. In doing this, the focus should not be on the children's ultimate best interests, but instead on their best interests in the short-term. In determining the short-term best interests of the child, care is to be taken to ensure that the exercise undertaken by the removals officer does not duplicate the analysis performed by the immigration officer considering an H&C application. The examples given by Justice de Montigny consist of deferral to enable completion of studies or to ensure that adequate care has been arranged if children are not going to accompany their parents. It is the Court's conclusion that the question of whether it is in the child's ultimate best interests to remain in Canada with his or her parents is a consideration to be analyzed at the stage of an H&C application and cannot be part of a decision to defer.

X. Conclusion

[32] The case of *Baron*, above, makes it clear that an outstanding H&C application does not constitute grounds for deferral in the absence of special considerations. In this case, the fact that the application was made in a timely manner does not constitute a special consideration in light of the Applicants' history in the immigration process and the fact that this is their second H&C application.

[33] It is vitally important for this Court to orient itself chronologically when reviewing decisions of this nature. In this case, it is important to remember that the Court is reviewing a decision made in August 2009, not April 2010. Had this decision been made last week, it may have been more reasonable to defer removal for a few short months until the Applicants' long-standing H&C application was considered; however, at the time this decision was made the Applicants were requesting a deferral of nearly a year which may have weighed against their chances of receiving a deferral in the absence of truly exceptional circumstances.

[34] The Court concludes that the decision of the removals officers is reasonable in light of the limited jurisdiction afforded to the position.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ALLI YUSSUF KHAMIS AND INDAH MARWATI v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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