Federal Court Cour fédérale

Date: 20131024

Docket: IMM-2002-13

Citation: 2013 FC 1073

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, October 24, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

EDUARDO GONZALEZ VELA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary comments

[1] Can a weight loss regimen be linked to a deportation date for the purpose of eligibility for a rehabilitation treatment and prosthesis?

II. Introduction

[2] This is an application for judicial review brought under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision rendered on March 14, 2013, by a Canada Border Services Agency enforcement officer, in which he refused to grant a stay of a removal order under section 48 of the IRPA.

III. Facts

[3] The applicant, Eduardo Gonzalez Vela, is a Mexican citizen, born in 1983 in Puebla, Mexico. He arrived in Canada on September 18, 2008, and filed a claim for refugee protection.

[4] On May 14, 2009, the applicant was involved in a train accident and had his left foot amputated. After his amputation, the applicant had to obtain a prosthesis for his leg.

[5] On June 11, 2011, the applicant underwent gastric bypass surgery in order to lose weight and obtain a new prosthesis.

[6] On April 10, 2012, the Refugee Protection Division [RPD] of the Immigration and Refugee Board rejected the applicant's claim for refugee protection. (The applicant filed an application for leave and judicial review of this decision, but this Court dismissed that application on October 9, 2012.)

[7] On May 24, 2012, the applicant applied for an exemption based on humanitarian and compassionate grounds [H&C application].

[8] On December 27, 2012, the officer called in the applicant in preparation for his removal to Mexico. It was then that the applicant first applied for a stay. The officer refused that application on January 31, 2013.

[9] On March 8, 2013, the applicant filed a second application for a stay of removal to allow him to remain in the country pending the outcome of his H&C application, or at least to allow him to meet with his prosthetist on April 30, 2013, to have a new prosthetic leg attached.

[10] The second application was rejected on March 14, 2013.

IV. Decision under review

[11] In his decision, the officer began by noting that he would not be reviewing the allegations that the applicant had already made in his initial application for a stay of removal. He would only review the new elements presented by the applicant in support of his second application.

[12] After considering the applicant's new statements, the officer concluded that the applicant had still not demonstrated any harm that would justify a stay of his removal to Mexico.

[13] The officer noted the following in particular:

(a) A pending H&C application does not justify a stay of removal;

(b) The applicant failed to demonstrate that he would be unable to pay for a new prosthesis or medical treatments in Mexico;

(c) There is no guarantee that the applicant will receive a new prosthesis on April 30, 2013, because he may not have lost sufficient weight by that date.

V. Issue

[14] Was the officer's decision to refuse to stay the removal order against the applicant justified?

VI. Relevant legislative provisions

[15] Section 48 of the IRPA applies in this case:

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 the order must be enforced as soon as possible.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

VII. Standard of review

[16] The standard of review applicable to an enforcement officer's decision to refuse to stay an applicant's removal is the standard of reasonableness (*Arrechavala de Roman v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 478; *Turay v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1090; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311).

[17] When a decision is reviewed on a standard of reasonableness, the analysis is concerned with "the existence of justification, transparency and intelligibility within 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" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[18] Accordingly, it is only where enforcement officers "have overlooked an important factor, or seriously misapprehended the circumstances of a person to be removed, that their discretion should be second-guessed on judicial review" (*Ramada v Canada (Solicitor General)*, 2005 FC 1112 at para 7).

VIII. Parties' positions

[19] The applicant argues that the officer's decision is unreasonable because the officer completely ignored the following evidence: the letter from Dr. José Martin Morales Garcia and the estimate from the Ortho Tech company. The applicant alleges that this evidence confirms that the cost of a new prosthesis in Mexico would cause him irreparable harm.

[20] The applicant also characterizes as unreasonable the officer's finding that there was no guarantee that he would lose sufficient weight by April 30, 2013, to be able to obtain a new prosthesis.

[21] The respondent submits that the officer took all of the evidence and the applicant's allegations into consideration and reasonably concluded that there were no impediments to his removal to Mexico.

[22] The respondent submits that the officer reasonably found that there was no proof that the applicant would have lost sufficient weight to ensure that his new prosthesis would be ordered on April 30, 2013.

[23] The respondent also submits that the high cost of medical care in other countries does not constitute irreparable harm and is not an impediment to the applicant's removal (*Singh v Canada (Minister of Citizenship and Immigration)*, 2005 FC 909; *Kunni v Canada (Minister of Citizenship and Immigration)*, 2004 FC 212).

IX. Analysis

Preliminary issue

[24] The Court agrees with the respondent that the review of the officer's decision must be based on the evidence that was before him. The applicant may not add evidence to complete his record at the judicial review stage. Accordingly, the Court excludes the evidence relating to the applicant's marriage and his wife's status.

Was the officer's decision to refuse to stay the removal order against the applicant justified?

[25] It is well established that, in order to obtain a stay of his removal, the applicant must demonstrate, firstly, that there is a serious issue to be tried; secondly, that he would suffer irreparable harm if no stay were ordered; and, thirdly, that the balance of convenience considering the applicant's total situation favours the order (*Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA)). To succeed, an applicant must meet all three criteria.

[26] In this case, the Court finds that the applicant has not raised a serious issue that could provide a basis for a stay of removal.

[27] First, the Court cannot accept the applicant's claim that the officer failed to take into account relevant evidence, in particular, the letter from Dr. José Martin Morales Garcia and the estimate from the Ortho Tech company. The officer expressly noted the following in his initial decision letter:

> Mr. GONZALEZ VELA has submitted multiple documents concerning his medical file as well as his request for Humanitarian and Compassionate grounds. I scanned the documents and sent them for medical expertise to our medical department at Citizenship and Immigration Canada. Below you will find an excerpt of the response from Citizenship and Immigration Canada:
>
> > We have reviewed the medical material submitted on this client.
> >
> > The client wears a prosthesis after receiving amputation of the left foot in June 2009. He also received a gastric bypass surgery. He is fully functional and works actively.
> >
> > The medical services for patients with prosthesis (orthopedist, occupational therapist, prostesists, physiotherapist) are all available in his home country Mexico, as well as gastroenterologists, surgeons, nutritionists and psychologists.

> There are no special medical recommendations for his travel.
>
> Thank you.
>
> After the evaluation from medical officer from Citizenship and Immigration Canada and a complete revision of Mr. GONZALEZ VELA file, I have concluded that the circumstances of this case do not grant any delay or deferral of this removal.

(Certified Tribunal Record [CTR] at p 25)

[28] The Court is satisfied that, in rendering his second decision, the officer properly considered this evidence, as well as the applicant's capacity to work to pay for his medical treatments. Based on this evidence, the officer found that the applicant's circumstances would not impede his return to Mexico.

[29] While it may be that the cost of a prosthesis and medical care is higher in Mexico, the Court agrees with the respondent that this does not in itself constitute irreparable harm (see *Singh*, above, at para 14). The officer did not err in finding that there was no impediment to the applicant's return to Mexico. The applicant already had a prosthesis, he was fully functional and he worked actively (CTR at pp 20 and 30). Furthermore, there is no evidence in the record that the applicant would be unable to return to Canada to have his prosthesis attached or to have it attached in Mexico.

[30] Nor can the Court accept the applicant's second allegation that the officer's conclusion regarding the applicant's weight loss was unreasonable. As the Court of Appeal held in *Baron*, above, it is well established that an enforcement officer's discretion is limited. Although

enforcement officers have the discretion to set new removal dates in specific circumstances, they cannot postpone a removal indefinitely (*Baron* at para 80).

[31] In this case, the time it would take to resolve the applicant's H&C application and have his prosthesis attached was unknown. According to the evidence in the record, it was unlikely that the prosthesis would be attached imminently (before April 30, 2013) because the applicant still had a significant amount of weight to lose (CTR at p 20). The Court finds that it was not open to the officer to stay the applicant's removal in the circumstances and that he reasonably concluded that he could not postpone the date beyond April 30, 2013. Therefore, the Court finds that the applicant has not raised a serious issue regarding the way in which the officer exercised his discretion in this case. The Court also notes that the applicant has failed to demonstrate that he would suffer irreparable harm in the event of his removal to Mexico.

[32] It is therefore clear in this case that, given the absence of a serious issue and irreparable harm, there is a public interest in proceeding with the removal in order to maintain the integrity of the system (*Membreno-Garcia v Canada (Minister of Employment and Immigration)*, [1992] 3 FC 306).

X. Conclusion

[33] For all of these reasons, the applicant's application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed.

"Michel M.J. Shore"
Judge

Certified true translation
Francie Gow, BLC, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2002-13
STYLE OF CAUSE:	EDUARDO GONZALEZ VELA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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