

Federal Court



Cour fédérale

**Date: 20170407**

**Docket: IMM-3754-16**

**Citation: 2017 FC 351**

**Ottawa, Ontario, April 7, 2017**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**GERALD DESMOND WELLS**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Gerald Desmond Wells has brought an application for judicial review of a decision of an enforcement officer with the Canada Border Services Agency. The enforcement officer refused Mr. Wells' request to defer his removal from Canada pending determination of his application for permanent residence on humanitarian and compassionate [H&C] grounds.

[2] For the reasons that follow, I have concluded that the enforcement officer's decision did not take account of an exigent personal circumstance facing Mr. Wells should he return to Trinidad and Tobago, namely the potential unavailability of treatment or medication for his serious mental health condition. The decision was therefore unreasonable, and the application for judicial review is allowed.

## II. Background

[1] Mr. Wells is a citizen of Trinidad and Tobago. He arrived in Canada in 1997 at the age of sixteen. He subsequently attained permanent resident status as the spouse of a Canadian citizen. He is the father of four Canadian-born children, all of whom live with their respective mothers: three in Winnipeg, Manitoba and one in London, Ontario. Mr. Wells lives in Mississauga, Ontario, near his own mother who is a Canadian citizen.

[2] Mr. Wells has been convicted of five criminal offences. The most serious of these was possession of cocaine for the purpose of trafficking, for which he received a sentence of 12 months' imprisonment in 2012. This led to a finding of inadmissibility based on criminality. Despite being subject to a removal order since 2012, Mr. Wells did not file his H&C application until July 15, 2016.

[3] Mr. Wells has been diagnosed with anxiety, agoraphobia and severe depression. He says that if he is removed to Trinidad and Tobago, he will be unable to obtain treatment or medication for his mental health condition, and his life will be at risk.

[4] Mr. Wells received a pre-risk removal risk assessment [PRRA] in August 2015. The officer who conducted the PRRA concluded that Mr. Wells would not be at risk if he returned to Trinidad and Tobago. Mr. Wells' application for judicial review of that decision was dismissed by Justice Ann Marie McDonald on June 21, 2016 (*Wells v Canada (Citizenship and Immigration)*, 2016 FC 697). Justice McDonald refused Mr. Wells' request to adduce as evidence a number of news articles describing deficiencies in the public health system in Trinidad and Tobago, particularly the lack of treatment or medication for his mental health condition. She found that the articles had not been before the PRRA officer, and therefore did not form part of the record. Justice McDonald concluded as follows (at para 17):

[T]he Applicant's PRRA application was rejected for want of evidence. The Applicant adduced evidence of his mental health issues, but he did not establish that the situation in Trinidad and Tobago was such that his mental health issues necessitated protection under sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. Nor did this evidence establish that the Applicant would be unable to obtain adequate care in Trinidad and Tobago.

[5] On August 19, 2016, Mr. Wells was served with a Direction to Report for removal on September 10, 2016. He requested deferral of his removal pending determination of his H&C application.

### III. Decision under Review

[6] In a decision dated September 2, 2016, the enforcement officer found that the average processing time for an H&C application was 38 months, and a decision on Mr. Wells' application was therefore not imminent. The officer stated: "I note that while the mental health

system in Trinidad is different than in Canada, it does exist and no evidence was submitted to this office to show that Mr. Gerald Desmond WELLS would be denied treatment for his condition.”

[7] The officer noted that many of the submissions made by Mr. Wells in support of his deferral request had previously been addressed by the PRRA decision. The officer concluded that Mr. Wells’ removal from Canada would not subject him to “risk to life, punishment or disproportionate treatment”. The officer therefore refused Mr. Wells’ request to defer removal.

#### IV. Issue

[8] The sole issue raised by this application for judicial review is whether the enforcement officer’s decision to refuse Mr. Wells’ request to defer his removal from Canada was reasonable.

#### V. Analysis

[9] An enforcement officer’s decision to refuse a request to defer removal is subject to review by this Court against the standard of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25 [*Baron*]). The Court will intervene only if the decision falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[10] A removal order must be enforced as soon as possible (*Immigration and Refugee Protection Act*, SC 2001, c 27, s 48(2) [IRPA]). An enforcement officer’s discretion to defer

removal is limited and should be exercised only in respect of circumstances that are the direct consequence of removal (*Meneses v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 713 at para 5; *Baron* at para 49). While an enforcement officer may consider a wide range of factors in deciding to defer removal, deferral should be construed narrowly against an enforcement officer's positive obligation under the IRPA to enforce the order (*Baron* at para 51; *Wang v Canada (Citizenship and Immigration)*, [2001] 3 FC 682, [2001] FCJ No 295 at paras 43-48 [*Wang*]). As Justice Nadon held in *Baron* at paragraph 51, citing Justice Pelletier in *Wang*:

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. [Emphasis omitted]

[11] Mr. Wells says that the enforcement officer's statement that "no evidence was submitted to this office to show that Mr. WELLS would be denied treatment for his condition" is contradicted by the news articles he submitted. These articles described serious shortcomings in the provision of mental health services in Trinidad and Tobago, particularly the scarcity of treatment and medication. According to the evidence, medication for the treatment of mental health conditions is not covered by social services in Trinidad and Tobago.

[12] Mr. Wells argues that the enforcement officer also failed to consider that he has been diagnosed with a mild intellectual disorder. He has previously attempted suicide, and he continues to have suicidal ideation. His children act as a deterrent against these harmful ideas, and his mother helps him to adhere to his treatment plan. He would not be able to afford either

treatment or medication in Trinidad and Tobago. He is unable to afford medication in Canada, and his health team provides him with samples free of charge.

[13] The Respondent says an enforcement officer is presumed to have considered all of the evidence, even if it is not specifically referred to in the decision. In this case, the officer's decision states: "I note the statements and articles related to problems with [the] mental health system in Trinidad. I also considered the medical documents related to Mr. Gerald Desmond WELLS's mental health condition." The Respondent cautions that an enforcement officer who considers a deferral request is concerned only with the short-term interests of an applicant, and is not expected to conduct a comprehensive H&C or risk analysis.

[14] While the enforcement officer "noted" the news articles and medical evidence submitted by Mr. Wells, the decision contained no analysis of either. Even within the limited scope of the officer's discretion, this omission gives rise to a reviewable error.

[15] In *Averin v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1456, Justice James O'Reilly held as follows:

[11] In my view, given the evidence before him, the officer was obliged to consider whether the unavailability of medication for Mr. Averin presented an "exigent personal circumstance" that justified a deferral. The mere fact that Mr. Averin had an outstanding H&C application would not have justified a deferral. But the fact that Mr. Averin would not have available to him the medication he required would have provided that justification. The officer did not consider that issue.

[12] In my view, the officer's decision was unreasonable because it did not take account of an exigent personal circumstance facing

Mr. Averin. There was evidence before the officer showing that Mr. Averin may not have access to the medication he required. The officer simply did not consider that evidence. Accordingly, I find that the officer's decision does not represent a defensible outcome based on the evidence before him, and the law requiring him to consider the applicant's personal circumstances. Therefore, I must grant this application for judicial review.

[16] This application for judicial review must be granted for similar reasons. In this case, there was evidence before the enforcement officer that Mr. Wells is unlikely to receive treatment or medication for his serious mental health condition in Trinidad and Tobago. The enforcement officer's decision did not take account of this exigent personal circumstance, and it is therefore unreasonable.

[17] In light of this conclusion, it is unnecessary to consider Mr. Wells' secondary argument concerning the enforcement officer's assessment of the best interests of his four children.

## VI. Conclusion

[18] The application for judicial review is allowed, and the matter is remitted to a different enforcement officer for reconsideration. Neither party proposed that a question be certified for appeal, and none arises in this case.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed, and the matter is remitted to a different enforcement officer for reconsideration. No question is certified for appeal.

"Simon Fothergill"

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3754-16

**STYLE OF CAUSE:** GERALD DESMOND WELLS v THE MINISTER OF  
PUBLIC SAFETY AND EMERGENCY  
PREPAREDNESS

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** APRIL 3, 2017

**JUDGMENT AND REASONS:** FOTHERGILL J.

**DATED:** APRIL 7, 2017

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