Federal Court  Cour fédérale

Date: 20200421

Docket: IMM-3741-19

Citation: 2020 FC 539

Ottawa, Ontario, April 21, 2020

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ROMULO ANDRADE LIMA
and
RUBIA GONDIM LIMA

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the refusal by an enforcement officer to defer the Applicants removal from Canada. The Applicants are Brazilian nationals and failed refugee claimants who assert that they should not be removed while their recently submitted application for an exemption from visa requirements on Humanitarian and Compassionate [H&C] grounds

under section 25 of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [*IRPA*] is still pending.

[2] The Applicants, Romulo Andrade Lima and Rubia Gondim Lima, are nationals of Brazil and husband and wife. As of June 2019, Mr. Lima was 63 years old and his wife Rubia was turning 60.

[3] The Limas arrived in Canada in May 2012 and sought refugee protection in November of that year. They waited several years to have their refugee claim heard by the Refugee Protection Division [RPD], which eventually took place on October 5, 2018. By a decision dated October 16, 2018, their claim was denied. They brought an application for leave and judicial review of the Refugee Board's decision, but leave was denied.

[4] The Canada Border Services Agency [CBSA] then began taking steps to remove the Applicants. Removal arrangements were deferred in May 2019 until mid-June as a physician recommended that Mr. Lima not fly during this timeframe given a recent knee surgery.

[5] On June 7, 2019, the Applicants requested a deferral of their removal until their H&C application was submitted and processed. The H&C request was submitted on or around July 25, 2019 following both the deferral refusal and the stay. On November 29, 2019, the Applicants were advised that the H&C application could not be processed, because less than 12 months had elapsed since the Federal Court had refused the application for leave and judicial review of their negative RPD decision. The H&C application was then resubmitted.

[6] On June 14, 2019, the Officer denied the request and refused to delay their removal pursuant to section 48 of the *IRPA*, noting that the evidence provided by the Limas, including on their various medical conditions, was not sufficient to warrant deferral.

[7] The Applicant's then brought an application for a stay of removal which was granted by Mr. Justice Denis Gascon on June 27, 2019. In granting the stay, Justice Gascon applied the elevated threshold developed in *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682 (F.C.) and endorsed by the Federal Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron FCA*]. He went beyond the "serious issue" branch of the tripartite test and reviewed in-depth the underlying application: *Sanabria Castillo v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 172 at para 11. In finding in favour of the Applicants, this "decision on the interlocutory application effectively grants the relief sought in the underlying judicial review application": *Patel v Canada (Citizenship and Immigration)*, 2018 FC 882 at para 4.

[8] It is worth noting that Mr. Lima has a number of medical conditions, including a heart block (requiring a pacemaker), prostate cancer, left total knee arthroplasty, reactive depression, and coronary artery disease. All of these conditions require monitoring for progression on a six months or longer cycle. According to his physician, "over the past 2-3 years Mr. Lima's health concerns have become significantly more complicated." His pacemaker, as an example, requires "regular follow up to maintain optimal pacemaker programming as well as to identify any system problems".

[9] A letter from a person described as a Brazilian doctor asserted that Mr. Lima would be unable to receive adequate medical care in Brazil and would not survive. Ms. Lima apparently also has a heart condition. The letter writer also asserts that she would undoubtedly suffer. Documentary evidence from credible international sources raise serious concerns about the state of the Brazilian healthcare system. It has been, for some years, dependent on Cuban doctors who are now being repatriated due to what is described as "unacceptable conditions". According to the British Medical Journal, constitutional rights to health care in Brazil have been undermined through austerity policies.

[10] The applicable standard of review of decisions made by enforcement officers under section 48 of the *IRPA* is reasonableness: *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 FCA* at para 25.

[11] The Supreme Court of Canada's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] articulates what reasonableness review entails. The mark of a reasonable decision, as noted by the majority in *Vavilov* at para 85, is that it is "based on an internally coherent and rational chain of analysis" that is "justified in relation to the facts and law that constrain the decision maker".

[12] The Officer's decision to refuse a deferral request is a discretionary decision and is owed deference, and reviewing courts are not to substitute their own notion of the appropriate answer (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). At the same time, in

Vavilov, the Supreme Court cautioned at para 135 that "[m]any administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law".

[13] In this instance, the Officer discounted or otherwise improperly weighed probative evidence, rendering the decision unreasonable. The Officer stated that: "Upon return to Brazil Mr. Lima will have ample time to arrange for monitoring and follow-up care as required". This statement exhibits a lack of understanding of the evidence that indicates that Mr. Lima may be unable to access either monitoring or follow-up care. The Applicants are of modest means. The documentary evidence indicates that they may not be able to access healthcare that is not covered under the limited public health system in Brazil or afford services available in the private sector.

[14] The Officer's decision displays unjustified skepticism about the credibility of the independent and reputable news sources such as *Deutsche Welle* and peer reviewed journals including the *International Journal for Equity in Health* and *BMJ Global Health.* The Officer offers no source in favour of his observation that the issues brought forth by the articles are similar to concerns that Canadian media and government acknowledge to be problems in the Canadian health care system such as underfunding, long wait times, limited access, and poor long term planning. At best this appears to be anecdotal or the Officer's personal opinion.

[15] Enforcement officers have discretion to defer removal when failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. H&C applications alone will not justify deferrals, "absent special considerations", unless based upon a threat to personal safety: *Wang*, above, at para 45; *Baron FCA* at para 51. Special considerations are broader than a threat to personal safety but do not include "the strength or compelling nature of the underlying H&C application": *Danyi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 112 at para 32.

[16] On the facts in the record before the Court, I am satisfied that the Officer's decision was unreasonable for failing to adequately consider the Applicants' medical conditions as special circumstances warranting deferral.

[17] In light of the prevailing global restrictions on travel due to the Covid-19 pandemic I see no practical reason to refer the deferral request to another officer for reconsideration. It may be that the Minister will consider that an administrative stay is warranted until such time as the Applicants' request for an H&C exemption is dealt with. That is a matter for the Minister to determine.

[18] No questions for certification were proposed.

JUDGMENT IN IMM-3741-19

THIS COURT'S JUDGMENT is that the application is granted. No order is made to remit the matter for reconsideration and no questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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