Federal Court  Cour fédérale

Date: 20110615

Docket: IMM-5562-10

Citation: 2011 FC 685

Ottawa, Ontario, June 15, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JANELLE MARIA FAISAL

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] On September 25, 2010, the Federal Court granted the Applicant's motion for a stay of removal from Canada until the final determination of this judicial review. In her decision, Justice Marie-Josée Bédard stated:

> I am also satisfied that the Applicant and her children would suffer irreparable harm if she were to be deported to Saint-Lucia before the custody issues regarding her two older daughters are resolved in an adequate manner. Considering the Applicant's personal situation, her decision to leave her two oldest daughters in Canada is in their best interest and she cannot simply leave Canada without securing adequate

> custody arrangements for them, which will involve making the appropriate legal arrangements. [Emphasis added].

[2] The same Justice Bédard also granted the application for leave in respect of the Removals Officer's decision on March 9, 2011.

[3] In her two-pronged request for an administrative stay, the Applicant asked that her removal be deferred until the humanitarian and compassionate (H&C) application is considered or, in the alternative, the custody arrangements are finalized. On September 22, 2010, the acting supervisor at the Canada Border Services Agency (CBSA) refused the Applicant's request for an administrative stay. The second prong of the request in regard to the judicial review considered by the Court is still a "live issue" as the Court was informed that the H&C had been decided with news to that effect having been received by both counsel the week of the hearing of the judicial review.

II. Judicial Procedure

[4] The Applicant filed an Application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*), of a September 22, 2010 decision rendered by a CBSA Removals Officer, wherein the Removals Officer rejected the Applicant's request for an administrative stay of removal.

III. Background

[5] The Applicant, Ms. Janelle Maria Faisal, was born on July 6, 1987 and is a citizen of Saint-Lucia.

[6] Ms. Faisal arrived in Canada on September 12, 2004, at the age of 17. She submitted a refugee claim, principally alleging that she had been abused by her former common law spouse. Her claim was denied by the Immigration and Refugee Board (IRB) on November 21, 2005. On June 9, 2009, Ms. Faisal filed a Pre-Removal Risk Assessment (PRRA) application which was refused on September 15, 2009. On April 9, 2010, Ms. Faisal submitted a H&C application claiming that it was in the best interests of her three Canadian-born children, ages 5, 3 and 9 months, that she stay in Canada. The H&C application was still pending (until news was received as is described in paragraph 3 in the Overview).

[7] On July 20, 2010, Ms. Faisal was informed by a Removals Officer that her removal was scheduled for September 26, 2010. Ms. Faisal then decided to leave her two oldest children in Canada. The father of her oldest child, who she had alleged in her refugee proceeding was persecuting her, lives in Saint-Lucia, while the father of her 3-year-old has shown no interest in caring for his child.

[8] According to Ms. Faisal, two Canadian citizens are willing to care for her children: Mr. McEnroe Thomas, her current common law spouse, and Ms. Olga Prescott, her former mother-in-law. In order to ensure that her children can be cared for by either one of these individuals, the Applicant stated that she must first obtain full custody of her children and then give Mr. Thomas or Ms. Prescott legal guardianship of the children. The Applicant states that she must be present for the duration of these custody and guardianship proceedings.

[9] Ms. Faisal's appointment with regard to her children's custody was scheduled for September 23, 2010. The Applicant stated that she had missed an earlier-scheduled appointment, on September 2, 2010, because she had attempted suicide.

IV. Decision under Review

[10] The Removals Officer based her decision to refuse the deferral request on the lack of relevant documentation:

> … Although it is asked of the court to grant custody of the child there is no documentation to show that your client does not have custody of that child or that the father is asking for full custody. As far as CBSA is concerned custody is not an issue that prevents removal.

(Removals Officer's Decision, Applicant's Record (AR) at p 7).

[11] With regard to the best interest of the children, the officer states:

> Your client's children are young, 5 years old or younger. Children that age are very adaptable and nothing was provided to show that they are unable to do so. On the other hand, the children are Canadian citizens and they can remain in Canada. Since Mr Thomas has been part of the children's life he could take care of the children until your client returns to Canada through proper channels…

(Removals Officer's Decision, AR at p 9).

V. Position of the Parties

[12] The Applicant submits that the Removals Officer made a reviewable error by failing to consider the immediate and future well-being of the children. The Officer clearly erred in stating that she can simply leave the children in the care of Mr. Thomas without settling the custody issue through proper legal channels. Mr. Thomas is not the father of either of the children who will be remaining. As a result, the Officer failed to exercise her discretion appropriately and failed to be alert, alive and sensitive to the best interest of the children as was required.

[13] The Respondent submits that the litigation with regard to the custody of the children can continue regardless of where the Applicant is located. She can provide instructions through counsel, and by affidavit evidence, teleconference, or videoconference, with the Court's permission. These modes of participation essentially amount to her presence at the proceedings. According to the Respondent, the Removals Officer has limited discretion over the matter and her decision was reasonable. (To which it was made clear during the hearing that the children in the meantime are not assured of any place or any person with whom to stay until such custody arrangements would be finalized.)

VI. Issue

[14] Did the Removals Officer properly exercise her discretion with respect to the Applicant's deferral request, particularly with regard to the interests of the Applicant's Canadian children?

VII. Relevant Legislative Provisions

[15] Section 48 of the *IRPA* is relevant to the present case:

Enforceable removal order	**Mesure de renvoi**
48. (1) A removal order is enforceable if it has come into force and is not stayed.	**48.** (1) La mesure de renvoi est exécutoire depuis sa prise 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	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que

enforced as soon as is reasonably practicable.	les circonstances le permettent.

VIII. Standard of Review

[16] The Federal Court of Appeal made it clear in *Baron* that the reasonableness standard of review applies to decisions of enforcement officers (*Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81, 176 ACWS (3d) 490 at para 25). Where the reasonableness standard applies, reviewing courts cannot substitute their own appreciation of the appropriate solutions, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" *(Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47). There might be more than one reasonable outcome (*Dunsmuir*; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339).

IX. Analysis

[17] Subsection 48(2) of the *IRPA* requires that a removal order "be enforced as soon as reasonably practicable". Removals Officers have the authority to defer execution of a removal order only in very limited circumstances such as those arising just prior to the removal date. Any matter in regard to a H&C is not, in any case, in and of itself, a basis to request to defer removal. The Court has made it clear that enforcement officers have limited jurisdiction and that is in regard to the timing of removal (eg. Extension of time for school year completion, essential medical treatment, etc.) (*Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180, [2006] 2 FCR 664). The matter is considered by the Court in regard to the custody arrangements to which reference is made by Justice Bédard in paragraph 1 of this decision. Thus, the "live issue" is in

respect of the custody arrangements for the children, recognizing that procedures have been set in motion for that to be effected.

[18] In her decision, the Removals Officer reviewed all the evidence submitted by the Applicant. She stated that "[n]o documentation has been submitted to show that a third party is or will be seeking custody of the children" (Removals Officer's decision, AR at p 7). Furthermore, the Officer examined the documentary evidence to determine if there would be help available for the Applicant should she go back to Saint-Lucia with her three children; however, recognizing the medically documented hospital report (Tribunal Record (TR) at p 28) on the suicidal past of the Applicant and that the custody of the children has, as yet, not been transferred to non-family members, the excerpt from the decision below is not considered reasonable by the Court.

[19] The Applicant herself submitted that her life would be in danger if she is to return to Saint-Lucia because she had recently attempted suicide and is considered to be in "dire need" of psychiatric care and "treatment" as stated in a medical report from a renowned specialized psychiatric hospital; and is, therefore, considered too unstable due to depression and post-traumatic stress disorder to be removed, all of which is documented (TR at p 28).

[20] The lack of reasonableness is evident in that the highly specialized psychiatric hospital which gave the report details the peril of the Applicant as a patient. It is not one with which to trifle. The Removals Officer did not address all the significant or primordial issues. Thus, the decision reviewed is unreasonable as the mother and the children are considered at risk.

X. Conclusion

[21] The Removals Officer erred in law failing to defer removal from Canada, due to a significant exception (in respect of the Applicant who has been confirmed as “suicidal” by a specialized medical hospital facility in that regard, and that coupled with the perception of legal procedures, as yet unconcluded in regard to the custody of her children) which did arise and would amount to a reason for deferral of the execution of the removal.

[22] For all of the above reasons, the Applicant’s application for judicial review is granted and the matter is remitted for redetermination by a different Removals Officer.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be granted and the matter be remitted for redetermination by a different Removals Officer. No question for certification.

Obiter

This is a matter unique unto itself. The combination of suicidal tendencies of the Applicant are significantly coupled and attributed to her preoccupation in respect of the welfare of her children, that legal custody arrangements be ascertained before her own departure from Canada. The case of the Applicant is only unique due to point specific evidence; otherwise, it would not be unlike any other case of an unwed mother, without status in Canada, due to a situation, often categorized as one of her own making. In that, she finds herself between a rock and a hard place, either returning with her children to her country of origin where she has no moral, financial and social support or on the other, leaving her children in Canada, without a certain future, outside of any legal custody arrangements. Why is this case different from other cases, categorized in the above- described manner? The Applicant, due to the support of significant detailed evidence from the United Church of Canada, school, medical and specialized hospital reports, has demonstrated that she has turned her life around entirely in the last five years to give a future to her children by preparing herself to become an asset to them and to society.

From an immature teenager to a mother, who recognizes the position that she must fill, her transition from someone alone to that of an aspiring responsible woman is shown through the evidence. She acknowledges in acts that she must prepare to be financially and independently responsible for her children through education, community and psychological strengthening, all for which she has worked as arduously as she could in her circumstances. If the evidence is truly examined and not simply set aside by pushing paper, it appears that this is a case that requires a second look by a removals officer for deferral of her departure, or even for one more H&C to be effected; however, subsequent to the Court's decision, this is only one obiter of one judge whose jurisdiction was completed, or over, before the obiter was begun. Yet, it is hoped that an opinion outside of this Court's jurisdiction is, at least, taken into consideration, in recognizing that a potential suicide of an Applicant is not an option. That is, it can be averted by an understanding of a decision-maker, who does have it within his or her jurisdiction, to make a difference within his or her respective legal framework, not outside of it. To do so, requires ensuring that the evidence in its entirety has been truly read and assessed in regard to that jurisdiction; that can only be done, if paper is not simply pushed aside to have one more case done with; but recognizing, if need be, an exception within the very confines of the jurisdiction, itself, is acknowledged for what it is, rather than dismissed out of hand. (Inspiration may perhaps be drawn from the recent film "Precious" drawn from actual events, wherein a young woman turned her life around in an exceptional manner for the sake of her children.)

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5562-10
STYLE OF CAUSE:	JANELLE MARIA FAISAL v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	June 7, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	June 15, 2011

APPEARANCES:

Arash Banakar	FOR THE APPLICANT
Michel Pépin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Arash Banakar, Lawyer Montreal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENT