Federal Court  Cour fédérale

Date: 20111103

Docket: IMM-1444-11

Citation: 2011 FC 1257

Ottawa, Ontario, November 3, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

TERHEMBA THOMAS SHASE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] For more than five years now, Mr. Shase has been trying to gain official status in Canada. He came from Nigeria and asked to be recognized as a refugee. He was turned down. He then applied for a pre-removal risk assessment [PRRA]. The PRRA officer found that he would not be at serious risk were he to be returned to Nigeria. He did not apply to this Court to have that decision reviewed. By early this year, he was removal ready, in that there were no legal or administrative imperatives which would allow him to remain in Canada. Indeed, section 48 of the *Immigration and*

Refugee Protection Act [IRPA] obliged the enforcement officer to remove him from Canada "as soon as is reasonably practicable".

[2] Through counsel, Mr. Shase asked that his removal be administratively deferred pending the outcome of his application for permanent resident status based on humanitarian and compassionate [H&C] grounds, given his four-year common-law relationship with a Canadian, the mother of his two children. That request was denied.

[3] Mr. Shase applied for leave and judicial review of that decision and, in the interim, sought a stay of his removal. A stay was granted by Mr. Justice Lemieux. His cogent reasons are reported at 2011 FC 418. Leave was subsequently granted. This is the judicial review of the enforcement officer's decision. This is yet another case which deals with an enforcement officer's limited discretion under section 48 of IRPA. The officer's discretion certainly extends to details pertaining to travel arrangements, but other factors may also be taken into account.

[4] In *Simoes v Canada (Minister of Citizenship and Immigration)*, 7 Imm LR (3d) 141, [2000] FCJ No 936 (QL), Mr. Justice Nadon, as he then was, stated that an enforcement officer may consider, among other things, "pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system." This was one of the factors which influenced Mr. Justice Lemieux, in that he was of the view that the application for permanent residence on H&C grounds had been filed in a timely manner.

[5] The leading case is the decision of the Federal Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2009] FCJ No 314 (QL). In addition to referring to his decision in *Simoes*, above, Mr. Justice Nadon fully endorsed the decision of Mr. Justice Pelletier, as he then was, in *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682, in which he made several points. With respect to H&C considerations, Mr. Justice Nadon paraphrased Mr. Justice Pelletier at paragraph 51of *Baron*, as follows:

> "[w]ith respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety." [My Emphasis.]

[6] More recently in *Canada (Minister of Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286, at paragraph 43, Mr. Justice Evans, speaking for the Court, referred to paragraph 51 of *Baron*, above, and reiterated:

> "[w]ith respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety."

[7] It has been definitively decided that removal to Nigeria would not pose a threat to Mr. Shase's personal safety.

[8] With respect to the H&C considerations in this case, they relate to his spousal relationship and the welfare of his two children.

THE ENFORCEMENT OFFICER'S DECISION

[9] Mr. Justice Lemieux did not have before him the tribunal record when he granted the stay. That record was only produced after leave was granted. It shows that the application for permanent residence, with spousal sponsorship, was not made in a timely manner, in the sense that it could have been made years earlier. Citizenship and Immigration officials cannot be reproached for not rendering a decision on an application which, at best, had just been filed.

[10] The notes written by the enforcement officer in support of her decision indicate that (1) Mr. Shase was removal ready, (2) the PRRA was negative, (3) at that time the children lived in Kuujjuaq, northern Quebec, with their mother, (4) there was no proof of financial support, and (5) although he had a Quebec Selection Certificate, it was good until 2014. Furthermore, he could not benefit from an administrative stay because he had been called in for a pre-removal interview prior to filing his application for permanent residence.

[11] The record before the enforcement officer, and the record before me, comprises some 265 pages. Although there is a presumption that the enforcement officer read all the material before her, that presumption may be displaced if there is material in the record which contradicts the decision. As Mr. Justice Evans, as he then was, said in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, [1998] FCJ No 1425 (QL) at paragraph 17:

> However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains* v. *Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has

> considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[12] Thus, the more important the evidence that is not mentioned specifically and analyzed in the officer's reasons, the more willing a court may be to infer from the silence that the officer made an erroneous finding of fact "without regard to the evidence".

[13] The exercise of discretion must be made on the material found in the record. It beggars belief that the enforcement officer took into account what was actually therein.

[14] Mr. Shase's spouse is an Inuit from northern Quebec. Their separation was temporary as he had bail conditions which required him to remain in Montréal (which conditions have apparently now been lifted). The fact that his spouse returned to northern Quebec to work did not negate the other evidence in the file that Mr. Shase was the main support of the children.

[15] The record shows that at one point Mr. Shase was given sole custody of the two children, although now they both have custody. Most telling is a report by the Batshaw Youth and Family Centres which indicated that Mr. Shase's spouse had a suicidal nature and was unstable. Mr. Shase himself was depressed because she had not, at that point, filed a sponsorship application. There is a cultural sensitivity issue here in that it is argued that an Inuit woman could not believe that the authorities would throw her spouse out of the country.

[16] Mr. Shase's spouse was said to be very impulsive and made choices on a personal level without consideration for her family or the negative impact on her children. She needs professional help, and "to be directed to make responsible decisions for herself and her family."

[17] The fact that Mr. Shase did not benefit from an administrative stay does not take away from the fact, as noted by Mr. Justice Lemieux, that the policy is designed to prevent hardship. As I said in a stay motion in *Collins v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 660, [2008] FCJ No 835 (QL), at paragraph 14:

> The public policy with respect to the Spouse or Common-law Partner in Canada class is a commitment "to preventing the hardship resulting from the separation of spouses and common-law partners together in Canada where possible." Thus it alleviates some of the hardship inherent in a separation. The fact that Mr. Ugochukwu is caught up in the fine print does not automatically mean that an officer properly informed as to the facts might not have granted a deferral.

[18] Things are better now but are practically doomed to failure should Mr. Shase be removed at this point in time. As said in *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1629, [2004] FCJ No 1967 (QL), which was a judicial review of an H&C application, Mr. Shase's removal will not only diminish him and his family, but will diminish us all.

[19] I find the decision unreasonable. As per *Wang*, *Baron* and *Shpati*, there were "special considerations" which were completely ignored.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The judicial review of a decision of an enforcement officer, dated 1 March 2011, not to defer removal pending the outcome of an inland H&C application for permanent residence with spousal support, is granted.
2. The matter is referred back to another enforcement officer for re-determination.
3. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Me Stewart Istvanffy	FOR THE APPLICANT
Me Lisa Maziade	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stewart Istvanffy Barrister & Solicitor Montreal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENT