Federal Court  Cour fédérale

Date: 20190715

Docket: IMM-5620-18

Citation: 2019 FC 935

Ottawa, Ontario, July 15, 2019

PRESENT: Madam Justice Walker

BETWEEN:

VIDESHARI KAYMAN DEMATTOS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Videshari Kayman Demattos, seeks judicial review of a decision (Decision) of an inland enforcement officer (Officer) of the Canada Border Services Agency (CBSA) refusing her request to defer her removal from Canada to Guyana that had been scheduled for November 16, 2018. This application for judicial review is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] For the reasons that follow, the application is allowed.

I. Background

[3] The Applicant is a citizen of Guyana. She came to Canada on October 31, 1997 as a permanent resident (sponsored by her ex-husband, Ray Demattos). The Applicant has two Canadian-born children (Nicholas Demattos, 17, and Sophia Demattos, 15). Her relationship with Mr. Demattos became abusive when she was pregnant with Nicholas and the Applicant turned to alcohol and drugs.

[4] In June 2007, the Applicant was convicted in Canada of fraud over $5,000. As a result, she was found inadmissible for serious criminality in 2009 and a deportation order was issued on March 2, 2009. The Applicant appealed the deportation order and was granted a conditional stay. However, she did not comply with the conditions of the stay and her appeal was declared abandoned in 2014.

[5] In 2015, the Applicant applied for permanent residence on humanitarian and compassionate (H&C) grounds. Her application was refused.

[6] On January 17, 2017, the Applicant was convicted of refusing to take a breathalyzer test after driving impaired in 2013.

[7] The Applicant currently faces three outstanding criminal charges for fraud relating to incidents that occurred in 2013. The Applicant's criminal counsel states that the charges are complex and involve co-accused.

[8] The Applicant submitted a second application for permanent residence on H&C grounds on March 1, 2018 which remains outstanding. The Applicant submits that her second H&C application contains medical evidence regarding her addiction and mental health issues that was not a part of her first unsuccessful application. In addition, since 2015, she has undertaken a rehabilitation program and has sought professional help.

[9] In September 2018, a Direction to Report was issued to the Applicant. Her removal was deferred at that time to allow her to attend her nephew's funeral.

[10] On October 9, 2018, the Applicant submitted a request for a three-month deferral of her removal from Canada then scheduled for November 7, 2018 for two reasons: (1) to allow a determination to be made regarding her second H&C application; and (2) to give her the opportunity to receive and review disclosure on her pending criminal charges with her criminal counsel. She stated that it is important that she remain in Canada until the Crown provides disclosure of the evidence relating to those charges as the information in that evidence may be important in her future immigration matters.

[11] A second Direction to Report was issued for the Applicant's removal to Guyana on November 16, 2018.

[12] On November 15, 2018, the Applicant's request for deferral of her removal was refused (the Decision) and she filed a motion to stay her removal. On November 16, 2018, the Court granted a stay of the Applicant's removal from Canada. The Applicant challenges the Decision to refuse her request for deferral in this application.

II. Decision under review

[13] The Decision is dated November 15, 2018. The Officer concluded that a deferral of the Applicant's removal from Canada was not appropriate in the circumstances of her case. The Officer considered the Applicant's deferral request under five headings:

- pending application for permanent residence on H&C grounds;
- the Applicant's mental health issues;
- hardship and risk upon return to Guyana;
- pending criminal charges; and,
- the best interests of the children.

[14] The Officer acknowledged the Applicant's H&C application filed on March 5, 2018. The Officer stated that the outstanding application did not automatically give rise to a statutory stay of removal and that processing of the application would continue if the Applicant were removed from Canada. The Officer noted that, as of November 6, 2018, the processing time for H&C applications was approximately 31 months and concluded that insufficient evidence had been provided to establish that a decision on the application was imminent or overdue.

[15] With respect to the Applicant's mental health issues, the Officer concluded that there was insufficient evidence to demonstrate that she would not be able to receive either psychiatric

treatment for depression or her current prescription medications in Guyana. The Officer was not satisfied that the Applicant's mental health would suffer irreparable harm upon a return to Guyana.

[16] The Officer then addressed the Applicant's hardship arguments, stating that there was insufficient evidence to demonstrate that she would be unable to obtain employment or lodgings in Guyana. The Officer also found that the Applicant failed to specify what hardship she would face in Guyana.

[17] The Officer addressed the Applicant's argument regarding the importance of her ability to receive disclosure of the evidence relating to her pending criminal charges by stating that the Crown has agreed to stay the criminal charges upon confirmation that she has been removed from Canada.

[18] Finally, the Officer concluded that the best interests of the Applicant's children did not warrant granting her deferral request. The Officer was sensitive to the fact that the children's separation from the Applicant would be emotionally difficult but noted that the children would again be living with their aunt in Canada, as they had previously, which would help attenuate their feelings.

III. Issue

[19] The issue before me is whether the Decision was reasonable. More specifically, the Applicant argues that the Officer erred in failing to address the prejudice to her H&C application

and future ability to return to Canada if her outstanding criminal charges are stayed and she is removed from Canada prior to receiving full disclosure from the Crown and reviewing the disclosure with her criminal counsel in person.

IV. Standard of review

[20] The standard of review applicable to an enforcement officer's deferral decision made pursuant to section 48 of the IRPA is reasonableness (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, at para 43 (*Lewis*); *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25 (*Baron*); *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at para 27). In assessing whether a decision is reasonable, the Court focusses on whether the decision is intelligible, transparent and justified. The Court must assess whether it is able to understand why the decision was made and to ascertain whether the decision falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47).

V. Analysis

Parties' submissions

[21] The Applicant submits that the Officer failed to consider the submission in her deferral request that her removal prior to receiving the Crown's disclosure in the pending criminal case against her would prejudice both her outstanding H&C application and any future application to

return to Canada. The Applicant argues that the Officer erred by simply stating that the Crown had agreed to stay the charges. She submits that, if the charges are stayed, she will not be able to obtain disclosure. As a consequence, her immigration matters going forward would be prejudiced as an officer evaluating an immigration application is entitled to consider the evidence underlying any criminal charges against an applicant (*Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237; *Veerasingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1661). The Applicant argues that the Respondent is seeking to backstop the Decision in its arguments in this application.

[22] The Respondent first notes the very limited circumstances in which an enforcement officer may defer removal, stating that these circumstances are typically related to physical ability to comply with the removal order, such as physical fitness to travel and/or ability to make travel arrangements. The Respondent argues that the Decision was thorough and reasonable and that the Applicant's concerns regarding receipt of disclosure materials does not fall within the circumstances in which an officer should grant deferral for a number of reasons.

Analysis

[23] The Officer addressed the Applicant's pending criminal charges as follows:

> Counsel has requested that Ms. Demattos's removal from Canada be deferred so that she may review Crown disclosure with her criminal counsel. Ms. Demattos' criminal counsel has also requested that her removal be deferred so that she may attend her criminal proceedings in court and review materials with counsel.
>
> It is important to note that the Crown has agreed to Stay Ms. Demattos' criminal charges upon confirmation that she has been

> removed from Canada. I further note that CBSA will notify the Crown once Ms. Demattos' depa[r]ture is confirmed. Ms. Demattos' will not be required to attend any further court dates.

[24] In the deferral request, the Applicant's counsel made lengthy submissions regarding the importance of the disclosure, beginning with the statement that "[a]lthough Videshari's removal officer has advised me that the Crown has agreed to stay Videshari's outstanding charges to facilitate her removal, this is not an acceptable arrangement for the following reasons…". It is fair to say that, upon review of the deferral request as a whole, this issue was given significant prominence.

[25] The Respondent argues that the Applicant's reliance on her need for disclosure of the evidence in her pending criminal case was the weakest of her deferral submissions and, as noted above, does not fall within the short-term, limited discretion of an enforcement officer (*Baron* at paras 49 et seq.). The Respondent makes a number of arguments as to why the Officer should not have granted a deferral on this basis, stating: that the Applicant had made no pro-active attempts to obtain disclosure following receipt of the September 2018 direction to report, notwithstanding she has been represented by immigration and criminal counsel throughout this process; that it is illogical that the Applicant could defer removal to litigate additional criminal charges when she is being removed due to her inadmissibility for serious criminality; that the Applicant has not established that she would be unable to obtain disclosure from the Crown if the criminal charges are stayed; that her arguments concerning the utility of the disclosure documents to her current H&C application and any future immigration applications are speculative; and, that the disclosure documents could be sent to her electronically and she could communicate with her criminal counsel from Guyana.

[26] The discretion of an enforcement officer to defer removal is very limited. The Chief Justice recently described the scope of that discretion as follows (*Forde v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1029 at para 36):

> [36] Moreover, it is now settled law that an enforcement officer's discretion to defer removal is "very limited," and is restricted to deferring for a short period of time in situations "where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment": Baron, above, at para 51; Lewis, above, at paras 54 and 83. In cases where a determination has not yet been made on a previously submitted H&C application, CBSA enforcement officers do not have the discretion to defer removal in the absence of "special considerations" or a "threat to personal safety": Baron, above, at para 51; Danyi, above, at paras 29-32. Even in such "special situations," as discussed below, there are important temporal limits on a removal officer's discretion to defer removal. …

[27] However, the question in this case does not centre on the breadth of an enforcement officer's discretion but on the fact that the Officer failed to address a significant submission made by the Applicant in support of her deferral request. The Respondent's substantive arguments regarding the weaknesses in the Applicant's reliance on the pending disclosure in her criminal case may be relevant considerations but I find that it was not reasonable for the Officer to wholly ignore the submission. The Officer was not required to give detailed reasons for rejecting the submission but was required to address it. As the Applicant's counsel stated at the hearing of this matter, we are left to wonder whether the Officer understood and discounted the submission or failed to appreciate the submission (assuming that the fact the charges would be stayed was sufficient). As a result, the Decision lacks transparency and justification and the Applicant's deferral request must be remitted for reconsideration.

VI. Conclusion

[28] The application is allowed.

[29] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-5620-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. No question of general importance is certified.

"Elizabeth Walker"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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