

Federal Court



Cour fédérale

Date: 20171003

Docket: IMM-774-17

Citation: 2017 FC 877

Toronto, Ontario, October 3, 2017

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

KAUNAHORE KAMUNDU

Applicant

and

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

Respondent

JUDGMENT AND REASONS

[1] The present Application concerns the Applicant's request for a deferral of removal to Namibia. By a decision dated February 20, 2017, the deferral request was rejected. Counsel for the Applicant argues that adequate reasons for the rejection were not provided by the Deferral Officer (Officer). For the reasons that follow, I agree with this argument and find that the decision rendered is unreasonable.

[2] The basic facts and the content of the arguments advanced to the Officer are as follow:

Mr. Kaunahore Kamundu is a Namibian citizen. In October 2009, he arrived in Canada and filed a claim for refugee protection shortly thereafter. He fears persecution in his country of origin of Namibia because of his sexual orientation. His refugee claim was rejected in March 2011. Mr. Kaunahore Kamundu and Mr. Edison Urietjeyova were married on February 22, 2012 in Fort McMurray, Alberta. They live together in Fort McMurray. They both work full-time to support themselves. Mr. Urietjeyova is also a Namibian citizen. He filed a refugee claim because he faced persecution in Namibia due to his sexual orientation; his claim was accepted. He is a permanent resident in Canada. On December 2, 2016, Mr. Kamundu's husband applied to sponsor him. They are awaiting a decision regarding their sponsorship application. On February 15, 2017, Mr. Kamundu received notice from CBSA of his removal date. He was ordered to report to CBSA on February 21, 2017 at 8:00am. On February 16, 2017, he requested a deferral of his removal. His deferral was based on three [advanced] reasons: additional time for the couple's sponsorship application to be processed; the ongoing threat to his personal safety, a risk of death, extreme sanction or inhumane treatment in Namibia; and the impact of a removal order on the sponsorship application. On February 17, 2017, Mr. Kamundu filed an emergency motion to stay his removal. At the time the stay motion was filed, the CBSA had not responded to the deferral request. On February 20, 2017, Mr. Kamundu's deferral request was denied by the CBSA. Mr. Kamundu filed an application for leave for judicial review of the negative CBSA decision on February 20, 2017. Mr. Kamundu's removal was stayed on February 20, 2017 pending determination of the [present] application [...].

(Counsel for the Applicant's Submissions, Applicant's Application Record, pp. 56-57, paras. 1 to 10)

[3] The following is the entire decision rendered by the Officer:

With regards to your request to Deferral of Removal received by Fax on the evening of Thursday February 16, 2017, this is to advise that I have considered the information put forward in your deferral request. Based on the information that has been presented to me, there are no compelling or extenuating circumstances that outweigh my statutory duty to enforce the valid removal order. As such, your deferral request has been refused.

I acknowledge that you have recently submitted an Application for Permanent Residence to IRCC on 02 DEC 2016. You have asked that the removal be deferred to allow for processing of this application. As such, there is no reasonable expectation that a decision will be made shortly.

I would also like to summarize that a previous Application for Permanent Residence, that was submitted to CIC on 23 MAR 2012 was refused on 22 JUL 2014. An Appeal was submitted to Federal Court and the final decision of that Appeal was denied on 21 MAY 2015.

As a reminder, you will still be expected to report for removal from Canada on Tuesday 21 February 2017 at 0800, as previously instructed. If you have any further questions or concerns, I can be reached at the number below.

[Emphasis added]

(Decision, Certified Tribunal Record, p. 41)

[4] The present assessment of the reasonableness of the Officer's decision is guided according to the decision in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with 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. [Emphasis added]

[5] The decision under review has two striking features: there is not one word of the Applicant's evidence filed in support of the deferral request; and, the only factual feature

mentioned from the record presented to the Officer is the rejection of a previous spousal application.

[6] In my opinion, the decision under review is not transparent. There is no way of determining why the Applicant's evidence and arguments on the merits were apparently dismissed. For example, there is no way to determine the content of the Officer's opinion that "there is no reasonable expectation that a decision will be made shortly". Most importantly, there is no way to understand the relevance of the rejection of the previous spousal application. In my opinion, the Officer's concern about the previous application unfairly introduces an extraneous consideration into the decision-making process for an unknown purpose.

[7] As a result, I find the decision under review is not reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

- a) The decision under review is set aside.
- b) There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-774-17

STYLE OF CAUSE: KAUNAHORE KAMUNDU v THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

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