Federal Court Cour fédérale

Date: 20190503

Docket: IMM-3830-18

Citation: 2019 FC 575

Ottawa, Ontario, May 03, 2019

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

BRUNO CEZAR MOURA MENDES NEVES
ARIANNA MEDEIROS DE ALBUQUERQUE NEVES
LARA DE ALBUQUERQUE NEVES
LUCCA DE ALBUQUERQUE NEVES

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicants are a family from Brazil who arrived in Canada in 2015 as temporary residents. Despite a number of attempts, they have not been successful in obtaining permanent resident status in Canada. On this application they seek judicial review of the August 8, 2018 decision of a Canada Border Services Agency (CBSA) Inland Enforcement Officer (Officer) who denied their request to defer their removal to Brazil.

[2] For the reasons that follow, this judicial review is dismissed as the Officer's decision is reasonable and the Officer did not overlook evidence or fetter his discretion.

Background

[3] Mr. and Mrs. Neves and their two children came to Canada as temporary residents on a visa that was valid from January 27 to June 2, 2015. They applied for and received an extension to their temporary resident status until January 5, 2016. They obtained a second extension to their temporary resident status pending a decision on a humanitarian and compassionate (H&C) application they submitted on March 31, 2016. The request for extension was refused on April 19, 2016 and the H&C application was refused on October 7, 2016. They did not challenge the H&C decision and were instructed to leave Canada. When they failed to leave Canada an exclusion order was issued on August 17, 2017. The Applicants submitted a pre-removal risk assessment (PRRA) application on September 13, 2017 and a second H&C application on September 17, 2017.

[4] A negative decision on their PRRA application was made on January 17, 2018, and their second H&C application was also denied. They were granted a deferral of their removal until the end of June to allow the children to complete the school year.

[5] On May 30, 2018, the family was served with a direction to report for their removal from Canada scheduled for July 6, 2018. They submitted a request to defer their removal to allow Mrs. Neves, who was then 12 weeks pregnant, to remain in Canada for the duration of her pregnancy. This deferral request was denied as a medical assessment cleared her for air travel.

Unfortunately, Mrs. Neves suffered a miscarriage prior to the scheduled removal and the family was granted a two-week ministerial stay of removal. Following the expiry of the ministerial stay, a new removal date was scheduled for August 10, 2018.

[6] The Applicants submitted another request for deferral of removal pending the decision on their third H&C application. The decision of August 8, 2018, to deny their deferral is the decision now under review.

[7] On August 10, 2018, the Applicants were granted a stay of removal by Order of Justice Kane pending the consideration of this judicial review application.

Decision Under Review

[8] In the August 8, 2018 decision, the CBSA Officer recognized that, in considering the deferral request, he was limited to determining whether removal would subject the Applicants to inhumane treatment, sanction, persecution or death. The Officer noted that the evidence of risk relied upon by the Applicants and the H&C factors raised had already been assessed by other qualified officers through the H&C and PRRA application processes.

[9] The Officer considered the medical evidence regarding Mrs. Neves' diagnosis of generalized anxiety disorder. The Officer also noted that the facts and evidence were materially the same as those that had already been assessed, noting that the medical letters from doctors in Brazil and Canada were included in previous applications and had already been reviewed and considered. In the circumstances, the Officer was not satisfied that there was any compelling

information to warrant a deferral. Furthermore, as the Applicants were found not to be at risk if they were to return to Brazil, and the Officer determined that they could await a decision on their third H&C application from outside of Canada.

[10] With respect to the best interests of the children (BIOC), the Officer noted that the materials in the third H&C application were of the same nature as those previously assessed, and that the BIOC factors had already been considered. He noted that although the children may be established such that it will be difficult for them to leave Canada, they will be leaving with both parents and thus would not be separated from the family unit.

[11] In considering the BIOC within the global assessment of the case, the Officer ultimately denied the deferral request as the application materials in the third H&C application were not dissimilar enough from previous applications and assessments so as to compel deferral.

Issues

[12] The Applicants raise the following issues on this judicial review:

a) Did the Officer fetter his discretion?

b) Did the Officer overlook evidence of risk of harm?

c) Did the Officer properly consider the best interests of the children?

Standard of Review

[13] The applicable standard of review when there is an allegation that an administrative decision-maker has fettered his or her discretion currently remains unsettled (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299, para 21-24).

[14] In any event, I agree with the approach taken by Justice Boswell in *Barco v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 421), at para 20, where he concluded that, if an officer did fetter his or her discretion, it would constitute a reviewable error under either standard.

[15] On the other issues raised by the Applicants, the parties agree that the applicable standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

Analysis

A. *Did the Officer fetter his discretion?*

[16] The Applicants argue that the Officer fettered his discretion by relying upon the previous PRRA and H&C decisions and thereby did not consider the merits of their deferral request. In particular, they argue that the PRRA decision relied upon by the Officer did not consider the personalized risk to the Applicant's wife and son but only focused on the Applicants' generalized risk in Brazil. They argue that personalized risk was not properly assessed by the PRRA Officer, and the CBSA Officer compounded the error by deferring to the PRRA assessment.

[17] To assess if the Officer fettered his or her discretion, it is necessary to consider the parameters of discretion available to an officer when considering a deferral request. The relevant legislative provision is subsection 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], which states that a removal order must be enforced “as soon as possible”.

[18] In the context of subsection 48(2), the nature and extent of an enforcement officer’s discretion to defer a removal has been described as very limited (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*] at para 67) and further explained at para 67 as follows:

> 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 added.]

[19] In support of their deferral request the Applicants did not provide the Officer with any new evidence of risk in the nature of “risk of death, extreme sanction, or inhumane treatment”. As noted in *Baron*, a pending H&C application alone is not a sufficient basis upon which to defer removal. The Officer noted that the Applicants had the benefit of two H&C considerations, therefore a third pending H&C application did not qualify as a special consideration meriting a deferral. Additionally, the Officer noted that the evidence and materials in the third H&C application are of the same nature as previously assessed. The Officer observed that although this evidence would have been more compelling if the family never had a previous H&C assessment,

here as the Applicants had the benefit of two H&C assessments within a two-year timeframe, the third application was not a compelling factor.

[20] In my view, the Officer properly considered the outstanding H&C application but, in the circumstances, determined that it was not a factor meriting deferral. This is an appropriate analysis and there was no fettering of the Officer's deferral discretion on the issue of the outstanding H&C application.

[21] The Applicants also argue that the Officer fettered his discretion by failing to properly assess the evidence of risk. The Applicants argue that the risk to Mrs. Neves and her son was never properly assessed. They submit that the medical reports filed in support of the deferral application identify a personalized risk to Mrs. Neves and to her son. The report of Dr. Nicole Nitti dated October 19, 2017 states as follows:

> Ms. Neves is diagnosed with Anxiety disorder with Panic attacks [*sic*] which began before she left Brazil and came to Canada. She was treated by a psychiatrist there. Since being here her symptoms consist of generalized fear and anxiety, poor sleep and panic attacks. The level of her symptoms affects her daily function through low mood and poor concentration. Her anxiety is mainly triggered by her fears of going back to Brazil. She describes witnessing and being threatened with violence while she was living there. Her son, Lucca, has also suffered due to their experience in Brazil. He experienced attention and behavior problems at school. He also described flashbacks of watching a man get shot by police.

[22] In addressing the risk issue, the Officer considered the medical evidence but also recognized that this evidence was fully considered in the previous applications. He quoted the following from the PRRA decision:

> A PRRA application is meant to deal with an allegation of personal risk. The evidence before me does not lead me to conclude that the Applicant family would be at an increased risk of harm on a basis that that is personal to them and more than that facing the rest of the population. While they have demonstrated that there is a subjective fear of returning to Brazil on the part of the female applicant; as well as mental health concerns; this has not been presented in a context that would translate into risk upon return to Brazil. There is a functioning state apparatus in place even though it is not perfect. The Applicant family has not rebutted the presumption of state protection. Having reviewed the country condition evidence and taking note of the lack of personalized evidence, I find that the Applicant family has not demonstrated that they faces [*sic*] a personal risk in the event of a return to their country. As the evidence before me did not demonstrate a basis for a positive PRRA decision; I must refuse this application.

[23] In the circumstances, the Officer did not fetter his discretion by referring to and relying upon the previous determination of risk under the PRRA. The Officer properly considered risk within his limited discretion and determined that the risk faced by the Applicants, including Mrs. Neves and her son, would not result in death, extreme sanction, or inhumane treatment. The Officer's finding is reasonably supported by the evidence.

[24] In the circumstances, the Officer did not fetter his discretion and it was reasonable for him to rely upon the findings of the PRRA and H&C decision makers who had a wider margin of discretion allowing a more fulsome consideration of the issues.

[25] On this judicial review the Applicants make nuanced arguments by reframing the risk issues. However, they rely upon the same evidence as previously considered. This is effectively asking the Court to reweigh the evidence but that is not the role of the Court on a judicial review (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61).

B. *Did the Officer overlook evidence of risk?*

[26] The Applicants argue that the Officer overlooked the specific evidence relating to Mrs. Neves's mental health. They point to the two miscarriages she suffered while in Canada and the opinions of Dr. Nitti that she has mental health issues and that returning to Brazil would cause a serious setback. Again, the Applicants argue that by focusing on the previous PRRA findings the Officer erred by not considering the medical evidence.

[27] In *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286, the Federal Court of Appeal at paragraph 44 confirmed that an officer can only consider *new* risk of harm evidence when requested to defer removal after a negative PRRA decision. At paragraph 45, the Court confirmed that enforcement officers' functions are limited and are not intended to make or remake PRRA or H&C decisions.

[28] In this case, it was not the role of the Officer to remake or reconsider the PRRA decision given the absence of new evidence of risk of harm. As noted above, the reliance of the Officer on the PRRA decision is appropriate and reasonable.

C. *Did the Officer properly consider the best interests of the children?*

[29] The Applicants acknowledge that the Officer had a limited scope to consider the BIOC issues, but they argue that the Officer failed to consider the short-term BIOC. The applicants rely upon *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 [*Lewis*] and

argue that the Officer failed to consider that given Mrs. Neves's mental health issues, she will be incapable of caring for the children in the short-term.

[30] I do not agree with the Applicants that the circumstances in *Lewis* are comparable to the circumstances in this case. In *Lewis*, the Canadian-born indigenous child was in a situation where the sole custodial parent was being removed from Canada. One of the significant factors noted by the Court in *Lewis* was the risk to the child losing her connection to her indigenous roots if she was removed from Canada. By contrast, the children here were born in Brazil and are being returned there with both of their parents. There is no separation of the children from their parents.

[31] Furthermore, although an officer must be "alert, alive and sensitive" to the best interests of the children (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75), the duty to consider BIOC factors are on the low end of the spectrum (*Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 at para 16). The full assessment of the interests of affected children is made in an H&C application and not in the context of a deferral request. Additionally I would note that despite the Applicants submissions, there is no medical opinion that Mrs. Neves is currently incapable of caring for her children because of her mental health issues. As well, the children are also returning to Brazil in the care of both parents.

[32] The short-term BIOC factors that *Lewis* considers (paras 82 and 83) include: the need for a child to finish a school year during the period of the requested deferral; maintaining the well-being of the child who requires specialized ongoing medical care in Canada; and the short-term

needs of the children if their parent or parents are to be removed while the children remain in Canada. None of these factors are at play in his case.

[33] The Applicants have had the benefit of two H&C considerations which provided for a more extensive consideration of the best interests of their children. Here the Officer reasonably considered the BIOC within the limited scope of his discretion.

Conclusion

[34] In conclusion, the Officer made a reasonable decision and the Applicants have not established any error in the exercise of the deferral discretion. To accept the Applicants arguments would be tantamount to providing a statutory stay of removal where it is not expressly provided by the *IRPA*. This would be inconsistent with the scheme enacted by Parliament and by section 48 in particular (*Shpati* at para 48). Although this is not the result the Applicants were seeking, in the absence of an error this Court has no basis to intervene.

[35] This judicial review is dismissed.

JUDGMENT IN IMM-3830-18

THIS COURT'S JUDGMENT is that this judicial review is dismissed. There is no question for certification.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3830-18
STYLE OF CAUSE:	BRUNO CEZAR MOURA MENDES NEVES ET AL v MPSEP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 21, 2019
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	MAY 3, 2019

APPEARANCES:

Dilani Mohan	FOR THE APPLICANT
Melissa Mathieu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MohanLaw Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Department of Justice Canada Ontario Regional office Toronto, Ontario	FOR THE RESPONDENT