Federal Court  Cour fédérale

Date: 20150807

Docket: IMM-7439-14

Citation: 2015 FC 954

Ottawa, Ontario, August 7, 2015

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

BAHRAM OMIDSORKHABI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision dated October 30, 2014 by a Canada Border Services Agency [CBSA] Enforcement Officer [the Officer] declining to grant the Applicant a deferral of removal to Afghanistan.

[2] For the reasons that follow, I have come to the conclusion that this application for judicial review must be dismissed. I come to this conclusion with some reluctance, considering the

predicaments of the Applicant and the challenging situation he will no doubt face upon return to Afghanistan; that being said, this Court is bound to apply the law as enacted by Parliament, and is not at liberty to disregard the provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA* or the *Act*] and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *Regulations*], however harsh the result may be.

I. Facts

[3] The Applicant is a 38 year old citizen of Afghanistan. He arrived in Canada as a permanent resident in 1995. Shortly afterwards, he was involved in a car accident and sustained severe head injuries which left him completely deaf, with serious mental health challenges, and with a changed personality.

[4] Since the accident, the Applicant has developed an addiction to crack cocaine and has amassed a criminal record comprising approximately 25 criminal convictions. These include convictions for theft under $5,000, assault, breaking and entering, possession of a substance pursuant to Schedule 2 of the *Controlled Drugs and Substances Act*, SC 1996, ch 19, possession of property obtained by crime, and possession of a weapon for a dangerous purpose. His mother is his *de facto* guardian and has communicated on his behalf with CBSA.

[5] Following two convictions on October 27, 2008 for breaking and entering a dwelling home to commit an indictable offence and for possession of a weapon for a dangerous purpose, which led to a ten month jail sentence, he was found inadmissible to Canada for serious criminality. As a result of the first conviction, an officer issued a report under subsection 44(1) of

the *IRPA* in which he opined that the Applicant was inadmissible for serious criminality pursuant to paragraph 36(1)(a) of the *Act*. On June 2, 2009, a Minister's delegate provided the Applicant with a warning letter.

[6] On July 24, 2013, after twelve additional convictions between May 2010 and June 2013, the Applicant was again reported under section 44 of the *IRPA* on the basis of the second October 2008 conviction. On April 1, 2014, the Immigration Division of the Immigration and Refugee Board of Canada issued a deportation order against him.

[7] On May 8, 2014, an enforcement officer interviewed the Applicant with the assistance of a sign language interpreter and provided him with Pre-Removal Risk Assessment [PRRA] materials.

[8] On July 3, 2014, Mr. Omidsorkhabi's PRRA application was refused. The PRRA Officer considered the Applicant's hearing impairment resulting from the car accident in 1995, and his submission that he would be subject to persecution and risk of death if returned to Afghanistan because of his disabilities, addiction to crack cocaine and the general climate in Afghanistan. The PRRA Officer found that there was limited information regarding the Applicant's hearing impediment and noted that Mr. Omidsorkhabi had basic writing, reading and oral comprehension abilities in Farsi. The PRRA Officer reviewed challenges faced by the deaf and disabled in Afghanistan, but also noted the availability of protection and services to assist them. Finally, the PRRA Officer considered the country conditions evidence and situation of drug users in

Afghanistan, but found that the Applicant had not established a connection between the overall situation in Afghanistan and his personal circumstances.

[9] On August 22, 2014, the Enforcement Officer interviewed the Applicant with the assistance of a sign language interpreter and provided him with a copy of the negative PRRA decision. The Officer explained that the Applicant must be removed as soon as possible and informed the Applicant and his nephew that he or his family needed to make arrangements. This was reiterated to the Applicant and his family on September 2 and September 30, 2014.

[10] The Applicant's removal was originally scheduled for October 29, 2014 and was then postponed until November 2, 2014. On October 29, 2014, the Applicant's counsel requested a deferral of removal so that his client could submit a claim on humanitarian and compassionate [H&C] grounds. On October 30, 2014, the Enforcement Officer sent a letter to counsel in which he explains his reasons for deciding not to defer the Applicant's removal to Afghanistan. On October 31, 2014, the Applicant's motion for a stay of removal was heard and granted by this Court. At the hearing, counsel also indicated that an H&C application had recently been filed.

II. The impugned decision

[11] In his decision dated October 30, 2014, the Officer noted that the Applicant and his family had known that his removal was imminent for some time. He considered the Applicant's submissions that he would be unable to cope in Afghanistan due to his mental health issues and drug addiction, but noted that these issues were not new and numerous steps had been taken to mitigate the effects of removal. Furthermore, the Officer noted that the Applicant had ample

opportunity to submit an H&C application after his PRRA was initiated in May of 2014. The Officer noted that the current processing time for an H&C application is two years and a deferral of that length would be inconsistent with the Officer's statutory obligations and limited discretion. The Officer further found that it was not appropriate for him to conduct a mini-H&C assessment and found that there was insufficient evidence to demonstrate that the Applicant would face a risk of death, extreme sanction or inhumane treatment in Afghanistan.

III. Issues

[12] The Applicant has raised the following two issues:

- Has the Enforcement Officer breached the principles of procedural fairness by making a negative credibility finding against the Applicant's mother without first conducting an inquiry to assess her credibility?
- Was the refusal of the Enforcement Officer to defer removal reasonable?

IV. Analysis

[13] Decisions by CBSA enforcement officers not to defer removal are reviewable on the reasonableness standard: *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 [*Baron*], at para 67. To the extent that procedural fairness issues arise in this case, it is well established that such issues are reviewable on the correctness standard: *Canada (Minister of Citizenship and Immigration v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43; *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 79.

[14] The Applicant submits that the Officer breached his right to procedural fairness. Counsel points specifically to the Officer's statement that "I find it difficult to submit to the fact that neither the subject nor his mother could fully appreciate that removal was imminent and, as such, not seek legal advice until approximately 5 days prior to scheduled removal to help them understand" and argues that it was unfair because the Officer had no basis for rejecting the Applicant's mother's credibility regarding her good faith attempts to make arrangements for her son and did not give her an opportunity to respond to his concerns.

[15] I agree with counsel for the Respondent that the duty of fairness in the context of a deferral request is at the low end of the spectrum. By the time a deferral request has been made, an applicant has already had access to a number of other procedures under the *Act*, each with their own procedural safeguards. Mr. Omidsorkhabi's circumstances have been considered by both a PRRA Officer and the Immigration Division of the Immigration and Refugee Board of Canada. Moreover, removal officers have very limited discretion to defer removal, as subsection 48(2) of the *IRPA* mandates that removal orders be enforced "as soon as possible". In those circumstances, it is clear that an enforcement officer has no duty to conduct an interview with an applicant or family members. The burden is on the Applicant to provide the necessary evidence and justification for his request.

[16] Moreover, Mr. Omidsorkhabi did not make his deferral request until October 29, 2014. In that letter, his counsel requested a decision by noon that same day, and advised the Enforcement Officer that he would be out of the office between 8:00 a.m. and 10:30 a.m. With such a tight timeframe, it was virtually impossible to conduct an interview with the Applicant's mother.

[17] In any event, the Enforcement Officer did not find that Mr. Omidsorkhabi's mother was untruthful, only that her statement could not justify deferral in the circumstances. It may be, as explained by counsel for the Applicant, that she was focused on making arrangements to ensure her son's survival upon his return to Afghanistan until she was actually notified of the Applicant's removal date on October 21, 2014. The Officer could nevertheless find that the Applicant and his mother could have appreciated that removal was imminent and should have sought legal advice earlier, as they had been repeatedly told since the end of August, 2014 that removal was fast approaching. This was not a credibility finding, but merely an explanation as to why deferral was not justified in the circumstances.

[18] Counsel for the Applicant further submitted that the Officer's decision is inconsistent and unreasonable. After he gave the Applicant's mother time and instructions to make arrangements for the Applicant's arrival and safety in Afghanistan, he declined to take note of the Applicant's mother's inability to make arrangements for her son, despite her best efforts and intentions. Had the Officer not seen the Applicant's disabilities as an impediment to removal, he would have had to enforce his removal as soon as the negative PRRA decision was made. If it was impossible to remove the Applicant without making prior arrangements, the fact that the Applicant's mother was incapable of making any arrangements warranted the deferral of his removal.

[19] Unfortunately for the Applicant, I am unable to accept that argument. Once again, an enforcement officer has a very narrow discretion. Where a deferral request has been made following a negative PRRA, enforcement officers are not to make or re-make PRRA or H&C decisions and may only consider any risk that has arisen after the PRRA: *Canada (Minister of*

Public Safety and Emergency Preparedness) v Shpati, 2011 FCA 286, [2012] 2 FCR 133, at paras 44-45. In certain circumstances, an officer may defer removal based on a timely H&C application. However, there is no authority for the Applicant's submission that the Officer should have deferred removal based on an unfiled, nonexistent application.

[20] Furthermore, where there are new allegations of risk, enforcement officers may only consider allegations where the alleged risk is obvious and where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment: *Jamal v Canada (MCI)*, 2001 FCT 494, at para 7; *Vargas v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 938, at para 17; *Haghighi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 372, at paras 31 and 34; *Baron, supra*, at para 51. In my view, the Officer correctly noted it was outside the ambit of his discretion to conduct a mini-H&C analysis: see, for example, *Chetaru v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 436, at paras 18-19; *Charles v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1096, at para 29.

[21] In this case, there is no basis for overturning the Officer's decision. Contrary to the Applicant's submissions, the Applicant did not in fact make any new allegations of risk beyond those considered in his PRRA or demonstrate any material change in his circumstances. The risk to the Applicant as a disabled person suffering from mental illness and drug addiction had already been assessed in the context of the PRRA, and the need for the Applicant's mother to make arrangements for him in Afghanistan had been apparent since the deportation order was issued and certainly since the negative PRRA decision was received.

[22] Contrary to the Applicant's submissions, the Enforcement Officer is not estopped from removing him because the Officer had previously granted both he and his family time to make any necessary arrangements. The Enforcement Officer did not acknowledge that it was "impossible" to remove Mr. Omidsorkhabi, absent arrangements having been made for his life in Afghanistan, but rather urged him and his family to make those arrangements in his best interests.

[23] For all of the foregoing reasons, I have no other option but to dismiss this application for judicial review.

JUDGMENT

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

No question is certified.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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