Federal Court Cour fédérale

Date: 20201120

Docket: IMM-4633-19

Citation: 2020 FC 1078

Ottawa, Ontario, November 20, 2020

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MAHINTHAN SIVALINGAM

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of a Canadian Border Services Agency [CBSA] Enforcement Officer [the Officer], dated July 25, 2019 [the Decision], refusing to defer removal of the Applicant, Mr. Mahinthan Sivalingam, from Canada. The Applicant's removal was scheduled for August 2, 2019. On August 1, 2019, Justice Roussel granted the

Applicant's motion to stay the execution of his removal until this application for judicial review is determined.

[2] As explained in greater detail below, this application is allowed, as I have concluded the Officer erred in failing to recognize the possibility that the Applicant's inadmissibility would be overcome by humanitarian and compassionate [H&C] considerations. That error must be considered against the backdrop of the request for H&C relief, made by the Applicant in March 2016, in seeking to be included in his wife's permanent residence application. Immigration, Refugees and Citizenship Canada [IRCC] subsequently rejected that application because of the mistaken belief the Applicant was already a permanent resident. As a result of the Officer's error, the Officer did not give consideration to whether the long-unaddressed request for H&C relief amounted to the sort of special circumstances in which outstanding H&C applications can warrant a deferral of removal.

II. **Background**

[3] The Applicant is a citizen of Sri Lanka. In 2001, the Applicant's father left Sri Lanka for Canada, fearing persecution by the Sri Lankan army. The Applicant's father made a successful refugee claim in Canada, and the Applicant and his family moved to Montreal in 2003.

[4] The Applicant met his wife in Montreal in 2015. She had fled Sri Lanka and applied for refugee status in Canada. They were married in 2015 and have sons born in December of 2015 and July of 2019. The Applicant, his wife and their children live in a house in Montreal with the Applicant's parents and two of the Applicant's siblings.

[5] The Applicant was granted landed immigrant status in 2003 and became a permanent resident of Canada. However, between 2007 and 2012, he was charged and convicted of crimes related to theft and credit card fraud. In September of 2010, the Applicant was found inadmissible for serious criminality pursuant to s 36(1)(a) of *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. His permanent resident status was revoked and a removal order was issued against him.

[6] The refugee claim of the Applicant's wife was accepted in June 2015, following which she applied for permanent residence. The Applicant's counsel then applied to IRCC in November 2015, asking that the Applicant be included as a dependent in his wife's application for permanent residency. In March 2016, the Applicant's counsel made H&C submissions in support of this request.

[7] The Applicant's wife received permanent resident status in March of 2018, but the Applicant was not granted permanent residence as her dependent. He states that he did not know at the time that he had been excluded. Rather, he states that, in the course of bringing an application for judicial review of a Pre-Removal Risk Assessment decision and an associated stay motion in early 2019, he learned that immigration officials had removed him from his wife's permanent residence application, on the basis that he was already a permanent resident and therefore could not be a dependent in his wife's application.

[8] The Applicant's removal from Canada was scheduled for March 17, 2019. He did not report to the airport for removal on this date, and a warrant was issued for his arrest. He

voluntarily turned himself into the CBSA on April 5, 2019, explaining that he had not attended his removal because his wife was pregnant with their second child. The CBSA deferred his removal and released him on conditions, permitting him to stay in Canada until the birth.

[9] The Applicant then applied to the IRCC, asking that his wife's permanent residence application be reopened so that his inclusion as her dependent could be reconsidered. He also states that he has filed an application for a Temporary Resident Permit [TRP], as a means of bridging his status while the reopening application was being considered.

[10] The Applicant's removal was rescheduled for August 2, 2019. On July 10, 2019, he requested that his removal be deferred until his request to reopen his wife's permanent residence application and request for a TRP were decided. He also raised concerns about risks he would face upon return to Sri Lanka, the needs of his wife and children, and his role in caring for his father, who suffered a serious brain injury in 2015. On July 19, 2019, the Applicant made further submissions asking that his removal be delayed by three months because his wife was suffering from post-partum issues.

III. **Decision under Review**

[11] In the Decision that is the subject of this application for judicial review, the Officer refused to defer the Applicant's August 2, 2019 removal. The Officer structured the Decision around consideration of whether the Applicant's removal should be deferred: (1) until a decision is rendered by the IRCC in his application to reopen and reconsider the application to add him to his wife's permanent residency, (2) until a decision is rendered by the IRCC in his application

for a TRP, (3) for the best interests of his children [BIOC] and (4) for the well-being of his father.

A. *Application to reopen and reconsider addition to wife's permanent residency*

[12] Considering the Applicant's submissions surrounding his request to reopen his wife's permanent residency application, the Officer first noted that IRCC was under no obligation to reopen the application and that a request to reopen such an application does not result in a stay of removal.

[13] The Officer recognized that the Applicant was excluded from his wife's permanent residency due to an error, i.e. officials believed he was a permanent resident when in fact he had lost his permanent resident status. However, the Officer reasoned that, as the Applicant lost his permanent resident status because he was inadmissible under s 36(1)(a) of IRPA, he would not have been eligible for inclusion in his wife's permanent residency application, or he would likely have been excluded.

[14] The Officer also took issue with the fact that the Applicant submitted his reopening request only in May 2019, when his wife received permanent resident status in March 2018. The Officer acknowledged the Applicant's submission that he did not know that he had been excluded at that time. However, the Officer found it inconceivable that the Applicant did not question how his wife could get permanent resident status and have her application closed without him also getting status. Moreover, the Officer inferred that the Applicant would have accompanied his wife to her permanent residency appointment, because the appointment letter

sent to his wife required all dependents included in the application to attend the appointment and because the Applicant's wife does not speak English or French.

[15] The Officer found that the Applicant had provided no credible documentation demonstrating that, if he had not been excluded for the wrong reason, he would have regained permanent resident status as his wife's dependent.

[16] Lastly, the Officer noted that the Applicant would be inadmissible under s 36(1)(a) of IRPA if he made an independent H&C application. The Officer explained that, once eligible to apply for a pardon for his criminal record in Canada, the Applicant can seek a pardon and, if successful, he can apply for an Authorization to Return to Canada.

B. *Application for Temporary Resident Permit*

[17] The Officer noted that a TRP application does not result in a stay of removal and that the Applicant had provided no proof that he had in fact submitted a TRP application. Immigration databases did not show that such an application had been received by the IRCC. The Officer concluded that the Applicant had provided no credible documentation to demonstrate that a removal should be deferred until his TRP application was processed.

C. *The best interests of the Applicant's children*

[18] The Officer stated that, while BIOC is an important factor to consider when scheduling a departure, invoking this factor is not in itself sufficient grounds to defer a removal. The Officer

found that there was no credible documentary evidence that the Applicant's children would suffer irreparable harm if he left Canada. Evidence indicated that the Applicant's wife and children would reside with the Applicant's family after his departure. Additionally, the Officer noted that the Applicant's wife and children have access to medical and social services in Canada.

[19] The Officer acknowledged that a letter from the Applicant's wife's physician indicated that she suffered from common post partum issues following the birth of their second child. The Officer stated that it is common knowledge that post partum depression is a serious condition and that it is common knowledge that women suffer from post partum issues to different degrees.

[20] However, the Officer also noted that the physician did not state that the mother cannot take care of her children or that their wellbeing will be jeopardized if the Applicant leaves Canada. The Officer concluded that no credible documentary evidence had been provided to demonstrate the children would suffer irreparable harm if the Applicant left Canada.

D. *The wellbeing of the Applicant's father*

[21] Lastly, the Officer addressed the Applicant's submission that he must remain in Canada to take care for his father who needs daily care due to his brain injury. The Officer noted that the Applicant provided a medical certificate indicating that his father has a suffered cognitive impairment and is dependent on the Applicant and his family for help with daily activities. The Officer found that the Applicant had not demonstrated that his father could not be cared for by his other children or be able to access medical and social services in Canada. Moreover, the

Officer found no indication that the Applicant's father's medical situation had improved since his accident in 2015, suggesting that caring for him is not a short term problem.

E. *Conclusion*

[22] The Officer concluded that there were not enough grounds to defer the Applicant's removal from Canada. Noting that, under s 48(2) of IRPA, an enforceable removal order must be enforced as soon as possible, the Officer advised that the Applicant's removal scheduled for August 2, 2019 was maintained.

IV. **Issues**

[23] The Applicant's Memorandum of Fact and Law articulates the following issues for the Court's consideration:

A. Did the Officer err in assessment of the Applicant's reopening application?

B. Was the Officer's analysis of the best interest of the children reasonable?

C. Did the Officer err by failing to assess all grounds raised in the deferral request?

V. **Standard of Review**

[24] The Applicant submits that the above issues are all reviewable on a standard of reasonableness. While the Respondent agrees that the Decision itself is reviewable on that standard, it submits that the standard of "palpable and overriding error," described in *Housen v*

Nikolaisen, 2002 SCC 33, applies to the Court's review of factual inferences and resulting findings of fact by the Officer. The Respondent relies on *Aldarwish v Canada (Citizenship and Immigration),* 2019 FC 1265 [*Aldarwish*], at paragraphs 24 to 30, for this distinction.

[25] The Applicant notes that *Aldarwish* was decided prior to the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*], which confirmed reasonableness as the presumptive standard of review of administrative decisions. I will apply the reasonableness standard prescribed by *Vavilov* to the present matter. However, I also note that, to the extent the Respondent is arguing that an even less deferential standard should apply, I would reach the same conclusion on the outcome of this judicial review, even if applying such a standard.

VI. **Analysis**

[26] My decision to allow this application for judicial review turns on the first issue raised by the Applicant, whether the Officer erred in assessing the significance of his efforts to reopen his wife's application for permanent residence. The Officer concluded that, because of his criminal inadmissibility, the Applicant would not have been eligible to be included in his wife's application or likely would have been excluded therefrom. The Applicant submits that this conclusion demonstrates an error in fact or law, either by ignoring the fact the Applicant had sought H&C relief from his inadmissibility or by failing to recognize that s 25 of IRPA afforded a statutory discretion to overcome this inadmissibility.

[27] I agree with the Applicant that the Decision does not demonstrate any appreciation of the possibility that the requested H&C relief could overcome the inadmissibility. Certainly, there is no explicit consideration of that possibility. I recognize the Officer's statement that the Applicant "likely" would be excluded from his wife's application. While the use of the word "likely" could possibly represent an implicit recognition of the possibility of H&C relief, this is far from a transparent recognition of that possibility.

[28] The Respondent points to the Officer's express mention, later in the Decision, of the possibility of H&C relief. However, the Officer's statement is that, even if the Applicant now submitted an independent H&C application, he is still inadmissible. I agree with the Applicant's response, that this portion of the Decision represents further support for the Applicant's position that the Officer failed to recognize that his inadmissibility could be overcome through H&C relief.

[29] The Respondent makes a more compelling argument, to the effect that any error of this sort is not material to the deferral decision, because the filing of an H&C application is not a bar to removal. To assess the strength of this argument in the particular context of the present matter, it is necessary to consider authorities which have explored the discretion afforded to a CBSA officer when considering a request for deferral of removal.

[30] In *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*] at para 51, the Federal Court of Appeal held that, absent special considerations, H&C applications will not justify deferral unless based upon a threat to personal safety. In *Lewis v*

Canada (Public Safety and Emergency Preparedness), 2017 FCA 130, the Federal Court of Appeal followed *Baron*, holding that the fact that an H&C application has been made shortly before a removal date by those subject to being removed does not mean that a deferral is warranted.

[31] The Federal Court has also rejected the position that the "special considerations," which *Baron* recognizes can warrant a deferral of removal even in the absence of a threat to personal safety, include the strength or compelling nature of a pending application for permanent residence (see *Newman v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 888 [*Newman*] at paras 29 and 34). However, special circumstances warranting deferral can arise where a timely application for H&C relief has not been addressed in a timely manner (see *Newman* at paras 31 and 34).

[32] The present matter could be characterized as raising such special circumstances, because the Applicant's March 2016 request for H&C relief was never addressed on its merits. Rather, it was rejected on the erroneous basis that the Applicant was already a permanent resident. Neither the Officer nor the Respondent disputes that this was an error. As such, the Applicant's re-opening application represents a request for consideration of a long-unaddressed application for H&C relief.

[33] I do not suggest that these circumstances necessarily warranted a positive deferral decision, but they are sort of circumstances in which an Officer has discretion available to grant such relief. Therefore, the Officer's error in recognizing the possibility that the unaddressed

request for H&C relief could overcome the Applicant's inadmissibility represents a material error undermining the reasonableness of the Decision.

[34] In so finding, I am conscious of the Officer's conclusion that the Applicant did not pursue his re-opening application in a timely manner. The Officer notes that, while the Applicant's wife received permanent residence status in March 2018, he did not seek to reopen her application until May 2019. The Officer disbelieves the Applicant's assertion that he only realized that he had been excluded from his wife's application in early 2019.

[35] The Applicant argues that, in so concluding, the Officer erred by ignoring evidence or engaging in speculation. It is unnecessary for me to address this argument. The Officer's conclusion could represent a basis to find that the present case does not represent special circumstances warranting a deferral. However, there is no basis to conclude that the original request for H&C relief was not made on a timely basis. In my view, the Officer's error in failing to recognize that such H&C relief could overcome the Applicant's inadmissibility is determinative of the outcome of this application for judicial review. If the Officer had not made that error and had proceeded to assess whether the Applicant's case presented special circumstances warranting a deferral, the Officer may have arrived at a different result.

[36] I therefore find that this application for judicial review must be allowed and the matter returned to another CBSA officer for re-determination.

VII. **Certified Question**

[37] At the hearing of this application, the Applicant raised the possibility of proposing a question for certification for appeal in this matter. The arguments advanced by the Applicant in this application include the submission that his removal was prohibited as a matter of law until a decision was made on whether or not to process his application for permanent residence as a dependent of his wife.

[38] In support of this position, the Applicant relies in part on the decision in *Haider v Canada (Minister of Employment and Immigration)* (1992), 58 FTR 268 , in which Justice MacKay, in the context of a stay motion, concluded that a serious issue arose as to whether a spouse, seeking inclusion in her husband's permanent residence application based on Convention refugee status, was entitled to remain in Canada until the question of inclusion was determined.

[39] In post-hearing written submissions requested by the Court, the Applicant articulated the following question, to be considered for certification for appeal, if the decision in this application for judicial review turned on the argument described above:

> Is a CBSA expulsions officer required to defer removal until there is a decision on the application for permanent residence made by the spouse of a Convention refugee pursuant to s. 176 of the *Immigration & Refugee Protection Regulations*, SOR/2002-227?

[40] The Applicant also advanced written arguments in support of the appropriateness of such question for certification. The Respondent provided written submissions opposing such certification. As my decision in this matter does not turn on the argument to which the proposed

question relates, an answer to that question would not be determinative of an appeal in this matter. Therefore, no question will be certified.

JUDGMENT IN IMM-4633-19

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is returned to another Canada Border Services Agency officer for re-determination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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