Federal Court  Cour fédérale

Date: 20200616

Docket: IMM-3043-19

Citation: 2020 FC 683

Ottawa, Ontario, June 16, 2020

PRESENT: Mr. Justice Annis

BETWEEN:

DAMIONE WILLIAMS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Damione Williams, seeks judicial review of the decision of a Canada Border Services Agency ("CBSA") Inland Enforcement Officer (the "Officer"), dated May 15, 2019. The Officer refused the Applicant's request for a deferral of his removal because there was insufficient evidence that there would be a serious detriment as a result of enforcing the removal order.

[2] The parties agree that the issue of the deferral of removal pending the birth of the child is moot. Similarly, they agree that the application is not moot pending the resolution of the spousal sponsorship application and considerations of the best interest of the child [BIOC].

[3] For the following reasons, this Court dismisses this application for judicial review.

II. Facts

[4] The Applicant is a citizen of Jamaica. He arrived in Canada in 2000 at the age of 17 as a permanent resident. In April 2016, he was convicted of a number of firearms offences and sentenced to 4 years in jail. He served 2 years and 8 months, and was released on May 2017. While in prison, the Applicant completed his high school education.

[5] In February 2017, he was reported for serious criminality pursuant to paragraph 36(1)(a) of the IRPA. The Applicant lost his permanent residence and a removal order was issued against him on April 19, 2017. Soon after, the Applicant was issued with a PRRA which was refused in October 2018.

[6] In July 2018, the Applicant met his wife, Keylonna Chaisson. In October 2019, she became pregnant and they married on February 27, 2019. On April 1, 2019, the Applicant moved in with her. On April 22, 2019, they submitted a spousal sponsorship application. At the time of the deferral request, the child’s expected delivery date was July 24, 2019.

[7] On May 2, 2019, the Applicant was served with a direction to report for removal, scheduled for May 16, 2019. On May 7, 2019, the Applicant requested a deferral of his removal pending a decision on the spousal sponsorship application, or until the birth of his child. On May 13, 2019, the Applicant submitted a psychological report, prepared by Registered Psychotherapist Natalie Riback. Ms. Riback's report stated that removal from Canada would cause the Applicant and Ms. Chaisson "significant emotional and psychological suffering."

[8] On May 14, 2019, the Applicant filed a Notice of Motion requesting a stay of his removal. On May 15, 2019, the CBSA issued its decision refusing the deferral of the Applicant's removal. The Officer concluded that the Applicant had not presented compelling evidence of the serious detriment based on either the In Canada Spousal Application or the short term BIOC that would result from the enforcement of the removal order as scheduled.

[9] Also on May 15, 2019, this Court granted the motion and stayed the Applicant's removal from Canada. The Court granted the stay on the basis that the Officer's decision refusing to defer removal pending the birth of his child was unreasonable.

III. Standard of Review and Applicable Law

[10] In accordance with the recent decision of the Supreme Court of Canada in *Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 [*Vavilov*], the new framework to determine the standard of review is based on the presumption that an impugned decision is reasonable (*Vavilov* at para 16). This presumption has not been rebutted for any of the issues raised in this case.

[11] The focus of reasonableness review must be on the decision actually made by the decision maker concerning both the reasoning process and the outcome. The reviewing courts must determine whether the decision "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." (*Vavilov* at para 85) Then, the reviewing court must determine whether the decision "bears the hallmarks of reasonableness –justification, transparency and intelligibility" (*Vavilov* at para 99). Finally, the onus is on the party who contests the decision to demonstrate that it is not reasonable (*Vavilov* at para 100).

[12] In *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 49 [*Baron*], Justice Nadon stated that "[i]t is trite law that an enforcement officer's discretion to defer removal is limited. It is "restricted to when a removal order will be executed" (*Simoes v Canada (Minister of Citizenship & Immigration)*, [2000] FCJ No 936 (QL), at para 12). This means that the concerns must be traced back to an element of harm attributable to or associated with the imminent removal being challenged.

[13] With regard to BIOC, Justice Nadon in *Baron* also stated that an immigration officer has no obligation to substantially review BIOC before executing a removal order (*Baron* at para 57). In *Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180, Justice De Montigny added at para 38 that "the obligation of a removal officer to consider the interests of Canadian-born children must rest at the lower end of the spectrum." (see also *Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 at para 16). More recently, it has also been confirmed that an enforcement officer must consider the immediate and short-term BIOC,

but cannot engage into a full-blown H&C analysis of such children's long-term best interests (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 CAF 130 at para 61).

[14] The Applicant cited the recent decision of *Huang v. Canada (MSPEP)*, 2018 FC 446 at para 9 [*Huang*] for the proposition that where no prior BIOC analysis had been conducted, the review by removal officers of the BIOC must be more "robust". The Court indicated that a robust review entailed the following: "Central to the exercise of that discretion must be a careful assessment of the length of the likely separation and the financial and emotional hardships that are expected to prevail over time" (*Huang* at para 9).

[15] With respect, this reasoning would appear to constitute a significant modification of the principles enunciated in *Baron* and various other cases from the Court of Appeal. Enforcement officers are required to be alert and sensitive regarding the BIOC evidence that is relevant to the imminent short-term harm and special exigent circumstances affecting the child arising from an applicant's removal. A careful assessment of the length of a likely separation and financial emotional hardship prevailing over time would appear to constitute, or at least approach, a full H&C review, but under a new legal standard of "robustness".

[16] It is also not apparent that enforcement officers are trained to undertake such robust assessments of the BIOC. If nothing else, this standard will increase the scope and volume of evidence required to be considered by a removal officer. This approach would also appear to fly in the face of Parliament's direction that non-status applicants be removed from Canada as soon as possible. The issue of the aptness of what appears to be a novel standard of review for the

BIOC by a removal officer does not arise in this matter. There is an absence of relevant probative evidence regarding the consequences to the child from the imminent removal of his father, apart from the moot issue of its effect on the pregnancy.

[17] With respect to the spousal sponsorship application, pursuant to the case law, a removal officer is not entitled to defer removal where a decision on an outstanding application is unlikely to be imminent (*Baron* at para 80). Chief Justice Crampton in *Forde v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1029 repeated the applicable principles in a similar case. He stated that "[t]o permit a person to avoid a removal from Canada by filing a spousal sponsorship or an H&C application shortly before the scheduled removal, or indeed well after being notified that he or she is subject to removal", would be contrary to the principles articulated in the jurisprudence (*Forde* at para 40). He added that allowing this to happen would "go beyond the very limited situations described above [and] would also be inconsistent with the plain language and the underlying spirit of subs. 48(2) of the IRPA". (*Forde* at para 41).

IV. Analysis: Fettering of Discretion and BIOC

[18] The Applicant argues "that the officer fettered his discretion by failing to appreciate the compelling facts of the case." This submission represents a request that the Court re-evaluate and reassess the weight of the evidence, which it cannot do. Normally the issue with respect to "compelling circumstances" is that the decision maker failed to consider them, such as described in the Applicant's supporting case law for this argument of *Poyanipur v. Canada (M.C.I.)*, [1995] F.CJ No 1785 and *Prasad v. Canada (MCI)*, 2003 FC 614, at para. 32.

[19] No overlooked compelling circumstances are apparent and require Court's intervention. The examples in the Applicant's memorandum refer, on the one hand, to the failure to consider the short-term delay of eight weeks pending the birth of the child, which is moot. On the other hand, the Applicant argues that the long-term circumstances of the effect of removal on the parents are not in the best interests of the child. However, these considerations fall outside of the officer's mandate, which is limited to the short-term interests of the child.

[20] The Applicant primarily based his BIOC submission on the last minute report of the registered psychotherapist. The original submission to the officer addressed the personal consequences of the removal on the Applicant, and its effect on the sponsorship application. The only unstated reference in relation to the BIOC was to longer-term studies showing the harm to children growing up without their fathers. Moreover, the specific reference to the BIOC was in the context of the removal thwarting the longer-term inland spousal sponsorship, which "given their relationship and the soon to be born child… would very likely be approved."

[21] The report of the psychotherapist similarly emphasizes the long-term consequences of removal on the parents, apart from the short-term impact on the pregnancy and its possible effect on the child. The Applicant's submission to the officer accompanying the report referenced its conclusion (which I find borders on advocacy):

> As a result of Mr. Williams' potential removal from Canada, Ms. Chaisson is exhibiting symptoms consistent with generalized anxiety and major depression which are detrimental to her mental and emotional health, and which puts undue stress on her pregnancy which has negative effects on her unborn child. Mr. Williams is also exhibiting symptoms consistent with generalized anxiety and major depression. It is my professional opinion that it is in Mr. Williams', Ms. Chaisson's, and their unborn child's best

> interests to live together in Canada where Mr. Williams can continue to support his family, physically, emotionally, and financially, and to build upon the strong relationships that already exist. I strongly believe that Mr. Williams' removal from Canada will cause him and his wife significant emotional and psychological suffering and would be contrary to their best interest.

[22] I agree with the Respondent that these are not short-term, exigent considerations, as well as being speculative in terms of the child's care and development, if at all. The officer also considered the statement to be speculative by offering only one treatment of many possible longer-term outcomes that could not be determined in the context of the deferral request, and not bearing in any probative manner on the BIOC issue. This is not an unreasonable conclusion.

[23] On a subsidiary technical point, the Applicant argues that the officer erred in concluding that he was removal-ready on June 26, 2017, despite making a PRRA request. He contends that requesting the PRRA modified his status from removal-ready until such time as the PRRA decision was rendered. No jurisprudence or reference to policies was provided in support of this submission. I disagree with this submission.

[24] While it is true that before a removal order is enforced a foreign national can apply for a PRRA, only a positive PRRA stay the removal order from Canada (*Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 at paras 11 and 49). In the present case, as per his affidavit, the Applicant has himself decided not to attend his PRRA interview given that he had lied in filing the application.

[25] The Minister did not intend that accessing adjunct procedures by an applicant, such as in this matter which entailed filing a false PRRA application, could modify the applicant's status of being deemed removal-ready, after already being found inadmissible or not a person in need of protection. There is no underlying policy or contextual argument that could support such an interpretation. It encourages conduct such as proceeding to enter into marriages and having children in the face of a pending removal, being circumstances that complicates removal when deportation as soon as possible is the foundational principle in such circumstances.

[26] This conclusion equally applies to the collateral submission that the officer erred regarding the BIOC by discounting somewhat the "special time" of the couple preferring to being together during the birth of their child. The argument suggests that removal was not anticipated by the couple based on the alleged lifting of the removal-ready status. It is wishful thinking that a PRRA request would substantially reduce the likelihood of pending and reasonably anticipated removal, regardless of it being based on a fraudulent misrepresentation. I agree with the officer's comment to the effect that one must take in account the ill-fated conduct of the applicant said to support a case against a pending removal. In any event, the facts on this point relate to the timing of the pregnancy, which is a moot issue.

[27] The Applicant also criticized the officer for noting that the psychotherapist "had one interview and listened to the concerns of Mr. Williams and his wife." Last-minute standalone reports based on one interview that often weigh heavily on the outcome of decisions, lack reliability for any number of reasons and significantly undermine the adjudication process (*Moffat v. Canada (Citizenship and Immigration)*, 2019 FC 896). There is no basis for

immigration matters setting lower reliability standards for evidence opining on human factors, or on any subject, and particularly that are often both determinative and unanswerable without responding opinions. It was not unreasonable for the officer to note that the psychotherapist's opinion was based on a single interview that listened to and related extensive negative psychosomatic consequences from removal provided by highly self-interested clients, who are not patients.

[28] Additionally, the Officer found that the short-term best interests of the child would be met because Ms. Chaisson would remain in Canada to care for the child and has extensive family support in Canada. The first point was an important distinguishing factor in *Pangello v Canada (MPSEP)*, 2014 FC 229 at para 25. The Officer also referred to the Applicant's recent moving in together with Ms. Chaisson on April 1, 2019, although married on February 27, 2019, and the reasonable conclusion that the mother returning to her previous living arrangement should not pose difficulties. If not, no evidence were provided to the Officer to assess this potential issue.

[29] Finally, with regard to the H&C submissions, the Officer noted that the Applicant's father, his two brothers, and his sister continue to reside in Jamaica. Therefore, the Officer found that there was no evidence that the Applicant would not receive some degree of support from his family living in Jamaica. Additionally, the Officer concluded that there was insufficient evidence to reasonably believe that the Applicant would be at risk of death, inhumane treatment, cruel or unusual punishment or suffer irreparable harm if the removal order was to be enforced at the time.

[30] In accordance with *Vavilov*, the Court concludes that the decision is justified based on an internally coherent and rational chain of analysis, and the outcome justifiable in relation to the facts and law that constrain the officer, while bearing the hallmarks of reasonableness – justification, transparency and intelligibility.

JUDGMENT in IMM-3043-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. No questions are certified for appeal.

"Peter B. Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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