Federal Court  Cour fédérale

Date: 20150504

Docket: IMM-712-14

Citation: 2015 FC 560

Ottawa, Ontario, May 4, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

SHEIKH NAUSHEER ALLY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Sheikh Nausheer Ally [the Applicant] has brought an application for judicial review under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] of a decision by a removals officer [the Officer] dated January 31, 2014. The Officer refused to defer the Applicant's removal from Canada.

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

II. Background

[3] The Applicant is a citizen of Guyana. He first entered Canada in August, 1988 and was granted permanent residence. He subsequently received two convictions for robbery and served a sentence of 16 months in the early 1990s.

[4] In October, 1994 a deportation order was made against the Applicant on the ground of serious criminality. An appeal of the deportation order and a subsequent application for judicial review to this Court were both dismissed.

[5] In December, 1994 the Applicant married his spouse. The Applicant's first daughter, who has Down syndrome, was born in September, 1995. In February, 1997 the Applicant was removed to Guyana while his spouse was pregnant with their second child. The Applicant's son was born in July, 1997. The Applicant and his spouse were divorced in July, 2000, ostensibly to enable the spouse to qualify for increased government benefits.

[6] In September, 2008 the Applicant re-entered Canada illegally and resumed living with his former wife and their children. The couple had a third child in June, 2013.

[7] The same month, the Applicant was detained by police and a deportation order was issued. In January, 2014 the Applicant applied for permanent residence, sponsored by his spouse

[the spousal sponsorship application]. The Applicant requested consideration on humanitarian and compassionate [H&C] grounds. He also allegedly applied for a pardon to overcome his criminal inadmissibility.

[8] On January 20, 2014 the Applicant received a direction to report for removal. On January 28, 2014 he submitted a request to defer removal pending the determination of his spousal sponsorship application or, in the alternative, pending the birth of his fourth child (who was due in September, 2014). He argued that it was in the best interests of his spouse and children that his removal be deferred, and that he would be at risk if he was returned to Guyana.

[9] On January 31, 2014, the Applicant's deferral request was denied. The Applicant was granted a stay of removal on February 12, 2014 pending determination of this application for judicial review.

III. The Officer's Decision

[10] The Officer found that neither the Applicant's application for a pardon nor his spousal sponsorship application was made in a timely way.

[11] With respect to the application for a pardon, the Officer concluded that there was insufficient evidence to support the Applicant's claim that in 2010 he retained an immigration consultant who accepted payment but did nothing in return. The Officer noted that the Applicant waited three years after he discovered that his application had not in fact been submitted before

he hired an organization called Pardons Canada to help advance his application. The Officer estimated that the Parole Board of Canada would not decide the application until November, 2014 at the earliest, and therefore no decision on the pardon application was imminent.

[12] With respect to the spousal sponsorship application, the Officer concluded that the Applicant waited approximately five years after illegally returning to Canada, and six months after he was notified that he could apply for a Pre-Removal Risk Assessment (PRRA), before commencing the process. The Officer again found that no decision on the spousal sponsorship application was imminent, as the initial assessment alone would take up to nine months and the file could then be referred to a local office of Citizenship and Immigration Canada for further review. Furthermore, the Officer noted that the Applicant was not eligible for spousal sponsorship due to his criminal convictions, nor could he benefit from an administrative deferral because he had filed his spousal application more than six months after he was deemed "removal-ready". The Officer found that a deferral of removal pending the Applicant's spousal sponsorship application was unwarranted.

[13] The Officer then considered whether a deferral of the Applicant's removal from Canada was justified based on a consideration of the best interests of the Applicant's spouse and children. The Officer acknowledged that the removals process could be difficult for all concerned; however, the Applicant's spouse and children are Canadian citizens who have access to a wide range of social and public services. They also have the support of family members and close friends. The Officer concluded that there was insufficient evidence to demonstrate that the Applicant's spouse and children would face exceptionally difficult circumstances that would justify a deferral of his removal.

[14] Finally, the Officer found that there was no new or significant personalized risk to the Applicant to justify a deferral of his removal. The Applicant did not allege that he had been subjected to any risk to his personal safety, risk to his health, denial of access to services, or that he suffered discrimination in his employment. The Officer noted that the Applicant had not submitted an application for a PRRA, and that any risk referred to in the deferral request was speculative and was not supported by the Applicant's experience when he previously resided in Guyana.

IV. Issue

[15] The central issue raised by the Applicant in this application for judicial review is whether the Officer's analysis of the best interests of the children was reasonable.

V. Analysis

[16] The decision of a removals officer is subject to review in this Court against the standard of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*] at para 25). The Court must consider whether the decision is justified, transparent and intelligible, and whether it falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[17] The Respondent argues that the Applicant does not come before the Court with "clean hands", due to his prior criminal convictions and his illegal re-entry into Canada following his deportation. In *Baron*, Justice Nadon said the following about the application of the "clean hands" doctrine in this context:

> [65] Thus, if the conduct of the person seeking a deferral of his or her removal either discredits him or creates a precedent which encourages others to act in a similar way, it is entirely open to the enforcement officer to take those facts into consideration in determining whether deferral ought to be granted. Neither enforcement officers nor the courts, for that matter, should encourage or reward persons who do not have "clean hands".

[18] In *Baron*, Justice Nadon also explained the limits of a removal officer's discretion to defer:

> […] my colleague Pelletier J.A., then a member of the Federal Court Trial Division, had occasion in *Wang v. Canada* (M.C.I.), [2001] 3 F.C. 682 (F.C.), in the context of a motion to stay the execution of a removal order, to address the issue of an enforcement officer's discretion to defer a removal. After a careful and thorough review of the relevant statutory provisions and jurisprudence pertaining thereto, Mr. Justice Pelletier circumscribed the boundaries of an enforcement officer's discretion to defer. In Reasons which I find myself unable to improve, he made the following points:
>
> > - There are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths.
> >
> > - The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act. In considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to

> return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission.
>
> - In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral 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.
>
> - Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application.

[19] This case bears some similarity to *Ahmedov v Canada (Minister of Public Safety and Emergency Preparedness*), 2013 FC 730, 435 FTR 253 [*Ahmedov*], where a stay of removal was granted pending the birth of the applicant's child. In that case, Justice Gagné held as follows:

> 47 First, it might be the case that the refusal to defer the removal pending the birth of the Applicant's second son was unreasonable. That might very well be why Justice Mosley granted the Applicant's motion for a stay of his removal until the present Application for judicial review is disposed of. However, this issue is moot as the Applicant's second son was born on December 13, 2012. *In Ramirez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 500, Justice Near (as he then was) held that an argument to defer removal based on the birth of a child became moot once the child was delivered. Citing *Borowski v Canada (Attorney General)*, [1989] 1 S.C.R. 342, Justice Near declined to exercise his discretion to decide the matter on its merits.

[20] In this case the Applicant's fourth child was due in September 2014. Unfortunately, the pregnancy ended in miscarriage. Based on *Ahmedov* and the cases cited therein, I am satisfied that this aspect of the application for judicial review is moot and no useful purpose would be served by considering its merits.

[21] With respect to the remainder of the Applicant's arguments, in *Munar v Canada (Minister of Citizenship and Immigration)*, [2005] FCJ No 1448 (QL), [2006] 2 FCR 664 at paras 40-41 [*Munar*], Justice de Montigny observed that removals officers lack jurisdiction to perform the full substantive analysis of the best interests of the child that is required in an application for permanent residence on H&C grounds. Rather, removals officers should consider only the short-term best interests of the child. Examples provided by Justice de Montigny include whether deferral would enable the child to finish a term or school year, or would ensure that adequate care has been arranged if the child will not accompany the parent facing removal.

[22] In *Canada (Minister of Citizenship and Immigration) v Varga*, 2006 FCA 394 at para 16, the Federal Court of Appeal stated:

> Within the narrow scope of removal officers' duties, their obligation, if any, to consider the interests of affected children is at the low end of the spectrum, as contrasted with the full assessment which must be made on a H&C application under subsection 25(1).

[23] Similarly, in *Fernandez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1131 at para 46), Justice O'Keefe wrote that "enforcement officers are not positioned to evaluate all the evidence that might be relevant in an H&C application". While they should treat the

"immediate interests [of affected children] fairly and with sensitivity", they are not required to review those interests comprehensively before enforcing a removal order.

[24] I am satisfied that the Officer's decision in this case was reasonable and that he was alert, alive and sensitive to the short-term best interests of the Applicant's children. It is clear that the Officer considered the information provided by medical professionals regarding the Applicant's daughter with Down syndrome. She is now 19. The Applicant's son is a teenager. The Officer noted the presence of support from family members, friends, and social services available to all Canadians. The Applicant may pursue his applications for a pardon and spousal sponsorship from outside the country. If he is successful, then the separation from his spouse and children will be temporary.

[25] Given the highly circumscribed jurisdiction of a removals officer to conduct an analysis of the best interests of the child when considering a deferral application, I reject the Applicant's assertion that the Officer made his decision without regard to the evidence presented or that the decision was otherwise unreasonable.

[26] The Applicant's lack of "clean hands" also supports the Officer's exercise of discretion in this case.

VI. Conclusion

[27] For the foregoing reasons, the application for judicial review is dismissed.

[28] Both parties made submissions regarding the certification of a question for appeal regarding the scope of a removal officer's consideration of the best interests of the child. I agree with the Respondent that the law in this area is settled (see *Munar* and the cases cited therein), and accordingly no question for certification arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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