Federal Court  Cour fédérale

Date: 20170526

Docket: IMM-3940-16

Citation: 2017 FC 524

Ottawa, Ontario, May 26, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

MUKESH SEEMUNGAL
(aka DHANRAJ SOOKOO)

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mukesh Seemungal, is a 42 year old citizen of Trinidad and Tobago who faces removal from Canada. In a letter dated September 6, 2016, he requested his removal to be deferred so that he could make arrangements for the care of his intellectually disabled sister. After this request was denied by an Inland Enforcement Officer in a letter dated September 19, 2016, he sought and obtained an order of this Court staying his removal. He has now applied

under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, [*IRPA*], for judicial review of the Officer's decision.

I. Background

[2] In July 2009, the Applicant and his older sister, Rawtee Petrie, arrived in Canada as visitors. A few years later, the Applicant made a claim for refugee protection based on his sexual orientation. His refugee claim was refused in January 2013, as was his subsequent application for a pre-removal risk assessment in February 2016; his applications for leave to judicially review these two decisions were denied by this Court in June 2013 and June 2016, respectively.

[3] On April 19, 2016, the Applicant attended an interview with the Canada Border Services Agency [CBSA], following which he was given a deferral of removal for two months to enable him to make arrangements for the care of his sister. He subsequently submitted an application dated August 8, 2016, for permanent residence on humanitarian and compassionate [H&C] grounds; the H&C application requested relief based on the Applicant's establishment in Canada, the adverse conditions he would face in Trinidad, and the negative impact removal would have on his older sister who suffers with diabetes, which requires her to use insulin, and who has the mental capacity of a 5 year old, which makes it difficult for her to look after herself independently.

[4] After the CBSA served the Applicant with a direction to report for removal, he submitted a written request dated September 6, 2016, for his removal to be deferred until he was able to make necessary arrangements for his mentally disabled sister and until his H&C application was

processed. The deferral request included a psychoeducational assessment which diagnosed the Applicant's sister with Moderate Intellectual Disability and outlined many limitations in her ability to function independently. This assessment concluded that the Applicant's sister would have "significant difficulty functioning on her own" and that she "should continue to receive the support from her brother in terms of managing her daily routine, and for financial assistance." The Applicant submitted to the CBSA that the September 20th removal date did not provide sufficient time for him or his sister's healthcare professionals to prepare a plan for his sister's care, and that more time was required to pass on the Applicant's duties as the trustee for his sister to another individual.

[5] The Applicant further submitted to the CBSA that his removal should be deferred because he would likely face threats to his personal safety upon return to Trinidad based on his sexual orientation and his health. The Applicant explained that Trinidad continues to discriminate against homosexuals and he would be forced to conceal his self-identity and face personal stigma, which would lead to negative psychological and physical impacts. The Applicant also informed the CBSA that he suffers from blood clots, a medical condition which could not be adequately treated in Trinidad.

II. The Officer's Decision

[6] In a letter dated September 19, 2016, the Officer refused the Applicant's request to defer his removal. After outlining his role and obligation to enforce a removal order as soon as possible under subsection 48(2) of the *IRPA*, the Officer stated that, as an enforcement officer, he had "little discretion to defer removal." The Officer then stated he had "carefully reviewed" the

evidence provided with the deferral request, including the medical evidence related to the Applicant and that related to his sister. The Officer further noted that, while the Applicant had recently submitted an H&C application, "the outstanding application for permanent residence does not automatically give rise to a statutory stay of removal under the IRPA and its Regulations, nor does it pose an impediment to removal."

[7] After referring to an instruction guide and an inland processing manual, the Officer concluded that:

> I am satisfied that the pending H&C application will continue to be processed even after the scheduled removal from Canada. … I question the timeliness of the H&C application.… Mr. Seemungal was made aware of his impending removal from Canada when he was initiated for his PRRA application in September 2015 …according to notes on the file, Mr. Seemungal noted at his 21 March 2016 interview with his removal's officer that he intended to submit an H&C at that time….the H&C factors raised in his current H&C application have been at issue for quite some time, specifically those concerns surrounding his sister.

[8] The Officer stated that, while it was beyond his authority to perform "an adjunct H&C evaluation," he had "carefully considered" the H&C factors presented in the deferral request, including the submissions supporting the Applicant's establishment in Canada and the hardship that would result upon his return to Trinidad and Tobago, "specifically considering the mental health concern of his sister, Rawtree [*sic*] Petrie." The Officer noted Rawtee's intellectual disability and diabetes, observing that her intellectual disability "makes it difficult for her to look after herself independently, including administering her own medication." The Officer also acknowledged that the Applicant takes care of his sister, acts as her power of attorney, attends her medical appointments, and is responsible for administering her medicine. The Officer

accepted that the Applicant's sister requires supervision in her daily life and acknowledged that the Applicant has played a central role as a caregiver for his sister.

[9] The Officer noted, however, that the Applicant had raised the same concerns about his sister when he was granted a deferral of his removal five months earlier, on April 19, 2016. The Officer found that "insufficient evidence" had been presented "to show what steps Mr. Seemungal has taken over the past 5 months to secure care for his sister upon his removal from Canada." The Officer observed that, while the Applicant's sister is currently visited by a social worker and receives assistance under the Ontario Disability Support Program, "insufficient evidence" had been presented to indicate that she had secured any of the other recommendations made by the psychoeducational consultant, such as connecting with Community Living Toronto. The Officer thus concluded:

> …based on the information provided, I am not satisfied that sufficient evidence was presented to indicate that upon Mr. Seemungal's removal from Canada, Ms. Petrie, with the assistance of her social worker, will not be able to secure the social services available to her, or that Mr. Seemungal's presence in Canada is required to do so.…should the family chose for her to return to Trinidad to accompany her brother, I am satisfied that Mr. Seemungal will be able to continue to provide the care and support he has been providing for her his entire life. Moreover…I note that insufficient medical evidence was provided to indicate that Ms. Seemungal would not be able to receive treatment or medicine for her diabetes, should the family decided that it would be in her best interest to return to Trinidad.

[10] The Officer also considered the Applicant's potential risk upon returning to Trinidad, stating that it was not within his jurisdiction to conduct "an adjunct risk assessment" and that his discretion "to defer removal is limited to assessing whether removal at this time would expose the family to a risk of death, extreme sanction or inhumane treatment." The Officer determined

that, while the Applicant might suffer anxiety and stress upon removal, there was no evidence that his risk had changed since his pre-removal risk assessment. The Officer concluded by stating: "Having carefully considered your request, I do not feel that a deferral of the execution of the removal order is appropriate in the circumstances of this case."

[11] The Officer's four page decision contains various references to facts and findings which have no connection with the Applicant's deferral request. In the Officer's summary of the case history, he noted: "21 Mar 2016 Mr. Zaman attends an interview at EIOD-GTAR; he is notified of his negative PRRA decision." In the middle of his analysis of the Applicant's risk, the Officer wrote: "I note that, according to the deferral request, Mr. Seemungal suffers from trauma related to incidents of persecution in Bangladesh, of which he fled to come to Canada. I note that this risk allegation was raised in Mr. Zaman claim for CR status before the RPD and the RPD rejected his claim on 18 January 2016." The materials submitted by the Applicant with his deferral request make no reference to a Mr. Zaman, nor do they indicate that the Applicant has ever been to Bangladesh.

[12] The Officer's decision also references arguments, evidence, and two individuals, Aya and Milia, which do not appear in the Applicant's submissions. At page two of his decision, the Officer wrote:

> I also note Counsel's submissions claiming CIC established timelines are misleading and experience, also confirmed by affidavits from colleagues, proves that [H&C] applications are decided much sooner. Counsel submits that the application, although submitted recently is potentially imminent and therefore deferral is requested for a period of two months. Counsel also submits that removal at this time will impact Aya and Milia's pending application. I note that the evidence provided by counsel

> as anecdotal and insufficient to show that a decision on this application is imminent. Each application will be decided on its own merits.

[13] The Applicant's submissions, however, make no reference to CIC timelines for processing H&C applications, nor do they argue that his H&C application is imminent. Furthermore, the materials submitted by the Applicant to the CBSA did not include any "affidavits from colleagues" and there is no mention of "Aya and Milia's pending application" in the Applicant's deferral request.

III. The Officer's Affidavit

[14] In view of the Officer's references to arguments, facts and findings which have no connection with the Applicant's deferral request, the Respondent has filed an affidavit in which the Officer offers an explanation for why his decision contains references to arguments, evidence, and individuals unrelated to the Applicant's request for deferral of his removal.

[15] The Applicant argues that the Officer's affidavit should not be accepted by the Court because it is an attempt to bolster and enhance the original decision. According to the Applicant, the Officer's affidavit "removes the damaging information" from his reasons, namely the references to arguments, evidence, and individuals not connected with the Applicant's case. The Applicant says, in view of *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 255 at paras 46-47, [2009] 2 FCR 576, that a tribunal or a decision-maker cannot improve upon the reasons given to an applicant by means of an affidavit filed in the judicial

review proceedings, and that transparency in decision-making is not promoted by allowing decision-makers to supplement their reasons after the fact in affidavits.

[16] The Respondent contends that the Officer's affidavit does not bolster or provide new or expanded reasons for the Officer's decision. According to the Respondent, the Officer's affidavit provides context for the decision and shows that the Applicant's removal was previously deferred twice before his request in September 2016. The Respondent says the Officer's affidavit should be accepted by the Court since the Officer acknowledges the mistakes in his reasons and provides context as to how the mistakes occurred.

[17] As a general rule, the record for judicial review is usually limited to that which was before the decision-maker; otherwise, an application for judicial review would risk being transformed into a trial on the merits, when a judicial review is actually about assessing whether the administrative action was lawful (see: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 14-20, 428 NR 297 [*Association of Universities*], cited in *Gaudet v Canada (Attorney General)*, 2013 FCA 254 at para 4, [2013] FCJ No 1189; also see: *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263 at paras 13-28, 261 ACWS (3d) 441). There are a few recognized exceptions to the general rule against the Court receiving evidence which was not before the decision-maker in an application for judicial review, "and the list of exceptions may not be closed" (see: *Association of Universities* at para 20).

[18] Affidavits are sometimes necessary to bring to the Court's attention procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural fairness. I do not see the Officer's affidavit being one which falls within this exception. On the contrary, this affidavit concerns the wording of the very decision under review. It does not offer evidence as to whether the decision under review was rendered in a procedurally unfair manner.

[19] Other times an affidavit is received on judicial review in order to highlight a complete absence of evidence before the decision-maker when it made a particular finding. Again, I do not see the Officer's affidavit as falling within this exception. There was ample evidence before the Officer to make the decision he did even though it refers to arguments, evidence, and individuals unrelated to the Applicant's deferral request.

[20] Additionally, the Court will sometimes accept an affidavit that provides general background in circumstances where such information might assist its understanding of the issues relevant to the judicial review; in this regard, the Federal Court of Appeal has cautioned though that: "Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider" (*Association of Universities* at para 20). Again, I do not see the Officer's affidavit as falling within this exception to the general rule noted above.

[21] The Officer's affidavit raises a peculiar situation inasmuch as it purports to rectify and correct certain errors in the Officer's reasons for denying the Applicant's request that his removal be deferred. I agree with the Applicant that the Officer's affidavit in this case should not be accepted by the Court because it is an attempt to bolster and enhance the Officer's original decision by removing or explaining away the references to arguments, evidence, and individuals not connected with the Applicant's case. The Officer's affidavit is an attempt to "clean up the original decision" by keeping only the favourable information and removing the damaging information. In *Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 at para 145, [2014] 1 FCR 766, the Federal Court of Appeal warned that supporting affidavits on judicial review "cannot be used as an after-the-fact means of augmenting or bootstrapping the reasons of the decision-maker." Similarly, the affidavit in this case attempts to improve the Officer's reasons by removing all of the irrelevant references and, if anything, it points to the unreasonableness of his decision, the issue to which I now turn.

IV. Is the Officer's Decision Reasonable?

[22] An enforcement officer's decision whether to defer an individual's removal from Canada is afforded deference and reviewed on the standard of reasonableness (see *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25, [2010] 2 FCR 311 [*Baron*]; *Escalante v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 897 at para 13, [2016] FCJ No 859; *Lilala v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 500 at para 18, [2016] FCJ No 466). An enforcement officer's discretion to defer removal is narrow. As stated by the Federal Court of Appeal in *Baron*: "It is trite law that an enforcement officer's discretion to defer removal is limited" (para 49).

[23] Under the reasonableness standard, the Court is tasked with reviewing a decision for "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a 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, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 S.C.R. 708.

[24] The Applicant contends that the Officer's references to arguments, evidence, and individuals which have no connection with the Applicant's case demonstrate that the Officer failed to carefully assess his deferral request. According to the Applicant, the Officer's reasons are not based only on the information presented by the Applicant and, therefore, they lack the requisite level of transparency and intelligibility. The Applicant says the Officer's reliance on evidence that was not before him and his failure to notice the blatant errors in the decision indicate that he did not reasonably assess the evidence on its merits.

[25] The Applicant urges the Court not to uphold the decision because it will run the risk of condoning sloppiness and a clear lack of attention in an officer's analysis of a deferral request. This decision is not, the Applicant says, one where an officer committed several small, typographical errors; on the contrary, it contains serious errors as to the assessment of the evidence. According to the Applicant, the decision should not be upheld because that would

amount to accepting the fact that a sub-par and non-diligent decision can meet the reasonableness standard so long as some of the facts relate to the Applicant. The Applicant notes that during the Officer's cross-examination on his affidavit, he was unable to correctly identify all of the errors in his decision and his testimony revealed that he was unable to tell what statements in the decision were about the Applicant and what statements were about unrelated persons.

[26] The Respondent relies on the Officer's affidavit evidence for both demonstrating that the Officer considered the Applicant's request and outlining the Officer's reasoning for his decision. In the Respondent's view, despite the Officer's errors in his reasons, the decision nonetheless accurately reflects the basis for refusal of the Applicant's request for deferral. According to the Respondent, while the Officer's mistakes are "unfortunate," the reasons for a decision do not have to be comprehensive or perfect and they should be read together with the outcome which, in this case, falls within a range of possible and acceptable outcomes.

[27] In this case, the Officer's references to arguments, evidence, and individuals with no connection whatsoever to the Applicant's case undermine the transparency and intelligibility of the decision-making process and the decision itself. The passages in the Officer's decision which have no connection to the Applicant's deferral request make this decision unintelligible and unreasonable. It is particularly troublesome that these mistakes are scattered throughout the decision. The mistakes appear in the initial summary of the case history, the overview of the Applicant's arguments, and in the middle of the Officer's risk analysis. Despite the Officer's statements that he "carefully reviewed the evidence" and "carefully considered the H&C factors presented," the manifest mistakes in the Officer's reasons for his decision make it unsafe to have

confidence that he carefully and reasonably considered the Applicant's deferral request. The Officer's decision is unintelligible because the actual reasons for why the deferral request was refused are co-mingled with references to arguments, evidence, and individuals which have no connection to the Applicant. The matter must be returned, therefore, to another enforcement officer to be re-determined.

V. Conclusion

[28] The Applicant's application for judicial review is allowed and his request for deferral of removal must be directed to another enforcement officer for redetermination.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the matter is returned for redetermination by a different inland enforcement officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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