Federal Court  Cour fédérale

Date: 20121121

Docket: IMM-1461-12

Citation: 2012 FC 1345

Ottawa, Ontario, November 21, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

HUI REN

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of an Enforcement Officer (Officer) of the Canada Border Services Agency (CBSA), dated 3 February 2012 (Decision), which denied the Applicant's request for an administrative deferral of his removal from Canada.

BACKGROUND

[2] The Applicant is a 30-year-old citizen of the People's Republic of China (China). He first entered Canada in 2001 on a study permit. He maintained legal status in Canada until May 2009.

[3] On 29 September 2009, the Applicant made a refugee claim, which was denied on 6 May 2011. The Applicant applied for a Pre-Removal Risk Assessment (PRRA) on 30 August 2011, which was refused on 12 January 2012. The Applicant was also married in July 2011, and submitted an In-Canada Spousal Sponsorship in September 2011.

[4] When the Applicant received his negative PRRA decision on 12 January 2012 he applied for a deferral in order to make proper arrangements to leave Canada. He was granted a 5-week deferral, which moved the Applicant's scheduled removal date to 17 February 2012.

[5] On 2 February 2012, the Applicant submitted a formal request for an administrative deferral of his removal. The basis of the request was that the Applicant's wife was pregnant, and he wished to remain with her for the duration of her pregnancy. The Applicant submitted medical documentation stating that his wife was experiencing complications with her pregnancy and was to remain on bedrest. His wife's due date was 6 May 2012 and the Applicant was requesting a deferral of his removal until June 2012.

[6] The Applicant's deferral request was denied on 3 February 2012. A stay of the Applicant's removal was granted on 16 February 2012.

DECISION UNDER REVIEW

[7] The Decision under review consists of a letter to the Applicant dated 3 February 2012 (Refusal Letter) and the Officer's Notes to File (Notes).

[8] The Refusal Letter states that the CBSA has an obligation under section 48 of the Act to carry out removal orders as soon as reasonably practicable. The Officer found that a deferral was not appropriate in the Applicant's case.

[9] The Notes start by reviewing the Applicant's immigration history. The Officer reiterates that it is customary that a person under an enforceable removal order be removed as soon as a negative PRRA is delivered. An officer has little discretion to defer removal, but even if a deferral is granted an Officer must still proceed with removal as soon as reasonably practicable.

[10] The Officer said that it is not in her authority to conduct an "adjunct H&C application," but that she had considered the special circumstances presented by the Applicant. She accepted that the Applicant's wife was facing medical issues with her pregnancy, and that the Applicant's removal might be difficult for her. She went on to note that the medical note provided by Dr. Ou says that the Applicant's wife has pregnancy complications, but does not specify their nature or gravity. It simply says that "she requires bed rest until delivery and that she needs her husband to take care of her at home until delivery."

[11] The Officer found that insufficient evidence was provided by the Applicant that he is the only person able to provide assistance to his wife during her pregnancy. The Officer pointed out that the Applicant's wife is a permanent resident of Canada, and thus has access to many public, social,

and health care services. Based on the doctor's notes, it appears she is already receiving medical attention, and there are agencies that can provide home care services. The Officer was satisfied that the Applicant's wife would receive adequate care for her medical conditions.

[12] The Officer acknowledged that the Applicant's removal will be hard on his wife, but found that she has access to a broad range of services in Canada that can provide her with assistance. The Officer found that the Applicant did not face exceptionally difficult circumstances to justify a deferral of his removal, and denied his request.

STATUTORY PROVISIONS

[13] The following provisions of the Act are applicable in this proceeding:

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.
(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.

ISSUES

[14] The Applicant and Respondent raise the following issues in this application:

a. Whether the issue raised in this judicial review is moot;

b. If not moot, whether the Decision to deny a deferral of the Applicant's removal was unreasonable.

ARGUMENTS

The Applicant

Mootness

[15] The Applicant acknowledges that he only requested a deferral of his removal until June 2012, but submits that a live issue remains to be decided in this application. He states that the leading authority on the issue of mootness is the Supreme Court of Canada's decision in *Borowski v Canada (Attorney General)*, [1989] 57 DLR (4th) 231 [*Borowski*]. The Court said at paragraphs 15-16:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly, if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear

> the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[16] The deferral request involved the interests of an unborn Canadian child, yet the Officer's analysis involved no consideration of this. Whether or not the Officer had a legal obligation to consider this factor is an issue that has yet to receive proper consideration from this Court. The Applicant submits that this remains a live issue between the parties, and that the Court ought to exercise its discretion to consider this application for judicial review for that reason.

The Respondent

[17] The event which invoked the Applicant seeking a deferral has now passed, and thus the Respondent submits that this application ought to be dismissed as moot. The Respondent points out that while Justice Donald Rennie granted a stay, the test for a serious issue on a stay motion is lower that that for granting leave.

[18] The Applicant requested a deferral until June 2012, and because this date has already passed this application has now become technically moot (see *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*] at paragraphs 30-31). Based on the decision in *Borowski*, above, the Court should not exercise its discretion to hear this matter. The Respondent submits that this application ought to be dismissed as moot.

STANDARD OF REVIEW

The Reasonableness of the Decision

[19] The Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[20] The standard of review applicable to a deferral request is reasonableness (*Ulloa Meja v Canada (Minister of Citizenship and Immigration)*, 2012 FC 980 at paragraph 22). Further, the adequacy of reasons is not a stand-alone basis for review, but goes to the reasonableness of the Decision as a whole (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*]). The standard of review applicable to the second issue is reasonableness.

[21] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that

it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

[22] The Applicant submits that the Officer provided no clear reasons or evidentiary basis for refusing to defer removal, but simply made assumptions as to what services may be available to the Applicant's wife. The decision in *Newfoundland Nurses* did not remove the legal onus on the Officer to provide reasons demonstrating how the Officer arrived at his ultimate determination. The Decision must still be based on specific, relevant evidence.

[23] In this case, the Officer engaged in sheer speculation as to agencies that would be able to adequately provide the Applicant's wife with the care she needed. There was no discussion as to which specific health care agencies would be able to provide these services, what kind of care they could provide, the cost, and how these agencies would be able to replace the love and support of the child's father.

[24] The Applicant states that the Officer simply copied the Applicant's immigration history and portions of his deferral request into the Notes, and failed to engage in a real analysis. If the Reasons for the Decision do not allow the Applicant to understand how it was made then it is unreasonable (*Nintawat v Canada (Minister of Citizenship and Immigration)*, 2012 FC 66 at paragraph 27). Although CBSA Officers do not have a duty to provide as detailed reasons as some other decision-makers, they must still provide reasons that meet the *Dunsmuir* criteria of transparency,

intelligibility, and justification (*Canada (Minister of Citizenship and Immigration) v Varga*, 2006 FCA 394 [*Varga*] at paragraph 16).

[25] The Applicant submits that if the Officer had questions about the Applicant's wife's medical condition he could have asked the Applicant or his legal counsel. It was unreasonable for the Officer to base his Decision on a lack of detail when the information was so easily available. The Applicant acknowledges that the Officer had limited discretion to award the deferral, but submits that the Officer still had an obligation to give serious consideration to the Applicant's submissions.

[26] Further, the Notes are silent on the Applicant's unborn Canadian child. *Article 3(1) of the Convention of the Rights of the Child* provides that the best interests of a child must be a "primary consideration" in all actions concerning children. The law states that this must be taken into account (see *Hawthorne v Canada (Minister of Citizenship and Immigration),* 2002 FCA 475 at paragraph 32; *Baker v Canada*, [1999] 2 SCR 817). The Officer was not "alert, alive, and sensitive" to the best interests of the child by simply stating that she took the interests of the child into account. The Applicant submits that at the very least the Officer should have embarked on some analysis of the impact of the Applicant's departure on his wife's pregnancy and the unborn child.

[27] The Applicant submits that the Officer's key findings were based on assumptions, and the Officer ignored criteria that were legally mandated to be considered – the best interests of the Applicant's unborn child. As such, the Decision is unreasonable.

The Respondent

[28] The Respondent submits that the Officer considered all the Applicant's submissions, such as the fact that his wife was seven months pregnant, before dismissing the deferral request. It was reasonable for the Officer to assume that the Applicant's wife, who is a permanent resident, would have access to Canadian social services and public healthcare during his absence.

[29] The *Newfoundland Nurses* decision, above, reiterated that reasons are not decided in a vacuum and do not need to be comprehensive; the context of the evidence, the parties' submissions, and the process must be considered. The reviewing court must pay attention to the decision-maker's statutory task in determining if the reasons adequately explain the basis of the decision.

[30] The Federal Court of Appeal noted in both *Varga* and *Baron*, above, that the duty of enforcement officers to consider the best interests of the child is at the low end of the spectrum. The discretion involved in the decision is narrow; a CBSA Officer is not under an obligation to substantially review a child's best interests before coming to a decision. In this case, the Officer was aware the Applicant's wife was seven months pregnant. While the Notes may not have explicitly mentioned the unborn child, if one considers the nature of the Officer's statutory task under subsection 48(2) of the Act this is not something that ought to call the Decision into question.

[31] Section 48 of the Act gives enforcement authorities little discretion to award a deferral. They are under an obligation to execute a removal order as soon as reasonably practicable. The narrow scope of an enforcement officer to defer removal was affirmed by the Federal Court of Appeal in *Baron*. The law is clear that removal is the rule, while deferral is the exception (see also *Canada*

(Minister of Public Safety and Emergency Preparedness), 2011 FCA 286 at paragraph 45; *Padda v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1081 at paragraphs 7-9).

[32] The Respondent submits it was reasonable for the Officer to conclude there was no evidence provided that only the Applicant was able to take care of his wife while she was on bedrest. It was also reasonable for the Officer to note that she would have access to publicly available services. The Decision falls within a range of possible and acceptable outcomes, and the Respondent submits that this application ought to be dismissed.

ANALYSIS

[33] The Applicant has made extensive submissions on reviewable error, but there is significant repetition in many of the points raised. I will deal with what I regard as the principal issues.

No Real Reasons or Clear Evidentiary Basis for the Refusal

[34] In my view, the reasoning and the basis of the Decision are clear: the Applicant failed to provide sufficient evidence to convince the Officer that, given the medical support the Applicant's wife had received to that time, and given the medical and social assistance available to her in Canada, the Applicant's presence was not required for the duration of her pregnancy. The evidentiary basis for this conclusion was the lack of evidence provided by the Applicant to demonstrate that he was the only person who could look after his wife.

No Analysis

[35] The Reasons do not have to be detailed. See *Boniowski v Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No 1397 (FC); *Turay v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1090. In this case, the analysis is both transparent and justifiable. The Applicant failed to provide sufficient evidence as set out above. General H&C factors are not relevant to the Officer's discretion under section 48 of the Act, and they did not need to be addressed in the analysis. They were also not part of the deferral request.

Failure to Confront Applicant With Questions and Give Him a Reasonable Chance to Respond

[36] The onus is upon the Applicant to provide the evidence and justification for his deferral request. See *Williams v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 274 at paragraph 30. The Officer does not have to ask questions or supply the evidence as to why the request should be approved. The Officer is under a statutory obligation to remove the Applicant as soon as reasonably practicable. It is for the Applicant to convince the Officer that his removal is not reasonably practicable and that a deferral is required. The Officer is under no obligation to conduct an interview or a discussion with the Applicant over his request. See *John v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ No 583 (TD). The Applicant had every opportunity to provide the Officer with his evidence and arguments. He was also represented by counsel, who made the request.

Officer Engaged in Speculation About Medical Requirements and Health Care Resources Available to the Applicant's Wife

[37] In my view, there was no speculation. Once again, the issue was whether the Applicant had provided sufficient evidence to demonstrate that his removal was not reasonably practicable because of his wife's pregnancy and medical complications.

[38] As the reasons make clear, Dr. Ou's letter did not "specify the nature and gravity of these complications. He only indicates that she requires bed rest until delivery and that she needs her husband to take care of her at home until delivery." The Officer accepted Dr. Ou's evidence on complications, but there was not sufficient evidence to show that the Applicant was the only person who could provide care.

[39] The Officer also points out that the Applicant's wife was already in contact with doctors and specialists who would deal with her medical issues. There was nothing to suggest, given Canada's health care and social system, that the Applicant's wife would not receive the health care and assistance that she needed. The Applicant provided no evidence to suggest that her needs could not be met by the health care and social assistance available to her.

[40] Given the nature of the deferral request, the sparcity of the evidence submitted by the Applicant (there were no affidavits from him or his wife explaining their personal situation), and the ambivalence and the lack of explanation in Dr. Ou's letter, it cannot be said that the Decision was unreasonable on this ground. Other conclusions may have been possible, but the Decision falls

within the *Dunsmuir* range. In my view, this is the principal issue on the merits and the Applicant has not established unreasonableness.

Faiture to Consider the Unborn Child

[41] The deferral request simply asked for a deferral until June 2012. Nothing was said in the request about the interests of the unborn child. It is not within a deferral officer's jurisdiction to undertake a full H&C analysis involving the best interests of a child. The jurisprudence of this Court is clear that the Officer need only consider "short-term" interests. See *Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, 277 DLR (4^{th}) 762 at paragraph 16; and *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paragraph 57. In this case, no short-term interests were identified by the Applicant in the deferral request. They still have not been identified before me.

Failure to Consider H&C Factors

[42] As set out above, the Officer is not required to do an H&C analysis. The issue is whether the Applicant's removal is reasonably practicable under section 48 of the Act. No H&C factors were put forward for consideration in the deferral request. See *Fernandez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1131; *Chetaru v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 436.

Mootness

[43] The Applicant says that the application is not moot because "the deferral request encompassed the consideration of the unborn child." This is simply inaccurate. The deferral request says nothing about the interests of the unborn child and, even if it did, it could only relate to the period of the deferral requested, which was until June 2012.

[44] At the hearing before me, the parties agreed that this matter is technically moot within the meaning of *Borowski*, above. The only issue for me is whether the Court should nevertheless exercise its discretion to hear the matter. The present case is very similar to *De Aguiar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 456 (CanLII) where Justice O'Reilly had the following to say, at paragraphs 5-9, of equal relevance to the facts before me:

> In these circumstances, the Minister urges me to conclude that this application for judicial review is moot because the applicants have already achieved a deferral of their removal beyond the date on which their H&C was decided, even though the officer had denied them one. Further, there is no point, the Minister suggests, in deciding whether the officer's decision was reasonable since any conclusion I would arrive at would have no practical effect. The applicants will be re-scheduled for removal no matter what I decide.
>
> I agree.
>
> The question of mootness must begin with a characterization of the controversy between the parties: *Baron* v. *Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81. Here, on March 11, 2008, the applicants asked for a deferral of their removal to allow them "an opportunity to remain pending the outcome of [their] H&C Application". They attached a variety of materials to their request outlining the medical and psychological needs of their Canadian niece and her 12-year-old son. This evidence was relevant to their H&C application.

> As the applicants themselves characterized it, the issue before the enforcement officer was whether their removal should be deferred pending the outcome of their H&C. Since the H&C has now been decided, there is no longer a live controversy between the parties (see *Baron*, above at para. 31, citing *Amsterdam v. Canada (Minister of Citizenship and Immigration)* 2008 FC 244).
>
> The applicants argue that, even if I were to find that their application was moot, I should exercise my discretion to decide the case on its merits in order to give guidance to enforcement officers on the exercise of their discretion to defer removal. In my view, Justice Marc Nadon of the Federal Court of Appeal has already provided a great deal of guidance on this question in *Baron*, above, and there is no need for me to say anything more.

[45] In the present case, there is no live issue between the parties. In effect, the Applicant has now received the deferral he requested as a result of the actions of this Court. Also, there are no legal issues that arise on these facts that require the Court to proceed beyond mootness. See *Borowski*, above.

Conclusions

[46] For the reasons given above, I find that this application is entirely moot and should be dismissed on this basis alone. Even if I consider the merits, however, I can find no reviewable error in the Officer's Decision.

[47] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1461-12
STYLE OF CAUSE:	**HUI REN** - and - **MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 24, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	November 21, 2012

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