Federal Court  Cour fédérale

Date: 20180305

Docket: IMM-2469-17

Citation: 2018 FC 249

Ottawa, Ontario, March 5, 2018

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

TINUADE IBUKUN ADESEMOWO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Tinuade Ibukun Adesemowo [the Applicant], seeks judicial review of the decision of an Immigration Officer, dated June 2, 2017, which refused her request to defer her scheduled deportation pursuant to section 48 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] until the Court determined her motion for reconsideration of the Order dated February 20, 2017 which dismissed her Application for Leave and for Judicial Review of her negative Pre-removal risk assessment [PRRA].

[2] For the reasons that follow, I find that the Application is moot.

I. Background

[3] The Applicant's immigration history is described in some detail to provide the necessary context for this decision.

[4] The Applicant, a citizen of Nigeria, arrived in Canada on February 24, 2016. She made a claim for refugee protection on March 3, 2016 alleging persecution in Nigeria on the basis of her sexual orientation. A section 44 Report was issued due to the Applicant's failure to comply with paragraph 20(1)(a) of the Act, given that she entered Canada without a visa, using a passport of another person.

[5] On March 17, 2016, the Applicant was arrested and detained by CBSA, on the basis that she was unlikely to appear for her Minister's Delegate review under subsection 44(2). On the same day, immigration officials discovered that the Applicant had been convicted of importing drugs in the United Kingdom in 2007, had been sentenced to seven years in prison, and had served three years before being deported by the United Kingdom to Nigeria. The Applicant was issued a further subsection 44(1) report, on the basis that she was inadmissible to Canada for serious criminality, pursuant to paragraph 36(1)(b) of the Act.

[6] On May 19, 2016, the Applicant was found inadmissible to Canada and a deportation order was issued. As a result, the Applicant is excluded from refugee protection in Canada.

[7] The Applicant applied for a pre-removal risk assessment (PRRA). In circumstances where an applicant is inadmissible to Canada, the PRRA is restricted and considers only the factors set out in section 97 of the Act. At her restricted PRRA, the Applicant again argued that she was at risk in Nigeria due to her sexual orientation.

[8] On September 30, 2016, the Applicant's restricted PRRA was dismissed. The PRRA Officer made adverse credibility findings about the basis for the Applicant's claim, among other findings.

[9] The Application for Leave and for Judicial Review of the PRRA decision was refused on February 20, 2017, due to the Applicant's failure to perfect the application within the statutory time period [the dismissed PRRA Application]. The Applicant submits that she had ineffective counsel who missed the filing dates. The record includes an affidavit from the Applicant's previous counsel which responds to the complaints made. In it, the counsel notes that, *inter alia*, she was of the opinion that there was no merit in seeking judicial review of the negative PRRA decision, however, she did not promptly advise her client of this opinion.

[10] On May 23, 2017, the Applicant was advised that her deportation was scheduled for June 3, 2017.

[11] On May 30, 2017, the Applicant filed a motion to vary or set aside and reconsider her dismissed PRRA Application.

[12] On May 31, 2017, after business hours, the Applicant wrote to the CBSA requesting that her deportation scheduled for June 3, 2017 be deferred pending the outcome of her motion to vary or set aside and reconsider the dismissed PRRA Application, which she had filed the previous day. On June 1, 2017, the Applicant provided written submissions in support of her request for deferral of her removal in which she also raised her medical conditions and reiterated her fear for her safety in Nigeria due to her sexual orientation.

[13] The Officer's decision, which is now the subject of this judicial review, was issued the following day, on June 2, 2017. The Officer refused to defer the Applicant's removal.

[14] The Applicant simultaneously filed a motion in this Court to stay the decision of the Officer and, as a result, stay her removal from Canada.

[15] On June 2, 2017, Justice Southcott granted the stay of the decision of the Officer, finding that the test for a stay as articulated in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA) – which requires that the Applicant establish: (1) that there is a serious issue to be tried; (2) that she would suffer irreparable harm by reason of her removal between now and the time this Application is determined; and, (3) that the balance of convenience lies in her favour – was met.

[16] On July 24, 2017, the Court dismissed the Applicant's motion to set aside and reconsider her February 20, 2017 dismissed PRRA Application.

[17] As a result, the event and the point in time to which the Applicant sought deferral of her removal have passed.

II. The Decision Under Review – the Officer's Decision to Defer Removal

[18] The Officer noted his statutory obligation, pursuant to subsection 48(2) of *IRPA*, to enforce the removal order against the Applicant "as soon as possible" as well as his limited discretion to defer removal. The Officer noted that all of the evidence submitted by the Applicant had been reviewed and carefully considered.

[19] The Officer recounted the procedural history as noted above up to the date of his decision, including the Applicant's claim that her previous counsel had erred in failing to perfect her application for leave and for judicial review of her negative PRRA. The Officer noted the Applicant's erroneous assertion that she would have been entitled to an automatic, statutory stay had her previous counsel perfected the application.

[20] The Officer noted that it was not his role to assess the merits of the Applicant's application for leave and for judicial review of her negative PRRA, which the Applicant argued would have been granted leave by the Court but for the error of her former counsel. The Officer noted that his role was not to perform an "adjunct risk assessment", but rather to determine whether compelling evidence had been presented to justify the delay of removal for the assessment of allegations of new risk or new evidence of risk that would expose the Applicant to the risks set out in section 97.

[21] The Officer noted that the Applicant's claimed risk due to her sexual orientation had already been assessed in her PRRA. The Officer also found that documentary evidence submitted by the Applicant did not indicate that the situation in Nigeria with respect to the LGBT population had deteriorated significantly since the time of her PRRA.

[22] The Officer addressed the Applicant's submissions that her mental health condition put her at risk, including with respect to the stigma she would face as a result. The Officer found that this was not new and compelling evidence, noting that it had been considered by the PRRA Officer. The Officer found that the risks related to the Applicant's mental health conditions did not post-date her PRRA application. Accordingly, the Officer found that there was insufficient new and compelling evidence of risk to justify that a deferral was required for a further risk assessment.

[23] The Officer then considered the Applicant's medical issues, noting that his or her limited discretion was focused on whether there was evidence of serious detrimental harm which would result from enforcing the removal as scheduled.

[24] The Applicant had alleged that she had been diagnosed with Fibroid, ovarian cysts, an eating disorder, depression and PTSD. The Applicant's submissions claimed that "the opinion of [her] medical team are [*sic*] quite chilling and confirms that removing [her] to Nigeria will not only deprive her of the medical support that she had been receiving and the medical team, but it may well lead to her untimely death".

[25] The Officer reviewed the medical evidence from the Vanier detention centre's medical team, where the Applicant had been detained for several months. The evidence indicated that the Applicant had had a recent ultrasound, which raised no concerns and which found that she was "fit to travel".

[26] The Officer also noted the psychiatric report of Dr. Harrison, which stated that the Applicant would require a "supporting, nurturing environment for optimal mental health."

[27] The Officer concluded that there was insufficient medical evidence to indicate that the Applicant's health would suffer irreparable harm upon return to Nigeria. In addition, there was insufficient evidence presented to indicate that the Applicant would not be able to access or receive the necessary medical treatment in Nigeria. The Officer noted that the Applicant's claims that deportation "may well lead to her untimely death" were speculative and not supported by any objective evidence.

[28] The Officer also noted the Applicant's personal circumstances: she is criminally inadmissible to Canada; she had been in immigration detention since her arrest in March 2016; she has no family in Canada; her brother, sister and father are living in Nigeria; and, she would have "some" family support in Nigeria.

[29] The Officer concluded that, based on all the evidence reviewed, he or she could not find that removal would expose the Applicant to the risks set out in section 97. As a result, there were insufficient grounds to warrant a deferral of removal.

III. The Decision to Stay the Applicant's Removal

[30] This Court allowed the Applicant's June 2, 2017 motion to stay the decision of the Officer – and as a result stay her removal to Nigeria – on the basis that a serious issue had been raised regarding the Officer's reliance on the medical report from the Vanier medical team. Justice Southcott found that the medical opinion, including that the Applicant was fit to fly, had not been disclosed to her and that this raised an issue of procedural fairness. Justice Southcott was also satisfied that the Applicant had established irreparable harm, given that the harm alleged was related to her asserted medical conditions.

IV. The Issues

[31] The Applicant argues that the Officer breached procedural fairness by relying on medical evidence, which the Applicant submits that she should have been presented with and given an opportunity to respond. She also argues that the decision is not reasonable because the Officer ignored or misapprehended evidence of the risks faced by the Applicant and fettered his discretion in denying the deferral request.

[32] In my view, the first issue to determine is whether this Application for Judicial Review is moot, given that the Applicant sought to defer her removal until her motion requesting reconsideration of her dismissed PRRA Application was determined. That event has already occurred; the Court dismissed the motion on July 24, 2017.

V. The Standard of Review

[33] An Officer's decision on a request to defer removal is reviewed on the reasonableness standard (*Baron v Canada (Minister of Public Safety and Emergency Preparedness*), 2009 FCA 81 at para 25, [2010] 2 FCR 311 [*Baron*]).

[34] Questions of procedural fairness are reviewed on the correctness standard (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339).

[35] Questions of mootness are also reviewed on the correctness standard (*Baron* at para 24).

VI. Is this Application for Judicial Review Moot?

[36] As noted above, the Applicant sought to defer her removal until the determination of her motion for reconsideration of her February 20, 2017 dismissed PRRA Application. That motion was dismissed on July 24, 2017. The PRRA decision, which found that the Applicant would not face a risk pursuant to section 97, is therefore final. The event and key reason for deferral of removal has passed.

[37] The Applicant submits that the Application is not moot, but that if it is, the Court should exercise its discretion to consider its merits.

[38] The Respondent, in written submissions at the leave stage, argued that the Application is moot. The Respondent noted that regardless of the outcome of this judicial review, the Applicant

remains inadmissible to Canada and will face a future removal order, which she could again seek to defer. The Respondent also noted that if the request for deferral is refused, the Applicant could again seek judicial review. The Respondent added that this calls into question of the purpose of pursuing this Application. However, at the hearing of this Application, the Respondent appeared to take the position that the Court should determine the Application on its merits given that leave for judicial review had been granted and both parties had filed written submissions and had appeared before the Court.

[39] Despite that the Court has heard the arguments on the merits of this Application, I question why the Court should consider the correctness or reasonableness of the Officer's decision. The stay of the Officer's decision has given the Applicant what she requested – a deferral of her removal until the determination of her dismissed PRRA as well as additional time for the treatment of her medical conditions. However, she remains inadmissible to Canada. Her risk upon return to Nigeria was fully assessed in the PRRA, and that decision is final. As the Respondent notes, it may now issue another Direction to the Applicant to Report for Removal, which will trigger the possibility of the Applicant requesting a deferral of that removal if sufficient grounds are advanced. If refused, the Applicant could once again seek a stay of that Order from this Court. The outcome of this Application for Judicial Review will have no practical effect on the Applicant because the Officer's decision was based on the Applicant's request to defer removal to an event which has already occurred.

[40] In *Baron*, the Federal Court of Appeal considered when a judicial review of a decision refusing a deferral request was moot. The Court of Appeal noted that the characterization of the

request for the deferral is a relevant consideration. The Court of Appeal canvassed the relevant jurisprudence, including *Amsterdam v Canada (Minister of Citizenship and Immigration*), 2008 FC 244, [2008] FCJ No 303 (QL) [*Amsterdam*] where Justice Strayer found that an application for judicial review was moot because a stay of removal was granted to permit the applicant to attend two events, which had since passed. In *Amsterdam*, Justice Strayer refused to certify a question for appeal on the basis that the law was well settled. Justice Strayer noted at para 15:

> There seems to be a wide measure of consensus in this Court, indicated in the cases cited above, that such a question should be answered in the affirmative. I find it hard to see how it could be otherwise: if the complaint in the judicial review is that the Enforcement Officer did not defer removal until the occurrence of some event which the Applicant considered justified the deferral, and as a result of a stay granted by this Court that event has in the meantime occurred. In such circumstances there can be no practical effect of a judicial review decision.

[41] In *Baron*, at para 37, the Court of Appeal agreed, noting:

> As I understand Strayer J.'s Reasons, it is the passing of the events in respect to which the applicant was seeking a deferral of his removal, i.e. a Family Court conference and a medical appointment, which rendered the judicial review application moot. In those circumstances, as Strayer J. says above, "… there can be no practical effect of a judicial review decision". I cannot but agree with that statement in light of the facts before the learned Judge. It is clear, however, that Strayer J. did not conclude that the application before him was moot simply because the removal date had come and gone, which is the position adopted by the Applications Judge.

[42] In *Baron*, the Court of Appeal did not find the application before them to be moot because the event for which deferral of removal had been requested – which was the determination of a pending Humanitarian and Compassionate Application – had not yet occurred (at para 38).

[43] In the present case, the event for which deferral was requested – the determination of the motion seeking to set aside and reconsider the dismissed PRRA application – has occurred. To the extent that the Applicant also requested deferral to await the outcome of other medical tests, this has also occurred. In my view, based on the jurisprudence, the determination of this Application for Judicial Review is moot.

[44] The parties submit that the Application should be heard on the merits despite any finding of mootness, basically because the arguments have been made and the hearing has occurred. I have considered the factors set out in *Borowski v Canada (AG)* [1989] 1 SCR 342, 57 DLR (4^{th}) 231, to guide the Court in determining whether to hear the merits of an otherwise moot application. The factors – (1) the existence of an adversarial relationship between the parties; (2) the concern for judicial economy; and, (3) the need for the court not to intrude into the legislative sphere – are not particularly helpful in the present circumstances. There is no concern about intruding into the legislative sphere. Judicial resources have already been expended. While there remains an adversarial relationship between the parties, it is not focussed on the Officer's decision.

[45] In the event that the Application for Judicial Review is determined on the merits and allowed, there would be no practical purpose in remitting the request to defer the Applicant's removal to another Immigration Officer for redetermination. Although the Officer refused to defer the Applicant's removal, the Court's Order which stayed the Officer's Order had the effect of deferring the Applicant's removal as she requested and until the determination of this Application for Judicial Review. A new removal order would be required if and when the Respondent seeks to remove the Applicant.

[46] In the event that the Application for Judicial Review is determined on the merits and dismissed, as the Respondent explains, a new Direction to Report would still be required if and when the Respondent seeks to remove the Applicant.

[47] I find that this Application for Judicial Review of the Officer's decision to refuse to defer the Applicant's removal is clearly moot and that there is no reason to exercise my discretion to consider the merits.

VII. Observations

[48] Despite the finding of mootness, I have noted a few observations about the present circumstances and the prevailing law.

[49] In the present case, the Applicant was served on May 23, 2017 with a Direction to Report for removal scheduled for June 3, 2017. She made her request for deferral of removal late in the day on May 31, 2017 leaving two business days before her scheduled removal. She provided her submissions on June 1, 2017. The Officer was faced with the difficult task of reviewing all the submissions and evidence and rendering a decision in a very short period of time – and did so on June 2, 2017. The description of the Officer's decision above reflects his thorough consideration of the evidence before him and the governing law.

[50] Contrary to the Applicant's submissions regarding the scope of the Officer's discretion, the law is clear that a removal officer has limited discretion. The Officer acknowledged the

proper scope of his discretion and considered whether the evidence warranted the exercise of that discretion.

[51] As noted by the Federal Court of Appeal in *Baron* at para 49:

> It is trite law that an enforcement officer's discretion to defer removal is limited. I expressed that opinion in *Simoes v. Canada (M.C.I.)*, [2000] F.C.J. No. 936 (T.D.) (QL), 7 Imm.L.R. (3d) 141, at paragraph 12:
>
> > [12] In my opinion, the discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, a removal officer may consider various factors such as illness, other impediments to travelling, and pending H & C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system. For instance, in this case, the removal of the Applicant scheduled for May 10, 2000 was deferred due to medical reasons, and was rescheduled for May 31, 2000. Furthermore, in my view, it was within the removal officer's discretion to defer removal until the Applicant's eight-year old child terminated her school year.

[52] The Court of Appeal echoed and emphasized the Federal Court's comments in *Wang v Canada (Minister of Citizenship and Immigration*), 2001 FCT 148 [2001] 3 FC 682at para 51 (of *Baron*):

> […]
>
> > 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 in original]

[53] These principles were recently summarized by Justice Gascon in *Newman v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 888 at para 18, [2016] FCJ No 852 (QL) [*Newman*]:

> 18 Removal officers have a narrow discretion and their authority to defer the execution of a removal order exists only in very limited circumstances arising just prior to the removal date. This was acknowledged by the Federal Court of Appeal in *Baron*, where Mr. Justice Nadon stated that "it is trite law that an enforcement officer's discretion to defer removal is limited" (*Baron* at para 49). Deferral is to be reserved for those cases where "failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment" (*Baron* at para 51; *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682 [*Wang*] at para 48). An enforcement officer may also exercise his or her discretion to defer when issues relating to the timing of the execution of the deportation order arise, such as factors relating to travel arrangements or fitness to travel, illness, a child's school year, or a pending birth or death (*Baron* at para 51; *Simoes v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 936 [*Simoes*] at para 12). I also emphasize that subsection 48(2) of IRPA expressly states that a removal order must be enforced "as soon as possible." The Minister has no authority to refuse to execute the order.

[54] The governing principle continues to be that deferral is to be reserved for those cases where failure to defer will expose an applicant to the risk of death, extreme sanction or inhumane treatment, and that exceptional circumstances are required to justify a deferral of removal (*Baron* para 67, *Newman* para 18).

[55] As noted above, as a result of the Court's Order which stayed the Officer's decision pending the determination of this Application for Judicial Review, the Applicant's removal was in fact deferred. Now, both the event for which deferral was requested – the determination of the dismissed PRRA – and the determination of this Application for Judicial Review have occurred.

JUDGMENT

THIS COURT'S JUDGMENT is that the Application for Judicial Review is moot.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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