Federal Court  Cour fédérale

Date: 20190425

Docket: IMM-5003-18

Citation: 2019 FC 523

Ottawa, Ontario, April 25, 2019

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

L.E.

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] LE is a citizen of Nigeria. On December 6, 2016, she was convicted of manufacturing and distributing child pornography involving her three children, who were then aged seven, five and two. An appeal is scheduled to be heard by the Ontario Court of Appeal on May 29, 2019.

This Court previously granted an order protecting LE's and her children's identities, and this Judgement and Reasons will continue to identify her only by her initials.

[2] LE seeks judicial review of the refusal by an officer [Officer] with the Canada Border Services Agency [CBSA] to defer her removal from Canada pending determination of her criminal appeal and an application for permanent residence on humanitarian and compassionate [H&C] grounds. Her removal was previously scheduled to take place on October 15, 2018, but was stayed by this Court until the resolution of this application for judicial review.

[3] For the reasons that follow, the Officer's analysis of the evidence pertaining to the scheduling of LE's criminal appeal was unreasonable. The Officer then failed to consider the evidence concerning the likely impact of removal on LE's precarious mental state, including suicidal ideation. The application is allowed.

II. Background

[4] LE arrived in Canada with her three children in July 2014. She made a refugee claim on July 29, 2014. She was found to have entered Canada with the intention of establishing permanent resident status without first obtaining a visa and a departure order was issued against her.

[5] LE's refugee claim was rejected on October 14, 2014. She applied for leave and judicial review, but leave was denied due to her failure to perfect the application.

[6] On August 20, 2015, LE attended an interview with the CBSA in connection with a pre-removal risk assessment [PRRA]. LE was suspected of attempting to frustrate the CBSA's efforts to remove her to Nigeria, and she was detained. The CBSA had reason to believe that LE's husband, GE, was also in Canada, and that she was in possession of her Nigerian passport despite claiming not to be. Following her arrest, the CBSA searched LE's home and seized two cell phones.

[7] A CBSA forensic technician examined the cell phones and discovered images that he thought may be child pornography. The technician contacted the police and provided them with the cell phone in question. On September 15, 2015, LE was charged with possessing, manufacturing and distributing child pornography.

[8] LE's request for a PRRA resulted in an adverse decision on March 31, 2016.

[9] LE was convicted of manufacturing and distributing child pornography on December 6, 2016. Before passing sentence, the trial judge ordered that LE be examined by a psychiatrist under s 21 of the Ontario *Mental Health Act*, RSO 1990, c M7. Dr. Paul Federoff , Director of the Sexual Behaviors Clinic at the Royal Ottawa Mental Health Centre, interviewed LE and made additional enquiries before preparing a report on February 10, 2017. On March 14, 2017, LE was sentenced to 36 months of imprisonment, less 27 months of credit for pre-sentence custody, and three years of probation. She appealed both the convictions and the sentence.

[10] On April 5, 2017, the CBSA issued a deportation order against LE, declaring her to be inadmissible to Canada for serious criminality.

[11] LE was released from prison on September 14, 2017, and was immediately detained by the CBSA pending her removal from Canada. She was subsequently informed that she would be removed on October 10, 2017. She requested deferral of her removal on October 4, 2017. The same Officer whose decision is the subject of this application for judicial review granted her request on October 6, 2017 for medical reasons, and gave LE 30 days to submit an application for permanent residence on H&C grounds under s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. LE was released from immigration detention on October 26, 2017.

[12] LE's first H&C application was refused on January 4, 2018. She was arrested on January 24, 2018 on the ground that she was unlikely to report for removal, which was scheduled for January 31, 2018.

[13] On January 26, 2018, LE sought leave and judicial review of the refusal of her first H&C application, and a stay of removal. The stay was granted on January 30, 2018, and LE was released from detention on February 2, 2018.

[14] The CBSA's suspicion that LE's husband, GE, was in Canada proved to be well-founded. He was looking after the children while she was in prison. GE had been granted refugee protection and had applied for permanent residence, listing both LE and the children as

dependents. LE was removed from GE's permanent residence application on May 8, 2018, due to her inadmissibility for serious criminality.

[15] LE's application for judicial review of the refusal of her first H&C application was dismissed on September 19, 2018 (*LE v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 930). On October 4, 2018, the CBSA informed LE that she would be removed on October 15, 2018. She submitted a second H&C application the following day, and requested a deferral of removal pending the determination of her criminal appeal and the second H&C application. The Officer refused the deferral request on October 11, 2018.

III. Decision under Review

[16] The Officer found that LE's criminal appeal did not justify a deferral of removal. He noted that an appeal of a criminal conviction does not result in an automatic stay pursuant to s 50 of the IRPA. Furthermore, LE's presence in Canada was not required for the appeal to proceed. No hearing date had been scheduled, and it was unclear when the appeal would be decided or what the outcome might be. Regardless of the outcome, LE would still be subject to the deportation order that was issued in 2014. It would therefore not be possible for her to be added to GE's application for permanent residence.

[17] The Officer found that LE's second H&C application did not justify a deferral of removal. LE's application for judicial review of the refusal of the first H&C application was dismissed, and the second H&C application did not address all of the shortcomings in the first.

The Officer noted that it was not his role to assess the merits of an H&C application when deciding whether to grant a deferral request (citing *Chetaru v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 436 at para 19). Nor did the H&C application result in an automatic stay of removal under s 50 of the IRPA.

[18] The Officer found that the short-term best interests of LE's children did not justify a deferral of removal. He noted that LE's children appeared to be in good mental and physical health, despite having been separated from LE for two of the previous three years due to her criminal incarceration and immigration detention. The Officer acknowledged that it would be detrimental for the children to be separated from LE, but held this was insufficiently severe to warrant deferral.

IV. Issue

[19] The sole issue raised by this application for judicial review is whether the Officer's refusal to defer LE's removal from Canada was reasonable.

V. Analysis

Preliminary Matters

[20] Shortly before the hearing of this application, counsel for the Respondent discovered that there were significant omissions from the certified tribunal record [CTR] filed with the Court. He

endeavoured to provide counsel for the Applicant with the missing documentation, but there was little opportunity to digest the voluminous disclosure. Given the absence of prejudice, and in the interests of efficiency, the parties agreed that the Court should decide the matter based on the documentation included in the Applicant's record and without regard to the complete CTR.

[21] Counsel for the Respondent proposed to rely on affidavit evidence that was not before the Officer, particularly in relation to the qualifications of Dr. Federoff to offer certain opinions contained in his report and correspondence. Counsel for the Applicant took the position that this amounted to a motion to adduce new evidence, and requested an opportunity to cross-examine. The Respondent ultimately agreed not to rely on the new evidence.

[22] Finally, the Court enquired whether the application for judicial review might be moot. LE's removal, previously scheduled for October 15, 2018, has now been deferred for more than six months. Regardless of the outcome of this application, any new removal date may prompt a further request for deferral that must be considered in light of all of the circumstances, including the hearing of LE's criminal appeal on May 29, 2019. The parties are both of the view that there remains a live controversy with respect to whether removal ought to have been deferred pending determination of the criminal appeal and the second H&C application, and ask the Court to decide the matter on its merits. I therefore exercise my discretion to do so.

Whether the Officer's refusal to defer LE's removal from Canada was reasonable

[23] The decision of a CBSA officer not to defer removal is subject to review by this Court against the standard of reasonableness (*Forde v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1029 at para 28). Reasonableness is a deferential standard, and is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. The Court will intervene only if the decision falls outside 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).

[24] The Minister notes that an officer's discretion to defer removal is strictly confined under s 48 of the IRPA. Removal may be deferred only in the most extreme circumstances, such as an imminent risk of death, extreme sanction or inhumane treatment (*Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FCR 682 at para 48; *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 51).

[25] LE challenges the Officer's decision on a number of grounds. One is determinative: the Officer's failure to conduct a reasonable analysis of the evidence pertaining to the scheduling of LE's criminal appeal, and his subsequent failure to consider the evidence concerning the likely impact of removal on LE's precarious mental state, including her suicidal ideation.

[26] LE's submissions to the Officer concerning the scheduling of the criminal appeal included the following:

> The appeal has been perfected, that is, the parties' evidence and legal arguments have been exchanged and submitted to the Court. The appeal was scheduled to be heard on October 19th, however it [has] been adjourned on the application of L.E., to submit fresh evidence, some of which is included in this application (Tabs 11-14). The appeal is now case-managed and a date should be set shortly. The Court of Appeal is well aware that L.E. is subject to imminent removal, therefore although difficult to predict, I suggest that the hearing date will be scheduled on a very prioritized basis, for [a] date within the next few months or even weeks.

[27] The appeal is currently scheduled to be heard on May 29, 2019, but of course the Officer could not have known this at the time. Nevertheless, the Officer was aware that the appeal had been previously scheduled to be heard on October 19, 2018; the appeal had been adjourned only to permit a motion to adduce new evidence; the appeal was under case-management; and a date would be set shortly.

[28] The Officer's analysis of this evidence consisted of the following: "… no date has yet been scheduled to hear the appeal and there is no way of knowing when it will be scheduled". While this statement was factually true, it significantly overstated the uncertainty surrounding the scheduling of the appeal. In this respect, the Officer's decision was unreasonable.

[29] It is unclear whether the Officer's conclusions regarding the timing of the criminal appeal and the second H&C application caused him to disregard the evidence of the precarious state of LE's health, including suicidal ideation. What is clear is that this evidence was not mentioned in the Officer's decision at all. The evidence included Dr. Federoff's report prepared under s 21 of the Ontario *Mental Health Act*, together with two letters he wrote in support of LE's deferral request. The letters clearly stated that LE was experiencing suicidal ideation, and this would

worsen if she returned to Nigeria. There was also evidence of a litany of other health problems suffered by LE, including post-traumatic stress disorder, depression, hypertension, tachycardia, bleeding hemorrhoids, difficulty sleeping and possible anemia.

[30] The Minister says that the Officer is presumed to have considered all of the evidence, even if it was not specifically mentioned. He argues that none of the omitted evidence was central to the decision or contradicted a factual finding (citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (CA) at para 17). According to the Minister, LE's request to defer her removal concerned only the criminal appeal and the second H&C application. She did not seek deferral to address her health problems, none of which were temporary in nature, and they were therefore irrelevant to the matter before the Officer.

[31] LE replies that she did not request deferral of removal due to suicidal ideation, because deferral on this basis would have been indefinite. Instead, she requested deferral, *inter alia*, until a decision was made regarding the second H&C application, which encompassed suicidal ideation.

[32] LE's suicidal ideation and other health challenges were repeatedly mentioned in LE's submissions in support of the deferral request, yet the Officer failed to acknowledge them in any way. The Officer's decision was unreasonable in this respect as well. There can be no question that suicidal ideation is a form of irreparable harm or extreme sanction that potentially fell within

the Officer's limited discretion to defer removal (*Tiliouine v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1146 at para 13).

VI. Conclusion

[33] The application for judicial review is allowed, and the matter is remitted to a different CBSA officer for reconsideration.

[34] LE asks the Court to certify a question for appeal concerning the obligation of a CBSA officer who considers a request to defer removal pending the resolution of criminal proceedings to make a preliminary assessment of the merits of the criminal case. In my view, this is not an appropriate question to certify in this proceeding. The answer to this question would not be dispositive of the appeal, and has not been dealt with by the Court in these reasons (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36). I therefore decline to certify a question for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to a different officer with the Canada Border Services Agency for reconsideration.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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