Federal Court  Cour fédérale

Date: 20160504

Docket: IMM-4346-15

Citation: 2016 FC 500

Ottawa, Ontario, May 4, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

MS. ANNE EKANGA EUGÉNIE LILALA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a judicial review of a decision by a Canada Border Services Agency [CBSA] enforcement officer [Officer] to refuse to defer the Applicant's removal from Canada. The Officer's decision is dated September 25, 2015. It is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act].

II. Background

[2] The Applicant is a citizen of the Democratic Republic of Congo [DRC]. She arrived in Canada and made a claim for refugee protection in December 1996. The claim was rejected in 1997 but, since the Minister of Citizenship and Immigration [Minister] imposed a temporary stay of removals [TSR] on the DRC in 1997, she was not removed from Canada. That TSR remains in place to this day, along with TSRs on only two other countries – Afghanistan (since 1994) and Iraq (since 2003).

[3] The Minister's power to issue a TSR is outlined in section 230 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations]:

> 230(1) The Minister may impose a stay on removal orders with respect to a country or a place if the circumstances in that country or place pose a generalized risk to the entire civilian population as a result of
>
> (a) an armed conflict within the country or place;
>
> (b) an environmental disaster resulting in a substantial temporary disruption of living conditions; or
>
> (c) any situation that is temporary and generalized.

[4] Subsection 230(3) of the Regulations, however, lays out exceptions to the protection offered by a TSR:

> 230(3) The stay does not apply to a person who:
>
> (a) is inadmissible under subsection 34(1) of the Act on security grounds;
>
> (b) is inadmissible under subsection 35(1) of the Act on grounds of violating human or international rights;

> (c) is inadmissible under subsection 36(1) of the Act on grounds of serious criminality or under subsection 36(2) of the Act on grounds of criminality;
>
> (d) is inadmissible under subsection 37(1) of the Act on grounds of organized criminality;
>
> (e) is a person referred to in section F of Article 1 of the Refugee Convention; or
>
> (f) informs the Minister in writing that they consent to their removal to a country or place to which a stay of removal applies.

[5] On March 23, 2006, the Applicant was charged with four counts of assault under the *Criminal Code*, SRC 1985, c C-46, all stemming from an incident in which she beat her daughter with a boot, a pair of metal tongs, and a cord from an iron. She was convicted of three offences – two counts under subsection 267(a) and one count under subsection 267(b) – on June 29, 2007. She then received a four month conditional sentence and one year of probation for each count, to be served concurrently.

[6] The Applicant's sentence ended on or about October 29th, 2008 and she became eligible to apply for a criminal record suspension (previously known as a pardon) in October 2013. The Children's Aid Society took custody of the Applicant's daughter shortly after she was charged; a subsequent investigation demonstrated that the Applicant had been abusing her daughter for years. The Applicant lost all custodial and visitation rights in 2010.

[7] After the 2007 conviction, the Applicant was arrested by CBSA and released under conditions. An inadmissibility report was prepared under subsection 44(1) of the Act and, on May 7, 2012, a deportation order was issued.

[8] On February 25, 2013, the Applicant applied for a Pre-Removal Risk Assessment [PRRA]. This application was denied on May 7, 2014.

[9] On April 16, 2015, the Applicant was sent a letter requesting she present herself to CBSA. She failed to appear as directed. As a result, on May 4, 2015, the Applicant was arrested and put in detention on the basis that she was considered a flight risk. When she was released on July 16, 2015, she was informed that her deportation was scheduled for August 2015.

[10] The Applicant submitted a request to defer removal on August 20, 2015. She was told, however, that the request could not be considered until a removal date was scheduled.

[11] On September 8, 2015, the Applicant received directions to report for a removal, scheduled for October 3, 2015. The Applicant's counsel contacted the CBSA about her request to defer and, when an answer was not forthcoming from the CBSA, commenced an application for judicial review and a motion for a judicial stay of removal.

[12] The Officer denied the deferral request on September 25, 2015. He found, among other things, that there was insufficient evidence to demonstrate that the Applicant would be in danger were she returned to the DRC; that the Applicant had the opportunity to apply for a record suspension since 2013 but had not done so; that her eligibility to seek a record suspension was not an appropriate basis to exercise his jurisdiction to defer; and that CBSA has an obligation to carry out removals as soon as possible. As such, the Officer was not satisfied that a deferral of the removal was appropriate in the circumstances.

[13] On October 1, 2015, this Court granted a stay of removal pending the outcome of a judicial review of the Officer's decision. Leave was then granted on January 20, 2016.

[14] Since the stay of removal and leave were granted, the Applicant has received a second negative PRRA and has, according to her counsel, submitted the paperwork to begin the processing of her application for a record suspension.

III. Issues

[15] The Applicant argues that the Officer erred by giving inadequate reasons in refusing her request to defer removal, in particular relating to her eligibility for a record suspension and the risk she would face in the DRC.

[16] The Applicant also argues that, in light of the application for a record suspension, she should be allowed to have that process completed. The Officer found that, since the Applicant was eligible for the suspension in 2013, she had had almost 2 years to apply but had failed to do so. The Applicant notes, however, that the CBSA had the authority to initiate the removal as early as 2008 and waited 7 years to do so. To hold her to a different standard in terms of timeliness, she submits, would be unreasonable. She also notes that she already filed for a record suspension once before but it was rejected for being submitted too early. According to the Applicant, when the record suspension which she has now filed, is granted, the removal will then be stayed by the operation of the ongoing TSR, and this should have been considered.

[17] Finally, the Applicant argues that the Officer erred in failing to take into consideration both the Government of Canada's 2015 travel advisory for the DRC and the presence of the TSR. She relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 for the principle that the more important a piece of evidence is that is not discussed in the reasons given for a decision, the more willing this Court may be to find the decision was made without reasonable consideration of that evidence. The Applicant argues that the travel advisory clearly demonstrates that the security situation in the DRC is poor, and the Officer should have taken this into consideration. The Applicant also argues that the TSR is sufficient proof that the DRC is an extremely dangerous place, and this should not have been ignored. As such, the Officer failed to conduct a full assessment of the risk that awaits the Applicant in the DRC.

IV. Analysis

[18] The standard of review applicable to an enforcement officer's refusal to defer removal is reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25). In a reasonableness review, this Court must take a deferential approach and resist imposing its own analysis. If the decision is a rational solution that is justifiable, transparent and intelligible, it should not be disturbed (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[19] In *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FCR 682 (FCTD) at para 48 [*Wang*], this Court made it clear that enforcement officers have only a narrow jurisdiction in which to consider deferrals when it found that "deferral should be reserved for

those applications or processes where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment in circumstances and where deferral might result in the order becoming inoperative". As further described in *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at para 40 [*Shpati*], an enforcement officer's "functions are limited, and deferrals are intended to be temporary… [they] are not intended to make, or to re-make, PRRAs or H&C decisions."

[20] In light of *Wang* and *Shpati*, as well as *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, I do not find that the Officer's decision was in any way unreasonable.

[21] First off, I do not find the reasons to be insufficient on their face. Even if I had, as the Supreme Court stated in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14, inadequacy of reasons is not a stand-alone basis for judicial review – the inadequate reasons must be connected to an unreasonable result.

[22] Second, I do not find that the Officer unreasonably failed to consider the evidence before him. He noted that the Government's travel advisory was among the submissions he had to consider, and there is nothing to suggest that, in declining to explicitly mention the TSR or discuss the travel advisory at length, he ignored these factors. This is especially true where, as with paragraph 230(3)(c), Parliament has provided explicit direction that the TSR not apply where findings of serious criminality are present. The Applicant's argument on this point

amounts to a request that this Court reweigh the evidence, something it is not, under a reasonableness review, permitted to do.

[23] Finally, as the Respondent noted in the hearing, a record suspension is discretionary. There is no guarantee that her application, if submitted, will be approved. Considering she had not even applied for a record suspension at the time of the Officer's decision, there was little evidence to suggest a deferral was reasonably forthcoming.

[24] As an aside, counsel for Applicant provided no authority for the proposition that "when" the record suspension is granted, the removal would not proceed. There are two weaknesses in this argument. First, the mere application for a record suspension in no way guarantees its subsequent receipt. Second, the Applicant provided no authority to show that if and when such suspension was received, the serious criminality bar to the TSR under paragraph 230(3)(c) would be removed. The Officer, therefore, did not err in his consideration of the Applicant's submissions on her eligibility for a suspension.

V. Conclusion

[25] This application for judicial review is dismissed. There are no questions for certification or costs awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. There are no questions for certification or costs awarded.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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