Federal Court  Cour fédérale

Date: 20120402

Docket: IMM-6156-11

Citation: 2012 FC 382

Ottawa, Ontario, April 2, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

SINNAIA SORUBARANI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, (SC 2001, c 27) [*IRPA*], for judicial review of the decision rendered by the Enforcement Officer A. Wong (the Officer) of the Canada Border Services Agency, on August 31, 2011, refusing Sinnaia Sorubarani's (the Applicant) application to defer the execution of the removal order issued against her.

[2] For the following reasons, this application for judicial review is dismissed.

II. Facts

[3] The Applicant is a citizen of Sri Lanka.

[4] She arrived in Canada on June 20, 2000, and immediately filed a refugee claim. Both her refugee application and application for judicial review before this Court were refused.

[5] The Applicant subsequently filed a Post-Determination Refugee Claimants in Canada Class [PDRCC] application. Her application was refused in October 2001 and the Applicant was scheduled for removal to the United States on November 27, 2001. She failed to appear and an arrest warrant was issued against her. It remained in effect until September 1, 2004.

[6] In January 2003, the Applicant filed a Pre-Removal Risk Assessment [PRRA] application that was also refused in April 2008. She then filed an application for judicial review of the PRRA decision which was allowed in December 2008. Additionally, a stay of removal was granted in June 2008.

[7] In February 2009, the Applicant filed an application for permanent residence under Humanitarian and Compassionate [H&C] grounds. This application is still pending.

[8] Her PRRA application was denied and she filed an application for leave and judicial review of her negative PRRA decision that was dismissed in August 2009. She also filed a motion to stay her removal scheduled for April 9, 2009. Her motion was dismissed and the Applicant was removed to the United States. Upon her arrival in the United States, the Applicant filed a claim for asylum that was rejected on the basis of her lack of credibility. Consequently, she was refused admission to the United States and was obliged to return to Canada on June 15, 2009.

[9] The Applicant was once more scheduled for removal and was to be deported on September 17, 2011. She filed a motion for stay that was granted on August 31, 2011.

III. Legislation

[10] Section 48 of the *IRPA* provides as follows:

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 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.

IV. Issue and standard of review

A. Issue

[11] The Applicant casts the issue to be determined as follows: Did the Immigration Officer breach the duty of fairness in failing to consider the evidence in its entirety in his refusal of the Applicant's request for deferral of the removal order and reaching an unreasonable decision?

[12] The Applicant does not argue the issue of procedural fairness. Therefore, the Court phrases the issue as follows:

- ***Did the officer err in not deferring the applicant's removal until her H&C application was decided?***

B. Standard of review

[13] It is established jurisprudence that "The appropriate standard of review of a removal officer's decision on a deferral request is reasonableness (see *Ortiz v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 18, [2012] FCJ No 11 at para 39; *Turay v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1090, [2009] FCJ No 1369 at para 15).

[14] In reviewing the officer's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making

process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

V. Parties' submissions

A. Applicant's submissions

[15] The Applicant submits that sufficient H&C grounds exist and that a decision is imminent because her application was filed 30 months ago. She claims that the average processing time for humanitarian and compassionate cases is 20 months based on the Citizenship and Immigration website. According to the Applicant, the Officer's failure to consider the foregoing is unreasonable and warrants the intervention of this Court.

[16] The Applicant mentions that her H&C application was sent to the backlog reduction office and is still pending. In *Simoes v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 936 at para 12 [*Simoes*], the Court held that "a removal officer may consider various factors such as illness, other impediments to travelling, and pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the systems".

[17] The Applicant further submits that her pending H&C application is likely to succeed considering the fact that she has close family in Canada and none left in Sri Lanka. The Applicant does not have any emotional or physical support in Sri Lanka. Moreover, her son provided an

affidavit indicating that the H&C application is based on his sponsorship agreement to support the Applicant.

[18] The Applicant alleges that the Officer failed to use her discretion, consider her outstanding H&C application and allow the Applicant to remain in Canada.

B. Respondent's submissions

[19] The Respondent responds that the Officer's decision was reasonable. He mentions that the only serious issue alleged by the Applicant is her pending H&C application. The Officer considered the issue and found that it did not warrant a deferral of removal.

[20] Abundant jurisprudence exists on that issue; according to the Respondent, an outstanding application is not, by itself, a reason for stay of removal (*Kim v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 321; *Akyol v Canada (Minister of Citizenship and Immigration)*, 2003 FC 931 at para 11; *Selliah v Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No 1200 (FCA); *El Ouardi v Canada (Solicitor General)*, 2005 FCA 42; *Sivagnanansuntharam v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 70 (FCA); *Tesoro v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148 (FCA); *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 [*Owusu*]).

[21] The Respondent disagrees with the Applicant that her H&C application was filed in a timely manner. She submitted an application for permanent residence on H&C grounds more than 8 years

after arriving in Canada. According to the Respondent the Applicant ought to have regularized her status years ago. There is also no evidence that a backlog has given rise to a delay in the processing of the Applicant's H&C application even though her application was sent to the Backlog Reduction Office for further processing.

[22] Additionally, the Respondent alleges that the effect of separation on an applicant's family, and financial hardship that separation would impose do not meet the narrow scope of an Enforcement Officer's discretion (see *Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1240 at para 25). Family hardship and disruption of family life are unfortunate consequences of removal but are not determinative (see *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 49 [*Baron*]).

[23] Finally, the Respondent submits that since the Applicant failed to raise the argument that she would be subject to extortion at the hands of paramilitary groups in Sri Lanka before the Officer. The Applicant cannot challenge the reasonableness of the decision based on such an allegation (see *Owusu* at para 9; *Lemiecha v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1333 at para 4).

VI. Analysis

[24] The Court must keep in mind that a Removal Officer has a very limited discretion (see *Baron* cited above, at para 69). The Minister is bound by section 48 of the *IRPA* to execute a valid

removal order with little discretion on the timing of that removal. A pending H&C application will not justify deferral unless it is based on a threat to personal safety (see *Baron* at paras 49 and 51).

[25] Furthermore, in deciding whether a removal is reasonably practicable, "a Removal Officer may consider various factors such as illness, other impediments to travelling and pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system" (see *Baron* at paras 49, 67-68; *Simoes* at para 12 and *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682 (FC)).

[26] In considering the duty to comply with section 48, the availability for an alternate remedy, such as an applicant's right to return to Canada, should be given great consideration. Cases where the only harm is family hardship can easily be remedied with the readmission of an applicant to Canada (see *Baron* at para 51; *Furtado v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 963 at paras 30-33).

[27] In the present case, the Applicant argues that her H&C application is to be determined imminently and that the Officer should have deferred her removal on the basis that her application has been pending for more than 30 months. The Officer wrote in his decision: "there is insufficient evidence before me to indicate that the application will be determined imminently, that the pending H&C application should warrant a deferral of removal" (see Officer's decision at page 5 of the tribunal record).

[28] In *Jonas v Canada (Minister of Citizenship and Immigration)*, 2010 FC 273, [2010] FCJ No 317, the Court wrote, in paragraph 21 of its decision:

> . . . in many cases, the imminence of a decision may be a reflection of whether the application had been filed in a timely manner. In this case, the officer does not indicate whether, in his view, the H&C application was filed in a timely manner; however, it is of note that the applicant did not file it until almost five years after the rejection of his refugee claim by the RPD. The officer concluded that a decision was not imminent even though the application had been transferred to the local CIC Office. The officer's determination that the pending H&C application did not warrant his exercise of discretion was reasonable.

[29] It was open to the Officer to consider the imminence of a decision in the pending H&C application. However, the Officer could not entertain such a consideration because no evidence was adduced by the Applicant to that effect. Even though the Officer did not determine whether or not the Applicant had filed her H&C application in a timely manner, the Court notes that the Applicant waited almost 8 years after the rejection of her PDRCC application and 6 years after she had applied for her PRRA application.

[30] In addition, the Officer acknowledged the fact that the Applicant may face hardship in Sri Lanka. The Officer determined that family hardship, though inevitable, is not a valid reason to justify deferral of removal. This conclusion is reasonable.

[31] “H&C applications are not intended to obstruct a valid removal order. Where a PRRA has revealed that the applicants are not at risk if they are returned, then the applicants are intended to make future requests for permanent residence from their home country” (see *Baron* at para 87).

[32] Given the applicant's lengthy immigration history and her failure to file her H&C application in a timely manner, the decision of the Officer not to defer by reason of the pending H&C is justifiable. Family hardship is not a valid reason to defer a removal order. For the above reasons, this application for judicial review is dismissed.

VII. Conclusion

[33] The Officer reasonably concluded that there was insufficient evidence to demonstrate that a determination of the Applicant’s H&C application is imminent. Furthermore, the Applicant failed to file her H&C application in a timely manner, therefore a deferral of her removal to Sri Lanka is not justified. The Officer properly determined that family hardship, although inevitable, is not sufficient in this instance to defer the Applicant’s removal. The Officer’s decision “falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law” (see *Dunsmuir* at para 47).

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is dismissed; and

2. There is no question of general interest to certify.

"André F.J. Scott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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