Federal Court  Cour fédérale

Date: 20200323

Docket: IMM-6381-18

Citation: 2020 FC 402

Ottawa, Ontario, March 23, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

RADOVAN CVETKOVIC
ZRINKA CVETKOVIC
DARKO CVETKOVIC
GORAN CVETKOVIC

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of a Canada Border Services Agency ("CBSA") Enforcement Officer (the "Officer") to deny a deferral request of the Applicants' removal order. The Applicants initially filed a refugee claim in 2012, but on the advice of new counsel, they decided to withdraw their refugee claim in March 2018, and instead submitted applications based

on humanitarian and compassionate ("H&C") grounds in August 2018. On December 12, 2018, the Applicants were provided a Direction to Report for removal to Croatia on December 26, 2018.

[2] On December 13, 2018, the Applicants requested a deferral of their removal based on three grounds: their pending H&C applications submitted on July 16, 2018; the best interests of the two children to finish their school year; and the best interests of one of the children who had an upcoming appointment with a pediatric respirologist on January 18, 2019.

[3] On December 20, 2018, the Officer denied the Applicants' request for a deferral of the removal order pursuant to section 48 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") to enforce removal orders as soon as reasonably practicable.

[4] On application for judicial review to this Court, the Applicants argue that the Officer's decision to deny the deferral request is unreasonable because the Officer failed to properly consider the Applicants' pending H&C applications and the short-term best interests of the children.

[5] For the reasons below, this application for judicial review is allowed.

II. **Facts**

A. *The Applicants*

[6] Radovan Cvetkovic (the "Principal Applicant"), Zrinka Cvetkovic (the "Associate Applicant"), Darko Cvetkovic, and Goran Cvetkovic (collectively, the "Minor Applicants")

(collectively, the "Applicants") are citizens of Croatia. They are respectively 38, 36, 15, and 9 years of age.

[7] The Principal Applicant was raised in Ostrovo, a predominantly Serb village. He is ethnically Serb. In November 2002, at the age of 21, the Principal Applicant was drafted into the Croatian army for mandatory military service. While in the military, the Principal Applicant met his current wife, the Associate Applicant, who is ethnically Croat. The couple married in April 2004, but the Associate Applicant's parents did not approve of the interethnic marriage due to the animosity between the two ethnic groups. The Associate Applicant's parents attempted to keep the couple apart by moving her to Umag, approximately 300 kilometres away from her family home of Zrinski Topolovac, but when the Associate Applicant became pregnant with her first child, Darko, in 2003, she was able to move back to Zrinski Topolovac shortly after.

[8] After the Principal Applicant finished his military service and found work, the Principal Applicant and the Associate Applicant moved to a city called Bjelovar, 18 kilometres away from Zrinski Topolovac. They kept the location a secret from the Associate Applicant's parents to protect themselves. Although at one point they tried to make amends with the Associate Applicant's parents, the Associate Applicant's father attacked the Principal Applicant with a pitchfork and threatened to kill him.

[9] The couple's first son, Darko, was born in May 2004.

[10] When the Principal Applicant's employer (an auto shop) closed in 2005, the Principal Applicant could not find work due to his Serbian ethnicity. As a result, the family was forced to relocate to Ostrovo, a Serbian village in Croatia where the Principal Applicant's family lived.

[11] In Ostrovo, the Principal Applicant's father and sister openly showed their disdain for the Associate Applicant and her ethnicity. The Principal Applicant's sister frequently picked fights with the Associate Applicant and the Applicants moved out to live on their own. In addition to the Principal Applicant's family, the villagers in Ostrovo constantly harassed the Applicants. The Applicants' son, Darko, was heavily bullied at his predominantly Serb school due to his mixed Croat-Serb ethnicity.

[12] The Applicants' second son, Goran, was born in October 2010. Wishing to prevent bullying for their sons and to escape the increasingly violent nationalism, the Applicants fled to Canada in 2012, when their second son, Goran, was almost two years old.

B. *Refugee Claim and H&C Application*

[13] The Applicants arrived in Montreal on September 27, 2012. As they intended to make a refugee claim, the Applicants filled out a Basis of Claim form upon arrival. The Applicants initially had contact with a lawyer through the YMCA in Montreal, but received little advice on how to proceed with the refugee claim and had great difficulty getting in touch with the lawyer.

[14] After staying in Montreal for six months, the Applicants moved to Toronto because Darko was having difficulty speaking French in school. In Toronto, the Applicants retained Downtown Legal Services on November 10, 2014, while residing in shelter homes.

[15] The Applicants' initial refugee claims were based on discrimination and threats of violence faced in Croatia, and fear for their safety and wellbeing. However, the Applicants were advised by their new counsel that their situation did not fit well within the legal criteria for a refugee claim and were advised to submit an application on H&C grounds. On this advice, the

Applicants withdrew their refugee claims on March 2, 2018, before filing any substantive evidence. The Applicants' counsel noted during the hearing that the delay of the refugee claims between the time when the Applicants initially submitted their refugee claims in 2012 and when the claims were ultimately withdrawn in 2018 was through no fault of the Applicants.

[16] On July 16, 2018, the Applicants submitted their H&C applications.

[17] On December 12, 2018, the Applicants were given a direction to report for removal on December 26, 2018 from Canada to Croatia.

[18] On December 13, 2018, the Applicants requested a deferral of removal. The request for a deferral of removal was based on three grounds: their pending H&C application submitted on July 16, 2018; the best interests of the two children to finish their school year; and the best interests of one of the children who had an upcoming appointment with a pediatric respirologist on January 18, 2019.

[19] On December 20, 2018, a CBSA Inland Enforcement Officer (the "Officer") denied the Applicants' request for deferral of removal. This is the decision that gives rise to the present application for judicial review (the "Decision").

C. *Decision Under Review*

[20] In the Decision, the Officer noted that pending H&C applications do not automatically give rise to a statutory stay of removal under the *IRPA*, and stated that the pending applications would continue to be processed even after the Applicants' removal from Canada. The Officer found that a decision on the H&C application was neither imminent nor overdue because the

H&C application had been in processing for five months at the time of the Decision, and the IRCC website stated that the processing time for an H&C application was 31 months at the time.

[21] Regarding the best interests of the children, the Applicants had made the following submissions relating to the Minor Applicants:

A. Goran, the younger child, benefits from an Individualized Education Plan ("IEP") at school, as he has been diagnosed with a Mild Intellectual Disability and Attention-Deficit/Hyperactivity Disorder. The Applicants noted that Goran had just begun flourishing at school.

B. Darko, the older child in Grade 9, has also been diagnosed with a mild intellectual disability.

[22] However, the Officer noted that the children were not in a formative year of schooling and found insufficient evidence to demonstrate that their education would suffer permanently upon their removal to Croatia. The Officer found insufficient evidence to establish that the children would not be able to enroll in the Croatian educational system.

[23] Although the Officer did acknowledge that the children required special needs education, the Officer ultimately concluded that there was insufficient evidence to establish the children would not be able to receive the appropriate educational support in Croatia.

[24] The Applicants had submitted that they would be at risk if they were returned to Croatia due to discrimination against their interethnic marriage. The Officer found that the Applicants had the opportunity to have their risk assessed when they made a refugee claim, but that they chose to withdraw their refugee claim.

[25] One basis for the Applicants' request for deferral of removal was based on Darko's medical condition. At birth, Darko was diagnosed with a lung disorder called congenital lobar emphysema, which required surgery. Darko had been scheduled for his routine specialist follow-up appointment on January 18, 2019 with a pediatric respirologist. His specialist had noted that regular medical appointments were important to monitor Darko's lung function and respiratory symptoms.

[26] The medical documentation by Darko's specialist was sent to a different doctor for assessment who concluded that Darko had not developed any "ongoing acute clinically significant complication and/or clinical sequelae/decompensation as a result of his baseline chronic respiratory medical condition".

[27] On this basis, the Officer noted that in the absence of any current objective medical evidence indicating clinically significant issues, the minor Applicant would not be precluded from air travel for removal. The Officer found insufficient evidence that the minor Applicant would not be able to receive medical assessment with a pediatric respirologist in Croatia.

III. **Issue and Standard of Review**

[28] The issue is whether the Officer's decision to deny the Applicants' request to defer their removal order was reasonable, and in particular, whether the Officer erred in consideration of the pending H&C application.

[29] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], the reasonableness standard generally applied to the review of decisions made by enforcement officers under section 48 of the *IRPA*, as

in the case at bar: *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 (CanLII) at para 43; *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 (CanLII) at para 27; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 (CanLII) at para 25 [*Baron*]. There is no need to depart from the standard of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[30] As noted by the majority in *Vavilov*, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker," (*Vavilov* at para 85). Furthermore, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency," (*Vavilov* at para 100).

IV. **Analysis**

A. *Timeliness of the Pending H&C Applications*

[31] The Applicants submit that while an enforcement officer's discretion to defer removal is limited by subsection 48(2) of the *IRPA*, the officer may nevertheless defer a removal order where an applicant has made a timely H&C application that remains outstanding through no fault of the applicant. The Applicants submit that the Officer erred by focusing on whether the H&C applications were overdue or their result imminent, instead of focusing on the timeliness of the Applicants' submission of the H&C applications. The Applicants assert that the Officer's analysis should have given consideration to the timeliness of the Applicants' submissions because that was the only factor within the Applicants' control. The Applicants make the

argument that after they decided to withdraw their refugee claims on the advice of new counsel, they promptly submitted their H&C applications with a full record within four months, and before any indication that they may be removed.

[32] To support their argument, the Applicants rely on several cases: *Guan v Canada (Public Safety)*, 2010 FC 992 (CanLII) at para 18; *Williams v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 274 (CanLII) at para 36; *Villanueva v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 543 (CanLII) at paras 17-20 [*Villanueva*]; *Laguto v Canada (Citizenship and Immigration)*, 2013 FC 1111 (CanLII) at para 31 [*Laguto*]; *Newman v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 888 (CanLII) at para 31; *Gebru v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 45 (CanLII); and *Kanumbi v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 336 (CanLII).

[33] The Respondent submits that the line of cases cited by the Applicants does not support the Applicants' argument, but stands for the proposition that a deferral for an outstanding H&C application may be merited where the application was filed in a timely manner and was yet to be determined due to backlogs in the system. The Respondent submits that the Applicants did not meet the latter requirement because their H&C applications had only been outstanding for five months at the time of the Decision. The Respondent argues that this was what the Officer had been referring to when noting that the decision was not "overdue".

[34] The Respondent further submits that the Applicants have conflated the question of whether an H&C application has been outstanding "through no fault of the Applicant" with whether an H&C application has been outstanding "due to backlogs in the system". The Respondent asserts that the former refers to the timeliness of filing the application, and the latter

speaks to why the application has not been processed. According to the Respondent, without this latter requirement, the mere filing of an H&C application in a timely manner would halt removals, running contrary to Parliament's intentions.

[35] The Respondent submits that the Officer was not required to explicitly consider whether the H&C applications had been filed in a timely manner since it had not yet been delayed due to backlogs in the system. The Respondent relies on the *Laguto* case for the proposition that although the Court found the Officer failed to consider whether the H&C application was filed in a timely manner, this omission was immaterial because the application—which had been outstanding for two months—had not been outstanding due to backlogs in the system.

[36] On this issue of whether the Officer erred in consideration of the Applicants' pending H&C applications, I am not persuaded by the Applicants, and the cases cited by the Applicants do not appear to fully support the Applicants' arguments.

[37] The Applicants had argued that the case at bar is distinguishable from *Laguto* because the Applicants had requested deferral until their application had completed the first stage, whereas in *Laguto*, the applicants only requested a deferral for 8 months. However, as the Respondent points out, the Court in *Laguto* states (at paragraph 39):

> Even if the request had been tied solely to the first stage assessment of the H&C application, it remains unlikely that the Officer's failure to consider the timeliness of the application would constitute a determinative error on the facts of this case. Assuming that the application was made in a timely manner, the Respondent is correct to submit that the Applicant has failed to establish that the H&C application was not determined due to a backlog in the system.
>
> […]

> It is only where an application is timely and has not yet been determined due to a backlog in the system that an officer is required to turn his mind to whether a deferral is warranted as a result of a pending H&C application.

[38] Citing *Baron*, the Federal Court of Appeal in *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 (CanLII) at paras 80-81 also emphasizes that "[I]t is only where a timely H&C application is still pending due to a backlog in processing that a deferral may be warranted."

[39] The Applicants cited *Williams* at paragraph 36 for the proposition that the focus of the Officer's consideration should be on the timeliness of the H&C application: "the Minister should not be allowed to rigorously enforce his duty of removal when he has been delinquent in his duty to process applications that may make the removal unnecessary or invalid." However, this quote should be viewed in the broader context of what the Court in *Williams* states. At paragraph 38, Justice Zinn explains:

> In short, the officer is required to ask (1) was the H&C application submitted in a timely fashion, and (2) is a backlog on the part of the department the reason why the H&C application has not yet been determined. It is only if the answer to both questions is "yes" that the officer should turn his mind to whether a deferral is warranted.

[40] I agree with the Applicants in part, that the timeliness of an H&C application can be considered by an officer, but the jurisprudence does not support the Applicant's assertion that timeliness—as a factor within the Applicants' control—must be the focus of the analysis. Therefore, although the Officer did not explicitly address the timeliness of the H&C applications, the Officer's omission was not unreasonable.

[41] The Applicants rely on *Villanueva*, but in my view, it can be distinguished from the case at bar on its facts. In *Villanueva*, the Court noted that officers could consider backlogs within the context of a removal order. The Court found that although the officer was asked to consider the significant backlogs in the system in the case of a timely H&C application that had been outstanding for a considerable period—15 months—the officer ignored this request and refused to defer based on "imminence" (*Villanueva* at paras 35-36). Thus, although the officer had recognized that the H&C application was timely, he neglected to consider whether the significant backlogs in the system and a long-outstanding H&C application should impact his decision (*Villanueva* at para 37).

[42] However, in the case at bar, the Officer had noted that the Applicants' H&C applications were neither imminent nor overdue, as they had been in processing for 5 months. The Officer did note whether the applications had been a part of the backlog in stating that they were not "overdue", and as they did not meet this requirement, it was reasonable for the Officer not to have explicitly addressed the timeliness aspect.

[43] Although the Applicants argue that a period of five months is still indicative of the applications being a part of the backlog system, I note that the case law considers whether an H&C application itself has been long outstanding due to backlogs. The merit of deferral of removal is not warranted simply by virtue of an H&C application submission and its placement in the system's queue (even with a timely application). The Officer cannot be asked to delay removal indeterminately and in this case, the date of the decision on the H&C applications was unknown. Moreover, if the outstanding applications were not yet in a "backlog", it was reasonable for the Officer not to have focused or engaged in an analysis of whether the H&C

applications were made in a timely manner, since that would not have affected whether the pending H&C applications warranted special circumstances to effect a deferral of removal.

B. *Consideration of IRCC Statistics*

[44] The Applicants submit that in their deferral request, they submitted IRCC statistics showing that there is only a 3.8% approval rate for H&C applicants who have been confirmed departed. The statistics had also shown that 68.2% of applicants who remained in Canada were approved. Based on this, the Applicants had argued that they would be significantly prejudiced on their H&C applications by being removed. The Applicants submit that these statistics were never addressed in the Decision. The Officer had simply stated that the H&C applications would continue to be processed after the family is deported.

[45] The Applicants submit that if they are removed prior to their H&C determination, they lose their right to a fair consideration of their H&C applications. The Applicants submit that the Officer's failure to consider this issue effectively renders the H&C's purpose—as an equitable and humanitarian remedy—illusory.

[46] The Applicants also submit that the Officer's disregard of statistics evidence defies the principles of procedural fairness because the deferral request process should be accessible to self-represented litigants and must be filed in a time-limited manner.

[47] The Respondent submits that statistical evidence absent expert analysis is of little probative value, and did not need to be discussed. The Respondent cites several cases for the proposition that this Court and the Federal Court of Appeal have cautioned against drawing any conclusions from statistics absent any expert analysis (*Es-Sayyid v Canada (Public Safety and*

Emergency Preparedness), 2012 FCA 59 (CanLII) at paras 45-49 [*Es-Sayyid*]; *Gillani v Canada (Citizenship and Immigration)*, 2012 FC 533 (CanLII) at para 43; *Zupko v Canada (Citizenship and Immigration)*, 2010 FC 1319 (CanLII) at para 22; *Xuan v Canada (Citizenship and Immigration)*, 2013 FC 673 (CanLII) at para 15).

[48] Furthermore, the Respondent notes that this Court has expressed skepticism about the probative value of the evidence submitted by the applicants, noting that the correlation between rates of success in H&C applications and the departure of an applicant from Canada does not necessarily infer causation (*Barco v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 421 (CanLII) at paras 23, 26; *Brown v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 83141 (FC) at para 6). For example, applicants with strong H&C factors may have been less likely to be removed from Canada, and those with weaker H&C applications may have been more likely to voluntarily depart or be removed prior to a determination on their application.

[49] While I agree with the Respondent's position that correlation does not necessarily indicate a causal relationship, the Officer in this case erred by failing to consider the evidence. The Applicants had submitted that their removal would fail to provide a meaningful remedy in the consideration of their pending H&C applications, citing the IRCC statistics in support. Although submitting an H&C application certainly does not necessitate the deferral of a removal request, the Officer in the case at bar shows no engagement with the supporting evidence and arguments. The Officer simply states the Applicants' pending H&C applications would continue to be processed even after their scheduled removal from Canada.

[50] While noting the Federal Court of Appeal conclusions regarding statistical analysis in *Es-Sayyid*, in my view, the present case can be distinguished on its facts. *Es-Sayyid* involved the case of a Convention refugee who was issued a danger opinion and facing a removal order, in which a law professor offered a statistical analysis opinion in support of the applicant's argument that the judge displayed a reasonable apprehension of bias (*Es-Sayyid* at paras 1, 25, 36-50). In that case, the analysis featured a statistical opinion on a series of cases featuring criminality and its alleged link to bias in the corresponding decisions.

[51] In distinguishing the case at bar from the decision in *Es-Sayyid*, the context is important. In the case at bar, the statistics were produced by IRCC, not by the Applicants. Furthermore, it features neither criminality nor a statistical analysis attempting to prove reasonable apprehension of bias. The Applicants were simply asking the Officer to consider the IRCC statistics in view of the argument that they would be prejudiced upon removal.

[52] This is not to say that the statistics evidence was determinative of the Applicants' submissions, or that the Officer ought to have given the statistics evidence high probative value. However, despite having made a blank statement on the pending H&C applications and the implications of removal, the Officer's reasons failed to provide insight into the engagement with supporting evidence and thus failed to properly consider the evidence. From the reasons, it is unclear why the Officer assigned diminished weight to the statistical evidence, or whether it was even considered at all.

[53] This renders the Officer's decision unreasonable.

V. **Certified Question**

[54] At the hearing, the Applicants proposed the following question for certification:

> What is the scope and/or nature of the discretion of a removals officer in considering a request by a person under a valid removal order for deferral of removal based on the timeliness of an outstanding humanitarian and compassionate application?

[55] The Applicants take the view that the proposed question for certification is "a slight variation of a question that was certified by the Federal Court in *Benitez v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1307," but that the proposed question is a broader formulation of the previously certified question, and emphasizes the timeliness of an outstanding H&C application.

[56] The Respondent opposes certification. The Respondent argues that the proposed question has already been dealt with by the Federal Court of Appeal in *Baron* and *Lewis*. In *Lewis*, Justice Gleason confirmed and restated the principles from *Baron* at para 81, noting that the timeliness of an H&C application is tied to whether the delay is caused by a backlog in processing:

> The impact of the Children's Convention on the type of assessment to be undertaken by enforcement officers was squarely addressed by this Court in *Baron*. There, this Court unequivocally held at paragraph 47 that the Children's Convention does not mandate that a full-blown best interests of the child analysis be undertaken by an enforcement officer or that removal be delayed due to an untimely H&C application. Rather, in adopting the statements in *Simoes*, this Court in *Baron* recognized that it is only where a timely H&C application is still pending due to a backlog in processing that a deferral may be warranted.

[57] In my view, the proposed question is one that has already been considered by the Federal Court of Appeal. I am not convinced that the slightly varied formulation of the question raises an issue of broad significance or general importance.

VI. **Conclusion**

[58] For the reasons stated above, I find the Officer's Decision is unreasonable.

[59] I would dismiss the Applicant's request to certify a question as I do not believe that this matter raises a serious question of general importance within the meaning of paragraph 74(d) of the *IRPA*.

JUDGMENT IN IMM-6381-18

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter referred back for redetermination by a different decision-maker.

2. No question is certified.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Prasanna Balasundaram	FOR THE APPLICANTS
Daniel Engel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Downtown Legal Services Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT