Federal Court  Cour fédérale

Date: 20191125

Docket: IMM-4532-18

Citation: 2019 FC 1504

Ottawa, Ontario, November 25, 2019

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

THIVAKAR KANAGASHAPESAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Thivakar Kanagashapesan, seeks judicial review of a decision of an Enforcement Officer [the Officer] of the Canada Border Services Agency [CBSA], dated September 20, 2018, refusing to defer the execution of the removal order issued against him.

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

II. Facts

[3] The Applicant is a 31-year-old Tamil citizen of Sri Lanka. He arrived in Canada from the United States in May 2010 and made a refugee claim.

[4] The Applicant's claim for protection was rejected by the Refugee Protection Division [RPD] in May 2011 because of the absence of credibility and the existence of an internal flight alternative. An application for judicial review of the RPD's decision was dismissed by Justice Roger Hughes on February 27, 2012, who determined that there was sufficient evidence that the Applicant was forum shopping.

[5] The Applicant applied for a Pre-Removal Risk Assessment [PRRA], which was rejected on July 15, 2014. The Applicant then applied for leave to seek judicial review of the decision. Leave was denied by Justice Hughes on November 24, 2014.

[6] The Applicant later submitted an application for permanent residence based on humanitarian and compassionate grounds [H&C application].

[7] On November 21, 2016, the Applicant was informed that his removal was scheduled for December 5, 2016. On November 25, 2016, the Applicant applied for another PRRA.

[8] On November 28, 2016, the Applicant requested his removal be deferred until his outstanding H&C application and PRRA were determined. A deferral of the execution of the removal order was granted until the determination of the PRRA.

[9] Both the PRRA and H&C applications were denied in March 2017. The Applicant's removal from Canada was then scheduled for May 25, 2017.

[10] The Applicant brought two separate applications for an extension of time and for leave to seek judicial review of the decisions rejecting his PRRA and H&C applications on May 24, 2017. The Applicant's motion for an extension of time to file the application for leave and for judicial review of the underlying H&C decision and the Applicant's motion to stay his removal were dismissed by Mr. Justice Alan Diner on May 25, 2017. The Applicant discontinued his application for leave to seek judicial review of the PRRA decision on May 30, 2017.

[11] The Applicant failed to appear for removal on May 25, 2017. As a result, a warrant for his arrest was issued.

[12] On December 9, 2017, the Applicant "religiously married" his common-law spouse, Thushajini Jeevanantham. They were unable to legalize their marriage since Ms. Jeevanantham's divorce from her first husband had not yet been finalized.

[13] In August 2018, the Applicant was stopped by the police at a roadside stop. After ascertaining his identity, he was arrested by the CBSA and detained for removal from Canada.

[14] While in detention, the Applicant submitted an application for permanent residence under the Spouse and Common Law Partner class in September 2018. The application was returned by Immigration, Refugees and Citizenship Canada without being processed because a police

clearance certificate was not included in the package. The Applicant resubmitted the application to be processed as an application for permanent residence on H&C grounds.

[15] On September 18, 2019, the Applicant was notified he would be removed from Canada on September 22, 2019. He immediately requested the deferral of his removal pending a decision on his H&C application. The Officer refused the Applicant's request to defer with written reasons on September 20, 2018. The Applicant then filed an emergency motion seeking a stay of his removal, which was granted by Mr. Justice Douglas Campbell on September 21, 2019.

A. *Officer's decision*

[16] In his decision, the Officer refers to subsection 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], which states that the CBSA has an obligation to enforce removal orders as soon as possible. The Officer indicates that the CBSA customarily proceeds with removal as soon as the removal order becomes enforceable. He adds that an enforcement officer has little discretion to defer removal.

[17] The Officer notes that the Applicant submitted an H&C application, but that it was only filed after the Applicant had evaded immigration authorities for over a year. He finds the application to be untimely and that there is no indication it would be processed imminently. He further observes that an outstanding application for permanent residence does not automatically give rise to a statutory stay of removal, and it is not meant to pose an impediment to removal.

[18] The Officer states that he is not mandated to conduct an assessment of the merits of the pending H&C application, and that his limited discretion is centered on evidence of serious harm resulting from the enforcement of the removal order as scheduled. While the Officer recognizes that the removal process and family separation are challenging experiences, he indicates that they alone do not warrant a deferral of removal.

[19] The Officer acknowledges the challenges that the separation would cause to the Applicant's family, particularly the fact that Ms. Jeevanantham would have to raise their 5-month-old son alone. The Officer indicates that he reviewed Ms. Jeevanantham's psychological assessment, which determined she suffered a major depressive disorder of moderate severity and stressor-related disorder with prolonged duration; however, he finds insufficient evidence to indicate that she has begun or sought mental health treatment as recommended by the psychologist.

[20] The Officer notes the Applicant's wife is a Canadian citizen entitled to all available social programs, including access to healthcare. He also notes, as indicated in the psychological assessment report, that Ms. Jeevanantham has a large extended family in Canada that would help her adjust to her new circumstances and cope with her husband's separation. The Officer further notes that the separation was not permanent or complete since the family could remain in touch via the phone or the internet.

[21] In considering the best interests of the Applicant's son, the Officer recognizes that the removal would be difficult, especially given the child's young age and the active role the

Applicant played in raising him. However, the Officer noted that the child would remain in the care of his mother and would have access to the social programs available to Canadians. Although sympathetic to the effect of separation, the Officer finds insufficient evidence to indicate that the Applicant's spouse and child would be unable to cope in his absence.

[22] With respect to the risk of mistreatment in Sri Lanka, the Officer indicates that he does not have the authority to conduct an assessment of the risk, and is limited to considering whether new and compelling evidence exists that would warrant a deferral of the removal to allow for a further risk assessment. The Officer notes that the risk allegation raised in the deferral request, namely, that the Applicant is profiled because of his Tamil ethnicity, involves the same risk allegation that was before the RPD and both his PRRA applications, which were denied. The Officer does not find sufficient compelling evidence that post-dates the Applicant's risk assessments that he would likely face a risk of death, extreme sanction or inhumane treatment if he is removed to Sri Lanka.

[23] The Officer concludes that there are insufficient grounds that warrant a deferral of removal.

III. Issues to be Determined

[24] According to the Applicant, the issues to be determined are whether (a) the Officer erred in law in misinterpreting the psychological assessment of the Applicant's spouse and in considering the best interests of the Applicant's child, (b) the Officer erred in law in failing to

consider the risks the Applicant faces in Sri Lanka, and (c) the Officer's decision was unreasonable.

[25] In my view, the application does not raise any arguable errors in law, but rather challenges findings of fact and mixed fact and law, and the exercise of discretion by the Officer in refusing to grant the deferral request.

IV. Standard of Review

[26] It is well established that the standard of review applicable to the decision of an enforcement officer to refuse a deferral of removal is reasonableness (*Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25; *Newman v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 888 at para 12). Reasonableness is a deferential standard, and a reasonable decision is one that "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-48).

V. Analysis

[27] It is trite law that the discretion that an enforcement officer may exercise is very limited, and it is restricted to when a removal order will be executed. In deciding when it is reasonably practicable for a removal order to be executed, an enforcement officer may consider various factors, including illness, other impediments to travelling and pending applications.

[28] Chief Justice Paul Crampton recently described the scope of an enforcement officer's 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" … 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" … Even in such "special situations," as discussed below, there are important temporal limits on a removal officer's discretion to defer removal. …
>
> [Emphasis removed.]

[29] The law is clear that removal is the rule while deferral is the exception.

A. *Whether the Officer erred in law in misinterpreting the psychological assessment of the Applicant's spouse*

[30] Ms. Jeevanantham was assessed by a doctor around September 12, 2018. The doctor found she suffers from sleep disturbances, psychic numbing, stress-related psychological arousal, appetite loss and problems with concentration and memory, among other conditions. The doctor concluded her health would deteriorate if the Applicant was removed from Canada.

[31] The Applicant submits that the Officer failed to consider the impact the Applicant's absence would have on Ms. Jeevanantham's health or how her mental health issues would impact the Applicant's child. He further submits that the Officer discounted that medical assessment because Ms. Jeevanantham has access to the Canadian healthcare system and family

support and that the Officer failed to adequately weigh the likelihood of Ms. Jeevanantham's mental health worsening.

[32] These arguments are without merit. Based on a plain reading of the decision, the Officer did not misapprehend or fail to engage with the evidence surrounding the mental health of the Applicant's wife or ignore submissions as to the resulting effect of his removal on his wife and son.

[33] I am satisfied that the Officer was alive to the impact the Applicant's removal would have on both his spouse and child. He noted there was no indication that the Applicant's spouse had sought mental health treatment. Further, there was no indication that the Applicant's removal from Canada would impede his spouse's access to services in Canada.

[34] The medical report states that Ms. Jeevanantham attended a physician in 2016 and received prescription antidepressant medications, but discontinued the medication because she did not experience substantial benefit and feared addiction. The doctor concludes that her condition will deteriorate should the Applicant be denied permission to stay in Canada.

[35] The Officer, while bound to consider the medical report, was not required to agree with its recommendation that the Applicant must remain in Canada (see *Hernadi v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 126350 (FC) at para 7). In this case, the Officer's conclusion that Ms. Jeevanantham's mental health issues do not constitute irreparable harm and that she will have access to the Canadian healthcare system is reasonable and

intelligible (see *Mahuroof v Canada (Public Safety and Emergency Preparedness)*, 2019 CanLII 36998 (FC) at para 23).

[36] Moreover, the Officer did not err in his analysis of the best interests of the child. The Federal Court of Appeal accepted that "enforcement officers may look at the short-term best interests of the children whose parent(s) are being removed from Canada, but cannot engage in a full-blown H&C analysis of such children's long-term best interests" (see *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 61).

[37] The Officer found that the Applicant's son would remain in the care of Ms. Jeevanantham and have access to the healthcare and social programs available to all Canadians. The Officer's finding that there is insufficient evidence to indicate the Applicant's child will be unable to cope in the Applicant's absence is within the range of reasonable outcomes.

B. *Whether the Officer failed to consider the risks the Applicant faced in Sri Lanka*

[38] The Applicant argues the Officer failed to consider the risks the Applicant faces in Sri Lanka and that it was insufficient for the Officer to indicate that the same sort of risks were previously assessed. I disagree.

[39] Enforcement officers are required to assess new and compelling evidence and the changing circumstances that may lead to death, extreme sanction or inhumane treatment. In the

present case, the Officer found there was insufficient new or compelling evidence arising after the previous risk assessment in March 2017.

[40] The Officer did in fact consider the Applicant's risk assertions. The Officer noted that the Applicant had already benefited from multiple risk assessments. He found that the Applicant had failed to demonstrate the existence of new and compelling evidence that post-dated the previous assessments to convince him that the Applicant will likely face risk of death, extreme sanction, or inhumane treatment if he is removed to Sri Lanka.

[41] I can find no reviewable error as regards this issue. It is not open to the Officer to remake or reconsider PRRA decisions without new and compelling evidence of risk.

C. *Whether the Officer's decision is unreasonable*

[42] The Applicant submits that the Officer's decision is unreasonable. According to the Applicant, the Officer failed to address key issues raised and misinterpreted evidence. I disagree.

[43] As the Officer noted, there is no statutory stay when an application for permanent residence is filed. The Officer found the Applicant's application untimely (as was conceded by his counsel at the hearing) and there was no indication that it would be processed anytime soon.

[44] It is clear that an outstanding H&C application does not constitute grounds for deferral in the absence of special considerations. The IRPA imposes a positive obligation on the Minister while allowing for some discretion with respect to the timing of a removal. To respect that

statutory scheme, deferrals should be reserved for those applications where failure to defer will expose the applicants to the risk of death, extreme sanction or inhumane treatment.

[45] The Officer concluded an exhaustive review of the material before him and reached a reasonable conclusion based on the said material.

VI. Conclusion

[46] I have not been persuaded that the Officer made any reviewable error in his review and consideration of the evidence. The Applicant is essentially asking this Court to reassess the evidence so as to reach a different conclusion, which this Court cannot do on judicial review.

[47] For these reasons, the application is dismissed.

[48] There are no questions for certification.

JUDGMENT in IMM-4532-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No questions are certified.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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