Federal Court  Cour fédérale

Date: 20180130

Docket: IMM-1736-17

Citation: 2018 FC 100

Ottawa, Ontario, January 30, 2018

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MARIA WILLIAMS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA* or the Act] for judicial review of the decision of an Enforcement Officer [Officer] in the Canadian Border Services Agency [CBSA], dated April 20, 2017, refusing the Applicant's request for a deferral of removal.

II. BACKGROUND

[2] The Applicant is a citizen of Grenada. She has been in Canada since 1989. After being arrested by the CBSA in 1995, she was issued a conditional departure order in 1996. Her refugee claim was denied in 1997 and her application for permanent residence on humanitarian and compassionate [H&C] grounds refused in 1998. She became subject to an arrest warrant in 2001 after failing to appear at a scheduled interview with Canadian immigration officials.

[3] In 2016, the Applicant was arrested as part of an unrelated police investigation at her place of work. A pre-removal risk assessment [PRRA] was carried out and rejected on December 6, 2016. The Applicant submitted a new H&C application for permanent residency on January 23, 2017. On April 4, 2017, she received a direction to report for removal from Canada scheduled for April 24, 2017.

[4] In a letter dated April 6, 2017, the Applicant requested deferral of her removal because of her pending H&C application. Her letter stated that should a written decision not be received by April 17, 2017, the Applicant would assume that the deferral request was refused and that an application for judicial review would be initiated.

[5] The Applicant filed an application for leave and judicial review on April 18, 2017. The application states that the Applicant seeks to review a decision of Officer Carly Worsley, dated April 14, 2017, to refuse without reasons the Applicant’s request for deferral of her removal.

[6] On April 20, 2017, Officer Sam Vatikiotis refused the Applicant's request for deferral.

[7] On April 21, 2017, Justice McDonald ordered a stay of the Applicant's removal.

III. DECISION UNDER REVIEW

[8] The Officer finds that a deferral of the Applicant's removal is not appropriate in the circumstances.

[9] The Officer notes that an enforcement officer has little discretion about whether to defer removal. Even where this discretion is exercised, the enforcement officer must enforce the order as soon as possible.

[10] The Applicant requested deferral of her removal to allow for the processing of her H&C application and so that she would have time to organize her departure from Canada. She requested that the Officer give consideration to the hardship she would face upon return to Grenada.

[11] The Officer reviews the Applicant's history of interaction with Canadian immigration authorities. The Officer specifically notes the Applicant's ongoing H&C application and that its determination is outstanding. But the Officer states that an outstanding application for permanent residence neither gives rise to an automatic stay of removal under the Act nor poses an impediment to removal. The Officer finds that the Applicant did "not provide any credible corroborated evidence to demonstrate that [her] presence in Canada is required for IRCC to

continue processing the application for permanent residence." The Officer also finds that the Applicant provided insufficient evidence to establish that a decision on her permanent residence application is either imminent or overdue. The Officer is satisfied that the Applicant's H&C application will continue to be processed after the Applicant's removal and questions the timeliness of the Applicant's submission of her H&C application.

[12] Despite lacking authority to perform an H&C evaluation, the Officer considers whether medical hardship justifies a deferral of the Applicant's removal. The Officer notes that the Applicant has been diagnosed with a thyroid condition, high blood pressure, and high cholesterol. The Applicant argued that access to medication for these conditions is prohibitively expensive in Grenada. But the Officer finds that "insufficient evidence was presented to indicate that [the Applicant] will be unable to seek medical treatment upon her return to Grenada, including access to the medication that she requires." Similarly, the Officer accepts that health care in Canada is likely better than in Grenada but finds that medical evidence that the Applicant would suffer irreparable harm if returned to Grenada does not rise above "mere speculation."

[13] The Officer points out that the Applicant has family in Grenada with whom she will be reunited and who can provide support during her transition.

[14] Regarding the Applicant's request for time to arrange her affairs before removal, the Officer finds that the Applicant has known of her pending removal since her arrest in August 2016 and the initiation of her PRRA the following month. This provided the Applicant ample time to prepare for her removal. Again, the Officer finds that there is insufficient evidence

or rationale about why the Applicant requires an additional three to four months to prepare for her return to Grenada.

IV. ISSUES

[15] The following issues arise in this application:

1. Is the Officer's refusal to defer the Applicant's removal to Grenada unreasonable?
2. Is the application premature?
3. Is the application an abuse of process?

V. STANDARD OF REVIEW

[16] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[17] The standard of review applicable to an enforcement officer's decision refusing deferral of a removal order is reasonableness: *Baron v Canada (Public Safety and Emergency*

Preparedness), 2009 FCA 81 at para 25 [*Baron*]; *Escalante v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 897 at para 13.

[18] The second and third issues in this application do not engage review of the Decision. Prematurity is a question of whether the Court should exercise its discretion not to grant a remedy in the circumstances because the underlying administrative process was not completed at the time of the Decision. See e.g. *Shea v Canada (Attorney General)*, 2006 FC 859 at paras 37 and 53-61. The question of abuse of process relates to the procedure used by the Applicant in her application for judicial review of the Decision by this Court, not in the underlying administrative process.

[19] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[20] The following provisions of the *IRPA* are relevant in this application:

Designation of officers

6 (1) The Minister may designate any persons or class of persons as officers to carry out any purpose of any provision of this Act, and shall specify the powers and duties of the officers so designated.

Désignation des agents

6 (1) Le ministre désigne, individuellement ou par catégorie, les personnes qu'il charge, à titre d'agent, de l'application de tout ou partie des dispositions de la présente loi et précise les attributions attachées à leurs fonctions.

Delegation of powers

(2) Anything that may be done by the Minister under this Act may be done by a person that the Minister authorizes in writing, without proof of the authenticity of the authorization.

Délégation

(2) Le ministre peut déléguer, par écrit, les attributions qui lui sont conférées par la présente loi et il n'est pas nécessaire de prouver l'authenticité de la délégation.

…

…

Enforceable removal order

48 (1) A removal order is enforceable if it has come into force and is not stayed.

Mesure de renvoi

48 (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.

Effect

(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.

Conséquence

(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

[21] The following provisions of the *Canada Border Services Agency Act*, SC 2005, c 38 [*CBSA Act*], are relevant in this application:

Definitions	**Définitions**
2 The following definitions apply in this Act.	2 Les définitions qui suivent s'appliquent à la présente loi.
Agency means the Canada Border Services Agency established under subsection 3(1).	***Agence*** L'Agence des services frontaliers du Canada constituée par le paragraphe 3(1).
Minister means the Minister of Public Safety and Emergency Preparedness.	***ministre*** Le ministre de la Sécurité publique et de la Protection civile.
…	…
Minister responsible	**Responsabilité du ministre**
6 (1) The Minister is responsible for the Agency.	6 (1) Le ministre est responsable de l'Agence.
Delegation by Minister	**Délégation par le ministre**
(2) The Minister may delegate to any person any power, duty or function conferred on the Minister under this Act or under the program legislation.	(2) Il peut déléguer à toute personne les attributions qui lui sont conférées sous le régime de la présente loi ou de la législation frontalière.

[22] The following provisions of the *Ministerial Responsibilities Under the Immigration and Refugee Protection Act Order*, SI/2015-52, (2015) C Gaz II, 2232 [Responsibilities Order], are relevant in this application:

Definition of *Act*	**Définition de *Loi***
1 In this Order, *Act* means the *Immigration and Refugee Protection Act*.	1 Dans le présent décret, *Loi* s'entend de la *Loi sur l'immigration et la protection des réfugiés*.

…	…
Dual responsibility	**Responsabilité partagée**
3 The Minister of Public Safety and Emergency Preparedness is, in respect of those matters for which he or she is responsible under the Act, the Minister for the purposes of section 6, subsections 15(4) and 16(2.1), sections 21 and 73, subsection 77(2), sections 86, 87 and 110, subsection 146(1), section 147, subsection 167(1), sections 169, 170 and 171 and subsection 175(2) of the Act. The Minister of Citizenship and Immigration is the Minister for the purposes of those provisions in respect of all other matters.	3 Le ministre de la Sécurité publique et de la Protection civile est, à l'égard des questions dont il a la charge sous le régime de la Loi, le ministre visé à l'article 6, aux paragraphes 15(4) et 16(2.1), aux articles 21 et 73, au paragraphe 77(2), aux articles 86, 87 et 110, au paragraphe 146(1), à l'article 147, au paragraphe 167(1), aux articles 169, 170 et 171 et au paragraphe 175(2) de la Loi. Le ministre de la Citoyenneté et de l'Immigration est le ministre visé à ces dispositions dans les autres cas.

[23] The following provision of the *Department of Justice Act*, RSC 1985, c J-2 [*Department of Justice Act*], is relevant in this application:

Powers, duties and functions of Attorney General	**Attributions**
5 The Attorney General of Canada	5 Les attributions du procureur général du Canada sont les suivantes :
…	…
(d) shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada;	d) il est chargé des intérêts de la Couronne et des ministères dans tout litige où ils sont parties et portant sur des matières de compétence fédérale;

[24] The following provision of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], is relevant in this Application:

Time limitation	**Délai de présentation**
18.1 (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	18.1 (2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[25] The following provisions of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [Immigration Rules], are relevant in this application:

Form of Application for Leave	**Forme de la demande d'autorisation**
5 (1) An application for leave shall be in accordance with Form IR-1 as set out in the schedule and shall set out	5 (1) La demande d'autorisation se fait selon la formule IR-1 figurant à l'annexe et indique ce qui suit :
…	…
(b) the date and the details of the matter — the decision, determination or order made, measure taken or question raised — in respect of which relief is sought and the date on which the applicant was	b) la date et les détails de la mesure — décision, ordonnance, question ou affaire — à laquelle se rapporte le redressement recherché et la date où le demandeur en a été avisé ou en

notified of or otherwise became aware of the matter;	a pris connaissance;

[26] The following provisions of the *Federal Courts Rules*, SOR/98-106 [FC Rules], are relevant in this application:

Content of affidavits	**Contenu**
81 (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.	81 (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.
Affidavits on belief	**Poids de l'affidavit**
(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.	(2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.
Use of solicitor's affidavit	**Utilisation de l'affidavit d'un avocat**
82 Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.	82 Sauf avec l'autorisation de la Cour, un avocat ne peut à la fois être l'auteur d'un affidavit et présenter à la Cour des arguments fondés sur cet affidavit.

VII. ARGUMENT

A. *Applicant*

[27] The Applicant submits that the Officer misconstrued or failed to consider credible evidence and that the Decision is therefore unreasonable.

[28] The Applicant says that her removal to Grenada will result in the following irreparable harm and disproportionate hardships: her health will be placed at risk; loss of her source of income will prevent her from supporting her son financially; her age and gender leave her with few economic prospects in Grenada; and removal will cause collateral suffering to psychiatric residents at the Applicant's place of employment in Canada.

[29] The Applicant emphasizes that she is not seeking a permanent deferral of removal. Rather, she is seeking deferral to allow time for her H&C application to be considered.

[30] The Applicant submits that the Decision is unreasonable because it ignores credible medical evidence that her health will be at risk of deterioration if removed to a country where she could not access her prescribed medications. Evidence of the hardships she will face includes: a letter from her doctor, Dr. Jill Blakeney, dated April 18, 2017; a copy of the website for the National Insurance Scheme of Grenada; an excerpt from an International Monetary Fund report regarding Grenada; and her H&C application with supporting documentation.

[31] The Applicant says that all of this evidence was submitted "to the Respondent" before the Decision. The Applicant points out that in Justice McDonald's order granting a stay of the Applicant's removal, Justice McDonald found that,

> … the applicant has established a serious issue and irreparable harm with respect to the Officer's failure to consider her medical condition and her ongoing need for medication and whether that medication is available in Grenada. The Officer either failed to consider this issue or failed to take heed of the evidence.

[32] The Applicant says that the same evidence that was before Justice McDonald was provided to the Respondent before "the Respondent's April 20, 2017 decision."

[33] The Applicant further submits that, even if the Officer did not receive the Applicant's evidence, the Respondent's counsel had the evidence in his possession before the Decision as part of the April 21, 2017 stay hearing in this Court. The Applicant says it is reasonable to expect that the Respondent's counsel would review that evidence with the Officer before the Officer made the Decision. The Applicant says that the Respondent has not explained why the Officer was not consulted given the imminence of the stay motion hearing and the scheduled removal date.

[34] The Applicant also says that the Officer's failure to contact her doctor amounts to wilful blindness. At an interview with another CBSA officer on April 4, 2017, the Applicant signed a release allowing any medical professional to disclose her personal health information to the CBSA for the purpose of assessing the medical basis of her request for deferral. Therefore, even if Dr. Blakeney's April 18, 2017 letter was not before the Officer, the information contained in the letter could have been obtained by the Officer earlier. The Applicant submits that the

Officer's conduct amounts to reviewable error and may be a special circumstance warranting an award of costs to the Applicant.

[35] The Applicant submits that the principle of judicial comity applies to Justice McDonald's findings in the stay order. The Applicant says the case relied on by the Respondent to rebut the application of comity, *Haghighi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 372 [*Haghighi*], is distinguishable. In *Haghighi*, the court on judicial review decided a different issue that was not considered in the stay motion order. The Applicant says that here, Justice McDonald's order determined the same issue before the Court, that is, whether the Officer failed to consider the Applicant's medical condition.

[36] The Applicant further asserts, without elaboration, that the Decision's adverse impact on her health breaches her rights under ss 7 and 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

B. *Respondent*

(1) Merits of the Decision

[37] The Respondent submits that the Decision is reasonable in light of the Officer's limited mandate and the lack of evidence submitted by the Applicant. An officer's discretion in deferring removal "is limited to cases where there is a serious, practical impediment to the removal": *Hernandez Fernandez v Canada (Citizenship and Immigration)*, 2012 FC 1131 at para 43. In

Baron, above, at para 51, the Federal Court of Appeal held that, while there are circumstances that may affect 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" (emphasis omitted).

[38] The Respondent says that the Applicant did not submit evidence substantiating her claim that she would be unable to access and afford her medication in Grenada. Evidence of the risk faced must be sufficient to defer removal. See *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144 at para 27. Lack of evidence establishing the nature of the health care and pharmaceutical system in Grenada and the overall availability, affordability, and quality of health care available renders the Officer's finding about the insufficiency of the Applicant's evidence reasonable and entitled to deference from this Court. Even if Dr. Blakeney's letter is considered part of the evidence before the Officer, the Respondent says that it speaks in terms of hypotheticals and presumptions. The letter does not speak to the state of health care in Grenada and is premised on the Applicant's inability to access her medication there.

[39] The Respondent submits that the requested deferral was not temporary because there was no evidence establishing the imminence of the processing of the Applicant's H&C application. The Respondent points out that the Federal Court of Appeal has held that "H&C applications are not intended to obstruct a valid removal order." H&C applicants determined to be not at risk if returned to their home country are expected to make future requests for permanent residence in Canada from their home country. See *Baron*, above, at para 87.

[40] The Respondent submits that the Applicant's claims of *Charter* violations lack substantive pleading and should be disregarded by the Court. The Supreme Court of Canada has held that *Charter* decisions should not be made in a factual vacuum as this "would trivialize the *Charter* and inevitably result in ill-considered opinions": *Mackay v Manitoba*, [1989] 2 SCR 357 at 361.

[41] The Respondent says that the principle of judicial comity does not apply between Justice McDonald's stay order and the issue to be decided in this application. Considering a similar argument in *Haghighi*, above, at paras 20-21, Justice Snider held that comity did not apply because the determination that there is a serious issue to be determined for the purpose of granting a stay is a different issue from the determination that an enforcement officer did not err. Justice Snider also noted that stay motions are often brought on an urgent basis and are rendered with haste, and that the responding party may not have time to prepare effectively. See *Haghighi*, above, at para 14. The Respondent submits that it is now in a position to fully address what evidence there was before the Officer and that the Court is not bound to adopt the substance of Justice McDonald's stay order.

(2) Procedural Concerns

(a) *Prematurity*

[42] The Respondent submits that this application is premature as it challenges a decision which does not exist. The Respondent points out that the application for leave and judicial review was filed on April 18, 2017 and purports to challenge CBSA Officer Carly Worsley's

decision to refuse the Applicant's deferral request without reasons. The application for leave and judicial review states that this refusal occurred on April 14, 2017. The only refusal of a deferral request included in the Applicant's record is the Decision. The Decision refuses the Applicant's deferral request of April 6, 2017 and is dated April 20, 2017.

[43] Subsection 18.1(2) of the *Federal Courts Act* and s 72(1) of *IRPA* both require that an application for judicial review be filed after the decision at issue. Rule 5(1)(b) of the Immigration Rules states that an application for leave shall set out "the date and the details of the matter — the decision, determination or order made, measure taken or question raised — in respect of which relief is sought and the date on which the applicant was notified of or otherwise became aware of the matter." The Respondent says that this application challenges a different decision from the deferral Decision, dated April 20, 2017, that is included in the Applicant's record.

[44] The Federal Court of Appeal has held that, in stating the grounds to be argued in a notice of application for judicial review, it is necessary to plead the material facts that support granting the relief sought. Further, the Court of Appeal stated that "[i]t is an abuse of process to start proceedings and make entirely unsupported allegations in the hope that something will later turn up." See *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paras 40-45 [*JP Morgan*].

[45] In *Alfaka Alharazim v Canada (Citizenship and Immigration)*, 2010 FC 1044 at para 39, this Court distinguished between a decision-maker's process of rendering a decision and the

decision itself. The Respondent submits that a premature application for judicial review filed while the decision is in the process of being rendered can result in a waste of court resources. The decision may not turn out as anticipated, or the grounds for judicial review could be significantly different from the decision rendered. This Court has held that a premature application for review of a deferral decision can be a special circumstance justifying the awarding of costs. See *Jackson v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 56 at para 16.

(b) *Fragmentation of the Administrative Process*

[46] In support of her application for judicial review and stay motion, the Applicant filed affidavits dated April 18, 2017 and April 19, 2017 with this Court on April 19, 2017. This was before the Decision was rendered on April 20, 2017. The Respondent says that this evidence was not submitted to the Officer.

[47] The Respondent points out that the Applicant's affidavit does not indicate that the evidence was sent to the Officer. The exhibit attached to the Applicant's affidavit is itself an affidavit sworn by a law clerk in the Applicant's counsel's office, created for the purpose of this application, and makes no claim that the evidence was submitted to the Officer. Consequently, the Respondent filed an affidavit in which the Officer attests that he was not provided with the evidence at issue, particularly the letter from Dr. Blakeney which was referred to in Justice McDonald's stay order, before he rendered the Decision. In the Applicant's reply, she denies that the evidence was not submitted to the Officer and claims that it was provided to the Officer with citation to the evidence. She then argues that, even if she did not submit the

evidence to the Officer, the Attorney General, as counsel for the Respondent, should have reviewed and consulted with the Officer about the evidence before the Court before the Officer rendered the Decision.

[48] The Respondent submits that the Applicant's approach fragments the administrative process. As a general rule, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until those processes are completed or effective remedies have been exhausted. One of the purposes of this rule is to prevent fragmentation of the administrative process. See *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 30-33. The Respondent says that the Applicant filed the evidence with the Court and served it on responding counsel for the purpose of adversarial litigation, but now asserts that the Court can make an adverse finding on the merits of the Decision based on evidence that she did not provide to the Officer. This conflates different processes and roles.

[49] The Respondent points out that the Minister of Public Safety and Emergency Preparedness' responsibility for making decisions under s 48 of the Act is legislatively delegated to an officer of the CBSA. See *IRPA*, s 6; *CBSA Act*, ss 2, 6; Responsibilities Order, s 3. Delegates personally exercise discretion within the bounds of the authority granted to them while the Minister retains accountability for their decisions. See *The Queen v Harrison* (1976), [1977] 1 SCR 238 at 245-46; *Sing v Canada (Citizenship and Immigration)*, 2007 FC 361 at paras 68-69. All administrative bodies have a duty to comply with the rules of natural justice and follow the rules of procedural fairness: *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC

11 at para 75. Part of this duty is ensuring that decisions are made impartially and independently: *Rosenberry v Canada (Citizenship and Immigration)*, 2010 FC 882 at para 26.

[50] In comparison, the Attorney General of Canada has regulation and conduct of all litigation for or against the Crown or any department: *Department of Justice Act*, s 5(d). The Attorney General's role in defending administrative decisions protects the impartiality of administrative decision-makers by not requiring the decision-maker to engage in the adversarial process directly. Compare *Northwestern Utilities Ltd v Edmonton* (1978), [1979] 1 SCR 684 at 709. On judicial review, administrative decision-makers do not have full participatory rights and "face real restrictions on the submissions they can make": *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at para 44 [*Forest Ethics*]. But "because the Attorney General is also the defender of the public interest and has a duty to uphold the rule of law, there may be limits to how vigorously he should properly defend the merits of a public body's decision": *Douglas v Canada (Attorney General)*, 2013 FC 451 at para 67. See also *Canada (Attorney General) v Cosgrove*, 2007 FCA 103 at para 51.

[51] The Respondent says that one limit created by the Attorney General's role as defender of the public interest is that the Attorney General should not engage in activity that undermines or appears to undermine an administrative decision-maker's independence. Independence could be jeopardized if counsel who is adversarial to an applicant in a judicial review proceeding were to advise the administrative decision-maker during its decision-making process. See *2747-3174 Québec Inc v Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at paras 54-56; *Sawyer v Ontario (Racing Commission)* (1979), 24 OR (2d) 673 (WL Can) at para 7 (CA) [*Sawyer*]. The

Respondent says that concerns over impartiality and independence can arise from the manner in which evidence is provided to an administrative decision-maker. See *Douglas v Canada (Attorney General)*, 2014 FC 299 at para 197. The Respondent therefore submits that the Attorney General cannot provide additional evidence to, or consult with, the Officer before the Decision as the Applicant is proposing. To do so would give rise to a reasonable apprehension of bias.

[52] The Respondent submits that a further concern arising from the Applicant's proposal is that communications between the Attorney General and those it represents could be subject to litigation privilege. If consultations are subject to privilege it could prevent the Court from being able to properly review the reasons for decisions. For examples of the court's ability to properly review being frustrated by an inability to access the decision-maker's reasons, see e.g. *Canada v Kabul Farms Inc*, 2016 FCA 143 at paras 33, 35, and 43, and *Sawyer*, above, at para 8.

[53] The Respondent submits that these concerns do not arise, however, because the Officer was not presented with the evidence in question before the Decision. The Respondent points out that the same hand-written numbers on the copy of Dr. Blakeney's letter in the Certified Tribunal Record appear on the copy in the Applicant's leave record. The Officer attests that he only received the documents on June 15, 2017 when they were provided to him to determine whether they were in the file before the Decision was rendered on April 20, 2017. The Officer also says that the last correspondence he received from the Applicant's counsel regarding the deferral request was on April 7, 2017.

[54] The Respondent says that arguments that access to a document by one administrative actor entails access by other actors attempts to merge the separate identities of actors in the administrative process. The Federal Court of Appeal warned against this type of argument in *Canada v Pathak*, [1995] 2 FCR 455 at para 21 (CA).

(c) *The Applicant's Assertions*

[55] The Respondent submits that the Applicant's manner of asserting that the disputed evidence was before the Officer raises additional concerns. The Respondent notes that the testimony in the Applicant's affidavit depends on what her counsel informed her was provided to the Officer and is vague regarding who the Respondent was and to whom her counsel provided the evidence. The Applicant then failed to provide evidence supporting her assertion.

[56] The Applicant attests that she bases her knowledge of what was provided to the Respondent on what she was told by her counsel. In *Seymour Stephens v Canada (Citizenship and Immigration)*, 2013 FC 609 at para 29, this Court held that this practice indirectly violates FC Rule 82 and can amount to hearsay if not limited to facts within the affiant's personal knowledge as required by FC Rule 81.

[57] The Respondent also points out that the Applicant denied that the Officer had not been served in her reply to the Respondent's memorandum at leave, but declined to submit a further affidavit in support of this claim after leave was granted. In the circumstances, the Respondent says that there is no evidence supporting the Applicant's denial.

[58] The Respondent submits that the Applicant's counsel may have had a duty to disclose to the Court whether the evidence was submitted to the Officer. The evidence at issue was significant to Justice McDonald's stay order and the Applicant now requests that this Court determine the reasonableness of the Decision based on the same evidence. In *Logeswaren v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1374 at paras 13-19, quoting *Mueller-Hein Corp v Donar Investments Ltd* (2003), 29 CLR (3d) 143 at paras 53-56 (Ont Sup Ct), this Court stated that a failure to inform the Court of facts within counsel's knowledge that would have avoided confusion if disclosed could be a circumstance justifying costs against counsel personally.

[59] Rather than providing relevant evidence to the Court through a further affidavit, the Applicant's reply makes the argument that, even if the evidence at issue was not served on the Officer, it was not her counsel's responsibility to do so. The Respondent says that the Applicant's abandoning of her claim that the Officer was served does not remedy the failure to disclose to the Court material facts within her counsel's knowledge.

(d) *Abuse of Process*

[60] The Respondent submits that the Applicant's proposition that, in prematurely engaged litigation, it is the Attorney General's responsibility to provide evidence filed with the Court to an administrative decision-maker could allow for an abuse of process.

[61] The Respondent says that this proposition would allow an applicant to hold back information from the administrative decision-maker to bolster a challenge on judicial review.

The Attorney General would be obliged to determine which evidence was before the decision-maker and advocate on the applicant's behalf by presenting this evidence to the decision-maker. Applicants could take advantage of the Attorney General not opposing every premature application in urgent stay motions and distort the evidentiary record before the Court. And the proposition would permit an applicant's counsel to abdicate her own responsibility to submit evidence on behalf of her client to the administrative decision-maker.

[62] The Supreme Court of Canada has stated that "[t]he doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute": *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 41. The doctrine derives from the inherent power of the court to prevent misuse of procedure and focusses less on the interest of the parties than the integrity of the justice system. See *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at paras 35-44. As such, it "captures conduct short of bad faith that nonetheless risks undermining the integrity of the justice system": *Canada (Attorney General) v Barnaby*, 2015 SCC 31 at para 10. The Respondent says that the Applicant's premature application and reference to a deferral decision that does not exist is an example of the sort of unsupported allegations the Federal Court of Appeal referred to as an abuse of process in *JP Morgan*, above, at para 45.

(e) *Evidence on Judicial Review*

[63] The Respondent submits that the Applicant's evidence does not fall into any of the recognized exceptions to the general rule against courts receiving fresh evidence in an application for judicial review.

[64] Because Parliament gives administrative decision-makers jurisdiction to determine the merits of certain matters, it is the role of the decision-maker to make findings of fact. Consequently, the Court "cannot allow itself to become a forum for fact-finding on the merits of the matter": *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Access Copyright*]. Therefore, the evidentiary record on judicial review is limited to the evidentiary record that was before the decision-maker and evidence going to the merits of the matter that was not before the decision-maker is not admissible in an application for judicial review. See *Access Copyright*, above, at para 19; *Forest Ethics*, above, at para 43.

[65] The Federal Court of Appeal, in *Access Copyright*, above, at para 20, recognized three exceptions to this general rule: background information that assists the court in understanding the relevant issues; evidence of procedural defects; and evidence highlighting the complete absence of evidence before a decision-maker. The Respondent says that the Applicant's additional evidence does not fit into any of these categories. Further, the prematurity of the Applicant's application deprives this Court of a full record and encourages the imposition of a correctness standard with respect to a question about which the Officer is owed deference. See *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 36.

[66] The Respondent requests that the application for judicial review be dismissed and says that the Applicant's request for costs is unwarranted.

VIII. ANALYSIS

[67] The Applicant says that, in refusing her deferral request, the Officer ignored or misconstrued important medical evidence:

> 16. The panel's finding that the Applicant was removal ready in the face of credible medical evidence of the Applicant's medical conditions and requirement of prescription medication to manage her health conditions, was unreasonable and completely missed the point, that removal given her health conditions would be a risk to her health and could trigger a deterioration in her health in a country where she could not access the proper treatment and medication.
>
> Reasons for Decision page 3, Record Tab 2; Affidavit of Maria Williams sworn May 15, 2017, paragraph 11, Exhibit 10, pages 248-249; Record Tab 13
>
> Misconstrued/lgnored Relevant Evidence
>
> 17. The panel's misconstruance/ignoring of the following relevant evidence amounted to reviewable error:
>
> a. Medical report of Dr. Blakeney dated April 18, 2017 (Affidavit of Maria Williams, sworn May 16, 2017, Exhibit 10, pages 248-249; Record Tab 13)
>
> b. Copy of the website for the National Insurance Scheme of Grenada (Affidavit of Maria Williams, sworn May 16, 2017, Exhibit 11, pages 255-256; Record Tab [*sic*]
>
> c. Copy of an excerpt from the International Monetary Fund's "2014 Article IV Consultation and Request for An extended Credit Facility Arrangement – Staff Report and Press Release" (Affidavit of Maria Williams, sworn May 16, 2017, Exhibit 11, page 259; Record Tab 14)
>
> d. Humanitarian and Compassionate Application and supporting documentation (Affidavit of Maria Williams, sworn May 16, 2017, Exhibit 4, page 62-105; Record Tab 7)
>
> [Emphasis omitted.]

[68] In the Decision of April 20, 2017, the Officer has the following to say on point:

> I note that insufficient objective evidence that rise[s] above mere speculation was provided to indicate that Ms. Williams would suffer irreparable harm or risk, based upon her circumstances. I note, that based upon the information provided, Ms. Williams has a sister in Grenada, who will be able to provide the emotional support to assist her in her transition back home. I also note that she has a son in Grenada, with whom she will be reunited with.

[69] It appears from the record before me in this application that the medical evidence which the Applicant says was misconstrued or overlooked by the Officer was never, in fact, placed before the Officer before he made the Decision. In oral submission before me, the Applicant conceded that she did not directly submit the medical evidence at issue to the Officer. She says, however, that the Officer must be taken to have had constructive knowledge of this evidence for two reasons in particular.

[70] First of all, she argues that in providing the signed medical release form, she was led to believe, and was entitled to assume, that the Officer would contact Dr. Blakeney directly to obtain any medical information that was relevant to the Decision.

[71] In her affidavit filed for this application, the Applicant simply says that she "signed a release authorizing the Respondent to speak to my doctor, a copy of which is attached hereto as Exhibit 7" (emphasis omitted). The Applicant does not say that, in signing the medical release, she was given to understand that the Officer would undertake to contact her doctor and obtain the medical evidence presently at issue. In oral argument, counsel for the Applicant argued that the terms of the medical release itself make it clear that the Officer would use the release to obtain the required medical information.

[72] A reading of the medical release form, however, makes it clear that it is in standard form and merely authorizes the release of medical information to allow the Officer to assess the medical basis for deferring the Applicant's removal from Canada. It does not say, or in my view even imply, that the Officer who makes the Decision will assume the responsibility of obtaining medical evidence to assist the Applicant's deferral request.

[73] As the Applicant's affidavit makes clear, the Applicant's whole understanding of the deferral process and her obligations were totally dependent upon her legal counsel who accompanied her to the immigration interview. Experienced legal counsel knows full well that, as a general rule, it is the responsibility of an applicant to provide all of the information that they want an officer to consider as part of the deferral request. See *John v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 420 at para 24. Experienced counsel must also be taken to know that the signing of a medical release does not, *per se*, relieve an applicant of this responsibility. And I have no evidence before me that removal officers, either in the experience of Applicant's counsel or as a matter of general practice, assume the responsibility of contacting medical practitioners so that applicants can assume that signing a release is all they need to do, and that this relieves them of the responsibility to provide the evidence to support their deferral request.

[74] I could understand that, if the Officer had represented he would do this, then procedural fairness issues would come into play. But there is no evidence of any such representation. Counsel do not leave such matters to removal officers because, by doing so, they would lose control of the information that the officers obtain. In order to represent clients properly, counsel

cannot allow the decision-maker to assemble the evidence that the decision-maker may think is appropriate for the decision. It is the Applicant's right and obligation to place before a removal officer the evidence they believe will assist their application. If an officer were to contact an applicant's doctor, for instance, there is no telling what questions might be asked or what misunderstandings might arise. This could easily give rise to a reviewable error on the basis of procedural fairness issues. Medical release forms allow checks to be made on the evidence and grounds for deferral put forward by applicants. They do not require or allow officers to assemble the medical record on behalf of an applicant.

[75] In the absence of a specific undertaking by the Officer in this case, there is no evidence to support a legitimate expectation that the Officer undertook to relieve the Applicant and her counsel of the need to submit the medical evidence she required to support her case.

[76] It was, in any event, Applicant's counsel who did eventually obtain the medical evidence in this case so that it could be used in the stay motion. That evidence was obtained quickly and easily and there is nothing to suggest that it could not have been obtained and submitted with the deferral request or at any time before the Decision was made. Applicant's counsel speaks of the timing crunch that can occur when someone is required to report for removal and the decision is not made in a timely way. But that is not an issue here. The Applicant's request for deferral was received by the CBSA on April 6, 2017 for a removal scheduled for April 24, 2017. There is no explanation as to why the medical evidence was not submitted with the request or at any other time before Applicant's counsel finally decided to obtain it for the purposes of the stay motion.

[77] The Applicant also alleges that the Officer had some kind of constructive notice of this medical evidence because it was provided to Respondent's counsel as part of the record that went before Justice McDonald for the stay motion:

> 7. Furthermore, if, as alleged by the Respondent, the Respondent officer did not receive the said evidence from the Applicant, it [is] clear that the Respondent counsel had the said evidence in its possession well prior to the Respondent decision of April 20, 2017. In its preparation for the April 21, 2017 stay motion hearing, one might reasonably expect the Respondent counsel to review the said evidence with the officer prior to the officer's April 20, 2017 decision. Respondent counsel does not deny timely receipt of the said evidentiary materials. The Respondent counsel offers no explanation as to why said counsel did not consult in a timely way with the Respondent officer regarding the import of the Applicant's said evidentiary materials, especially given the imminence of both the stay motion hearing and then scheduled removal date.

[78] As the Respondent rightly points out, this attempt to make Respondent's counsel responsible for placing the Applicant's evidence before the Officer gives rise to many complex procedural issues, not the least of which is the conflict of interest issues that arise if opposing counsel is required to assume responsibility to act in the Applicant's interest. There is no point in attempting to explore and resolve all of the permutations of placing this obligation upon Respondent's counsel. As I pointed out above, there was nothing to prevent Applicant's counsel from placing the medical evidence before the Officer in a timely way before the Decision was made. The Applicant cannot delegate this responsibility to the Officer or to Respondent's counsel. At the oral hearing of this matter, Applicant's counsel put forward the argument that the Applicant should not be penalized for counsel's failure to submit the medical evidence needed for the deferral request earlier in the process. There is no reason, of course, why the Respondent

should be penalized for that failure and be fixed with the responsibilities that Applicant's counsel is now attempting to foist on the Respondent.

[79] The Applicant also suggests, for reasons of judicial comity or otherwise, that I should simply adopt the conclusions of Justice McDonald as set out in the order she issued when granting the stay of removal. Justice McDonald's decision reads, in relevant part, as follows:

> The applicant is a 67 year old woman who has been in Canada for 28 years. I am satisfied that the applicant has established a serious issue and irreparable harm with respect to the Officer's failure to consider her medical condition and her ongoing need for medication and whether that medication is available in Grenada. The Officer either failed to consider this issue or failed to take heed of the evidence. This resulted in an incomplete consideration of the risk to the applicant's health if she cannot access medication in Grenada. There is contradictory evidence as to whether her medication is available in Grenada and, if so, if the applicant has the financial means to purchase the medication. A medical letter dated April 18, 2017 from her family physician who has treated her for 23 years states "…if she has to return to Grenada and she is unable to afford medical care and medications there…her health will quickly deteriorate." On this basis I am satisfied that the applicant meets the first two parts of the *Toth* test.

[80] I do not know what oral arguments were made before Justice McDonald, but it is clear that she did not have before her the Officer's affidavit that makes it clear that he never saw the medical evidence at issue here before he made his Decision of April 20, 2017. Also, the jurisprudence is clear that I am not bound to follow interlocutory injunction decisions which often follow a hurried process (as happened here) and where I have the advantage of different and/or fuller evidence and more time for reflection. See *Haghighi*, above, at paras 12-19; *Williams v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 274 at paras 28-29; *Roy Doman v Canada (Public Safety)*, 2012 FC 435 at para 4.

[81] The essence of the Decision is that

> …insufficient evidence was presented to indicate that Ms. Williams will be unable to seek medical treatment upon her return to Grenada, including access to the medication that she requires. Moreover, I note that insufficient evidence was presented to indicate that Ms. Williams in [*sic*] unfit to travel at this time.

Given the evidence that was before the Officer when the Decision was made, this is not an unreasonable conclusion.

[82] I realize that the Applicant is a vulnerable person and that she does have serious medical issues that should be addressed fully before she is required to leave Canada. Her H&C application is still underway and, having been granted a stay of removal, my conclusions in this application will not prevent her from seeking deferral again if she is asked to leave before the H&C application is finalized, at which time she will be able to place a full medical record before the removal officer concerned and avoid the problems that have arisen in this case.

IX. CERTIFICATION

[83] The Applicant has raised the following questions for certification:

> 1) Where an applicant files an application for leave and for judicial review challenging a deferral decision that has yet to be rendered and seeking a motion for a stay of removal, and the identity of the administrative decision maker is unknown to the applicant, does service of evidence prior to the issuance of the administrative decision, on the Attorney General, engaged under s. 5(d) of the [Department of] Justice Act to respond to the motion, constitute service on the administrative decision maker?
>
> and,

2) Is there a breach of procedural fairness / natural justice, or doctrine of legitimate expectation, where a CBSA officer/delegate refuses a deferral request after failing without reason to action a signed medical release provided by the applicant at the request of the CBSA officer, which applicant has informed the CBSA that there are medical concerns related to a pending removal, which release form authorizes the CBSA and/or their delegate to contact and ask questions of any medical professional referenced in the request to defer removal, in order to assess the medical basis for the request to deter?

[84] In *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178, the Federal Court of Appeal confirmed the principles to be applied when certifying questions:

> [15] This Court in *Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] F.C.J. No. 1637 (QL), 176 N.R. 4 [*Liyanagamage*]) set the principles that should be considered when determining whether a question should be certified:
>
> > [4] In order to be certified pursuant to subsection 83(1), a question must be one which, in the opinion of the motions judge, transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application (see the useful analysis of the concept of "importance" by Catzman J. in *Rankin v. McLeod, Young, Weir Ltd. et al.* (1986), 57 O.R. (2d) 569 (Ont. H.C.)) but it must also be one that is determinative of the appeal. The certification process contemplated by section 83 of the *Immigration Act* is neither to be equated with the reference process established by section 18.3 of the *Federal Courts Act*, nor is it to be used as a tool to obtain from the Court of Appeal declaratory judgments on fine questions which need not be decided in order to dispose of a particular case.
>
> [16] In *Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168, [2014] 4 F.C.R. 290 [*Zhang*], at paragraph 9, this Court reaffirmed these principles. It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as

> contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Liyanagamage*, at paragraph 4; *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89, [2004] F.C.J. No. 368 (QL) at paragraphs 11 and 12 [*Zazai*]; *Varela* at paragraphs 28, 29, and 32).

[85] The Applicant has cited no jurisprudence or principle that, in my view, could possibly suggest a positive answer to either of these questions on the facts of this case. Applicant's counsel is simply attempting to absolve himself of responsibilities that were clearly his, e.g. his failure to ensure that any officer who decided the deferral request had the evidence necessary to assess the Applicant's medical condition and its implications for any removal to Grenada. These issues do not need the guidance of the Federal Court of Appeal.

JUDGMENT IN IMM-1736-17

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. No question is certified.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1736-17
STYLE OF CAUSE:	MARIA WILLIAMS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
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DATED:	JANUARY 30, 2018

APPEARANCES:

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