Federal Court | Cour fédérale

Date: 20141020

Docket: IMM-1052-14

Citation: 2014 FC 995

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 20, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MARIA VARGAS EZQUIVEL
CESAR EDUARDO TAPIA VARGAS
MANUEL OCTAVIO TAPIA VARGAS
JUAN ABDIEL TAPIA VARGAS

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of the refusal by an officer (officer) of the Canada Border Services Agency (CBSA), dated February 18, 2014, to grant a stay of removal to the applicants.

[2] The female applicant (the principal applicant) contends that the officer erred by refusing to grant her stay of removal until June 20, 2014, the date on which the Quebec Direction de la protection de la jeunesse (DPJ) was expected to provide an assessment of the family situation of her spouse's minor children.

[3] The principal applicant argues that her removal would not be in the best interests of her spouse's children.

II. Facts

[4] The principal applicant and her three children, who are between the ages of 20 and 24, are citizens of Mexico.

[5] In her affidavit, the principal applicant alleged that she fled Mexico for Canada in March 2007 and claims to fear her former spouse because of threats that he apparently made against her. The principal applicant's sons, applicants in this proceeding, fled Mexico to join the principal applicant.

[6] On June 22, 2013, the principal applicant married a Canadian citizen, a father to two minor children who are 9 and 11 years of age. The principal applicant alleges that she is the primary care giver for her spouse's children and that granting a stay of her removal is necessary in consideration of the best interests of those children.

[7] On September 25, 2013, the applicants' pre-removal risk assessment applications were rejected. Consequently, removal orders against them were enforced.

[8] After receiving a notice from the CBSA ordering their removal, which was scheduled for February 24, 2014, the applicants filed a motion to stay the removal with Officer David Dickson, requesting that their removal be deferred until the expiry of an agreement on voluntary measures between the mother of the children of the principal applicant's spouse and the principal applicant's spouse on June 20, 2014. That was when the DPJ would provide a report on the family situation of her spouse's children. According to the principal applicant, on that date, if the DPJ found that the children's security or development was in danger, the matter would be brought before a court and the children would be at risk of being placed in a foster home (Exhibit B, Applicants' Record).

[9] On February 18, 2014, that motion for a stay of removal was dismissed by the officer.

[10] On February 21, 2014, the Court granted the applicants a stay of the removal order in favour of the applicants until a decision is rendered in the present proceeding.

III. Decision

[11] The decision under review is that of Removal Officer David Dickson dated February 18, 2014, dismissing the applicants' motion for a stay of removal.

IV. Issue

[12] The Court finds that the following issue arises in this application: did the removal officer properly exercise his discretion with respect to the motion for a stay of removal given, in particular, the interests of her spouse's two children?

V. Statutory provisions

[13] The following statutory provisions of the IRPA apply:

Enforceable removal order **48**. (1) A removal order is enforceable if it has come into force and is not stayed.	**Mesure de renvoi** **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 (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.	**Conséquence** (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.

VI. Position of the parties

[14] The principal applicant argues that the removal officer did not consider the best interests of her spouse's children. The principal applicant alleges that the officer erred by not considering the adverse effect on the children's stability and security, as well as the severing of family ties that her removal would cause.

[15] The principal applicant alleges that she became the mother figure to her spouse's children and that her removal would result in the children being placed in a foster home. First, the principal applicant maintains that the children's father (the principal applicant's spouse) is not able to care for the children on his own, namely because of his job, which requires that he be away in the evenings, and because of his history of alcohol abuse. Second, the principal applicant contends that the children's biological mother is not able to care for them because she suffers from mental health problems and drug use issues.

[16] Furthermore, the principal applicant argues that the officer provided insufficient reasons in his decision. The officer purportedly failed to analyze the special circumstances of the applicants' motion for a stay.

[17] Finally, the principal applicant maintains that her return to Mexico could cause her irreparable harm.

VII. Standard of review

[18] In *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 (*Baron*), the Federal Court of Appeal found that a refusal of the CBSA to grant a stay of removal is reviewed on a standard of reasonableness (see *Mauricette v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 420; *Ramirez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 706 at paragraph 10; *Ovcak v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1178 (*Ovcak*)).

[19] Although the applicants disagree with the officer's decision regarding his assessment of the principal applicant's circumstances, that is not sufficient to warrant the intervention of this Court. The Court must show deference to the officer (*Martinez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 1256 at paragraph 15).

VIII. Analysis

[20] In a supplementary memorandum, the respondent argues that because the impugned decision is that of the officer's refusal to grant the applicants a stay of removal until June 20, 2014, this application for judicial review has become moot, by the passage of time. The respondent alleges that, as a result, the Court should not exercise its discretion to determine the application on its merits, citing *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342.

[21] Even though the application might be moot in certain regards, the Court is nevertheless exercising its discretion to analyse the application on its merits. In light of the issues raised in

this application, including the best interests of the children, the Court will substantially analyze the application.

(a) The limited discretion of the removal officer

[22] According to section 48 of the IRPA, removal officers have limited discretion and must enforce a removal order "as soon as possible". A stay of a removal order is limited to extraordinary circumstances (*Ovcak*, above at paragraph 24).

[23] In *Baron*, above, the Federal Court of Appeal stated the following:

> [D]eferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.

[24] Furthermore, CBSA officers have a limited obligation to provide reasons (*Boniowski v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1161). The Court finds that the officer upheld his duty of providing reasons in a letter sent to the applicants on February 18, 2014, which states the grounds justifying his refusal to grant a stay of removal:

> [TRANSLATION]
>
> After reviewing the motion for a stay of removal, and considering the grounds for it, including the best interests of the children of Ms. Parker and Mr. Magana, Ms. Vargaz Ezquivel's spouse, the motion for a stay of removal is dismissed. (Applicants' Record, at p 7)

[25] The Court finds that the officer's file notes, which contain the reasons, show that the officer considered all of the evidence submitted by the applicants in support of their stay motion. Namely, the file notes demonstrate that the officer prepared a list of the elements submitted by the principal applicant and said that he had considered them. The officer found that the evidence submitted by the applicants was insufficient to justify granting a stay of removal.

[26] In his notes, the officer also stated that it has only been since the principal applicant married her spouse in June 2013, that she has had a relationship with her spouse's children. Furthermore, the officer noted that the principal applicant is not the biological mother of her spouse's children.

[27] The officer found that it was not until two weeks before her scheduled removal date that the principal applicant raised the best interests of her spouse's children and submitted supporting documentation. The officer also stated that none of those concerns was raised during the applicants' meeting with the CBSA on January 24, 2014, and that the applicants were ready for removal on that date.

[28] Finally, the principal applicant contends that her return to Mexico would cause her irreparable harm. However, the Court finds that no probative evidence was submitted in that regard.

(b) Best interests of the children

[29] First, a removal officer has a duty to be alive and sensitive to the short-term interests of children (*Acevedo v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 401).

[30] Second, the assessment and analysis of the children's interests in the context of a motion for a stay of removal are limited to situations with special and compelling circumstances (*Legnin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 869 at paragraph 13; *Salazar v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 56 at paragraph 24). Justice Donald J. Rennie stated the following in *Ovcak*, above, at paragraph 13:

> Family separation and financial hardship are unfortunate but ordinary consequences of removal from Canada. They do not constitute extraordinary circumstances that may justify deferral of removal: *Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1240.

[31] The Court finds that, contrary to the analysis required in an application on humanitarian and compassionate grounds (H&C), a removal officer is not required to carry out a detailed analysis of the long-term interests of children in considering a removal motion. Instead, the officer's discretion is limited to short-term factors. In *Simoes v Canada (Minister of Citizenship and Immigration)*, 2000 FCJ No 936, Justice Marc Nadon stated the following:

> [11] I am in complete agreement with the view expressed by Dawson J. In my opinion, *Baker* does not require a removal officer to undertake a substantive review of the children's best interests, including the fact that the children are Canadian. This is clearly within the mandate of an H & C officer. To "read in" such a mandate at the removals stage would, in effect, result in a "pre H

> & C" application, which in my opinion, is not what the law requires. . . .
>
> [12] In my opinion, the discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, 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. [Emphasis added.]

[32] In *Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180, Justice Yves de Montigny took the position of Justice Judith A. Snider (*John v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ No 583 (see also *Munar v Canada (Minister of Citizenship and Immigration)*, 2006 FC 761 at paragraph 18):

> [38] I tend to agree with my colleague Justice Snider that the consideration of the best interests of the child is not an all or nothing exercise, but should be seen as a continuum. While a full-fledged analysis is required in the context of an H & C application, a less thorough examination may be sufficient when other types of decisions are made. Because of section 48 of the Act and of its overall structure, I would also agree with her that the obligation of a removals officer to consider the interests of Canadian-born children must rest at the lower end of the spectrum. [Emphasis added.]

[33] The Court finds that the officer considered and assessed the interests of the children of the principal applicant's spouse in accordance with his obligation set out in the above case law.

[34] Moreover, in support of her motion, the principal applicant submitted several intervention reports prepared by the DPJ attesting to the family situation of her spouse's children. In reviewing that evidence, the Court finds that, apart from the DPJ's letter dated February 13,

2014, the documentary evidence only briefly mentions the principal applicant's presence in the children's lives, even though some of those reports likely coincide with the period during which the principal applicant lived with her spouse and his children.

[35] The Court finds that, in a letter dated February 13, 2014, which was submitted less than two weeks before the scheduled removal date and was written in support of the motion for a stay of removal, the DPJ indicated that the principal applicant and her spouse participated in guiding and providing for the children. The letter states that the principal applicant [TRANSLATION] "provides residential, physical and emotional stability" to the children and that her departure [TRANSLATION] "would therefore sever that familial stability, which would threaten the children's development, change their routine and even disturb them" (Exhibit C, Principal Applicant's Record, at pp 97-98).

[36] However, the Court finds that the evidence submitted by the principal applicant shows that her involvement with the children and her spouse is recent and does not support her claims that her spouse's children would be in a precarious situation if she were removed.

[37] Furthermore, the DPJ reports submitted by the principal applicant show the involvement of the children's mother and father in the children's lives as well as their willingness to provide for them. That evidence shows, in particular, that the children lived on a full-time basis with their mother, who had legal custody of the children, until April 2013, before she was evicted and hospitalized. It was at that time that the principal applicant's spouse assumed custody of his children. The evidence shows that the children's mother is in an unstable situation because of

mental health problems, substance abuse problems and financial challenges, which prevent her from assuming custody of her children.

[38] In a report dated June 5, 2013, the DPJ found that, according to the children's father, [TRANSLATION] "the contact between mother and children is positive", that the father values the relationship between the children and their mother, that he [TRANSLATION] "was cooperative and was available to offer support to the mother and receive the children" and that the children talk to their mother every day. The report states that the family of the children's mother is concerned about the well-being of the children and that they are prepared to offer support. Furthermore, the report states that the children's father [TRANSLATION] "quickly took action to assume his parental responsibility for the children by himself" (Emphasis added). The DPJ also mentioned that, despite the distance between the father's apartment and the children's school, he [TRANSLATION] "organized everything so that the children could attend school regularly and he was on schedule" (Applicants' Record, at pp 63-64).

[39] Finally, again in the report, the DPJ found that [TRANSLATION] "[c]onsidering the steps taken by the father, we find that the [children's] security and development are not in danger, even though the facts are substantiated". The DPJ listed its findings in the report as follows:

- The children are developing in a healthy, stable and safe living environment where all of their needs are being met;
- Their mother's drug use is not impacting them;
- The mother is receiving assistance for her mental health problems;
- The parents have put in place a daily routine adapted to the needs of the children;

- The parents have taken the necessary steps to ensure that the children have good attendance at school.

(Applicants' Record, at pp 65-66)

[40] In conclusion, the intervention of the Court regarding the officer's exercise of his discretion is not warranted. As a result, the Court believes that the officer was reasonable in finding that the circumstances do not justify a stay of removal of the applicants.

IX. Conclusion

[41] The Court finds that the officer's decision was reasonable. Consequently, the application is dismissed.

JUDGMENT

THE COURT ORDERS that

1. The application for judicial review is dismissed;

2. There is no question for certification.

"Michel M.J. Shore"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1052-14
STYLE OF CAUSE:	MARIA VARGAS EZQUIVEL v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	OCTOBER 15, 2014
JUDGMENT AND REASONS:	SHORE J.
DATED:	OCTOBER 20, 2014

APPEARANCES:

Perla Abou-Jaoudé	FOR THE APPLICANTS
Zoé Richard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Perla Abou-Jaoudé Montréal, Quebec	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT