Federal Court  Cour fédérale

Date: 20200922

Docket: IMM-2028-19

Citation: 2020 FC 919

Ottawa, Ontario, September 22, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

DEMAR LYNFORD DWYER

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In the present matter the Applicant, Mr. Demar Lynford Dwyer, is seeking judicial review of a decision dated April 4, 2019 of the Canada Border Services Agency [CBSA] denying his request for a deferral of his removal from Canada [Decision].

[2] This matter was heard in conjunction with the matter in IMM-4518-19 in which Mr. Dwyer is seeking judicial review of a decision of the Immigration Appeal Board [IAD] dated May 30, 2019 denying his second attempt to reopen the appeal of his removal order on the grounds of *res judicata*. Mr. Dwyer's initial appeal of his removal order was determined on November 2, 2015 to be abandoned, and his first attempt at reopening his appeal was dismissed by the IAD on December 6, 2016.

[3] For the reasons that follow, I am dismissing Mr. Dwyer's application for judicial review.

II. Background

A. *Facts*

[4] Mr. Dwyer is a citizen of Jamaica; he arrived in Canada in December 2000 at the age of 14, having been sponsored as a permanent resident by his mother.

[5] Mr. Dwyer has an eventful immigration history in Canada, which I set out below:

- March 2006 – at the age of 20, Mr. Dwyer was charged with attempted murder and pleaded guilty to the lesser included offence of aggravated assault in October 2006.

- December 2006 – on the basis of his October 2006 conviction, Mr. Dwyer was determined to be inadmissible to Canada for serious criminality and a deportation order was issued for his removal; he was under an obligation to report any change in his residential address. He appealed this decision to the IAD.

- September 2007 – while awaiting his appeal, six additional criminal charges were brought against Mr. Dwyer including assault and weapons offences.

- June 2008 – Mr. Dwyer appeared at an oral hearing before the IAD, which stayed his appeal until after his criminal trial had taken place.

- June 2010 – Mr. Dwyer again attending an oral hearing before the IAD, which once again stayed his appeal, this time for an additional four years, with reporting conditions, pending the conclusion of his criminal trial.

- April 2014 – at the four-year mark, the IAD notified Mr. Dwyer that it would be reconsidering the stay of his appeal, and eventually invited Mr. Dwyer to a hearing to deal with that issue.

- October 2014 – Mr. Dwyer appeared before the IAD on the issue of the reconsideration of the stay of his appeal, however, by then, Mr. Dwyer had two additional criminal convictions and a number of outstanding criminal charges. The IAD extended Mr. Dwyer's stay of his appeal for an additional year, with the same conditions, pending the outcome of his criminal trial. Mr. Dwyer's address of record with the IAD at the time was 746 Midland Avenue, Apt 115, Toronto.

- March 18, 2015 and September 16, 2015 – Mr. Dwyer reported to the CBSA Bond Reporting Centre as he was required to do. He reported his address of residence on both occasions as being 141 Stephenson Ave, Unit 19, Toronto.

- September 18, 2015 – the IAD sent Mr. Dwyer a notice to appear at a hearing scheduled for October 9, 2015 on the issue of the reconsideration of the stay of his

appeal. The hearing notice was sent to Mr. Dwyer's last reported home address with the IAD, that is, 746 Midland Avenue, Apt 115, Toronto, and to his counsel. The copy of the notice sent to his home address was returned undelivered.

- October 2, 2015 – counsel for Mr. Dwyer sent a letter to the IAD confirming receipt of the notice to appear but indicating that he could not contact Mr. Dwyer or his mother through the telephone numbers he, counsel, had on file as the numbers were not "accessible".

- November 2, 2015 – the IAD declared Mr. Dwyer's appeal to be abandoned. The notice of the decision was sent to Mr. Dwyer at the Midland Avenue address, but was returned undelivered.

- November 19, 2015 – an arrest warrant was issued for Mr. Dwyer. The warrant indicated that he was located at the Toronto South Detention Centre awaiting a court date for a charge of weapons trafficking. It was unlikely that Mr. Dwyer would be able to appear for removal once released from custody.

- December 8, 2015 – on the strength of the warrant, Mr. Dwyer was arrested at the Toronto South Detention Centre. In the same month, Mr. Dwyer was also advised of the opportunity to submit a Pre-Removal Risk Assessment [PRRA] application, and he proceeded to do so.

- February 2016 – Mr. Dwyer's PRRA application was denied; it was determined that he would not be subject to risk upon removal to Jamaica.

- September 30, 2016 – having been released on bail since July 2016, Mr. Dwyer applied to reopen his IAD appeal.

- December 6, 2016 – the IAD dismissed Mr. Dwyer's application to reopen his IAD appeal on the basis that he had failed to update his residential address. The IAD also found that it had not breached natural justice in declaring the appeal abandoned, and thus there was no basis to reopen the appeal.

- January 10, 2017 – Mr. Dwyer filed for judicial review of the IAD decision not to allow the reopening of his appeal. The application for leave was dismissed by the Federal Court in April 2017. Mr. Dwyer's second attempt at reopening his IAD appeal is the subject matter of the related application in IMM-4518-19, which I heard concurrently with the present application for judicial review.

- January 10, 2018 – one year later, Mr. Dwyer, having been previously summoned to attend a meeting with the CBSA on February 1, 2018 to make arrangements for his removal from Canada, filed an application for permanent residence on humanitarian and compassion [H&C] grounds. That application is still pending.

- January 15, 2019 – one year following the filing of his H&C application, Mr. Dwyer was instructed to meet with the CBSA so as to make arrangements for his removal from Canada.

- March 4, 2019 – following a series of requests from Mr. Dwyer for postponements of his removal so as to give him more time to make appropriate

arrangements, the CBSA issued a direction to Mr. Dwyer to report for removal on March 13, 2019.

- March 5, 2019 – Mr. Dwyer once again claimed that he was not given enough time to prepare for his removal and requested an additional 60 to 90 days to finish making his arrangements and spend time with his family. His removal was rescheduled for April 15, 2019, and Mr. Dwyer was directed to report for removal on that day.

- March 13, 2019 – Mr. Dwyer again requested a deferral of his removal from Canada on the grounds of the pending birth of his fourth child (due approximately four weeks after the date of his removal), the best interests of, at the time, his three children, his medical condition and his pending H&C application.

- March 27, 2019 – Mr. Dwyer filed a motion with the Federal Court for a stay of his removal from Canada.

- April 4, 2019 – Mr. Dwyer's request for a deferral of his removal order was denied by the removal officer; the present application for judicial review is in respect of that Decision.

- April 10, 2019 – this Court granted Mr. Dwyer's motion and ordered his removal stayed pending the outcome of the present application for judicial review of the deferral decision.

[6] As stated, a decision on Mr. Dwyer's outstanding H&C application, which he filed on January 10, 2018, had not yet been rendered at the time of the hearing before me in the present matter.

B. *Relevant Statutory Framework*

[7] Section 48 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], reads as follows:

Enforceable removal order	**Mesure de renvoi**
48(1) A removal order is enforceable if it has come into force and is not stayed.	48(1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
Effect	**Conséquence**
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

III. Decision Under Review

[8] The officer noted that an enforcement officer has little discretion to defer a removal and that even if he/she chooses to exercise this discretion, he/she must do so while continuing to enforce a removal order as soon as possible.

[9] The officer also stated that the IRPA does not contain a provision to stay the enforcement of a removal order because of an outstanding H&C application, that it may take up to 31-months to receive a decision on an H&C application, that there was insufficient evidence submitted by Mr. Dwyer to show that a decision on his H&C application was imminent, and that the H&C application is not meant to be an impediment to removal.

[10] The officer stated that the exercise of the duty to review the considerations brought forward by Mr. Dwyer and the deferral of removal is "intended to obviate or address temporary practical impediments to removal and is not meant to be a long term reprieve". After listing a number of the considerations set out by Mr. Dwyer to support his request for a deferral, the officer ultimately found that these factors are insufficient to allow a stay of removal or a deferral of removal from Canada. The officer acknowledged that Mr. Dwyer's removal from Canada "may cause a period of adjustments" for him, but that he is capable of making responsible decisions, and that Mr. Dwyer had been aware of his removal from Canada for some time, allowing him to prepare for it.

[11] In reading the Decision, the best interests of the children were considered in light of Mr. Dwyer's removal. The officer noted that he/she was alert, alive and sensitive to the situation of the children, including Mr. Dwyer's nieces, nephews (one of whom has since passed away after a fight with cancer) and his own children, and that they will remain in the care of their mothers and parents, who will provide them with love and support, and that they all have status in Canada.

[12] According to the officer, Mr. Dwyer will continue to have contact with the children via various modes, and ultimately there was insufficient evidence to show that he would not be able to maintain such contact with the children if removed from Canada. The officer also found that there was not enough evidence to show that the children would not be able to visit their father in Jamaica or that Mr. Dwyer could not eventually apply for a visa to return to Canada at a later time.

[13] The officer noted that Mr. Dwyer's mother suffers from diabetes and has problems seeing, and that Mr. Dwyer was her primary caregiver. However, Mr. Dwyer's mother has status in Canada and is able to access medical and social assistance available to all Canadians. The officer also found there was insufficient evidence provided on this front.

[14] The officer then detailed the medical issues put forward in Mr. Dwyer's deferral request, acknowledged that Mr. Dwyer has had sickle cell anemia since birth and that despite Mr. Dwyer's claims that he cannot get the drugs required to treat the condition in Jamaica, he had been receiving treatment for the condition while he still lived in Jamaica. The officer found that there was insufficient evidence to show that a substitute drug to treat the condition or a different method or cure is not available to Mr. Dwyer in Jamaica. The officer also noted that the condition is relatively prevalent in Jamaica and that treatment and medical care for the condition is available there. In addition, the issue of Mr. Dwyer's sickle cell anemia was already addressed in Mr. Dwyer's PRRA decision, which had a negative outcome.

[15] The officer also noted that Mr. Dwyer had been diagnosed with a deteriorating hip and spine bone and that he was undergoing treatment for these conditions but that there was insufficient evidence to show that such treatment would not be available to him in Jamaica.

[16] The officer also discussed Mr. Dwyer's psychological issues and determined that the December 4, 2017 report from Dr. Pilowsky was written for immigration purposes and that there was not enough evidence to show that the "undue and undeserved psychological hardship" of being returned to Jamaica could not be adequately treated in Jamaica.

[17] The hardship and risk to Mr. Dwyer, particularly on the basis of employment and developing relationships, were also addressed by the officer, who "considered the article regarding criminality and [the] socio economic situation in Jamaica"—an issue that was also dealt with in the PRRA decision. The officer stated that there was not enough evidence to show that Mr. Dwyer would not be able to find employment in Jamaica and support himself, in particular because he developed numerous transferable skills in the construction industry in Canada.

[18] The officer then set out Mr. Dwyer's criminal history and stated that Mr. Dwyer had many opportunities to prepare for his removal from Canada. In particular, the officer noted that Mr. Dwyer had already been given a 30-day deferral of his removal and concluded that there was, overall, insufficient evidence provided to warrant a deferral of Mr. Dwyer's removal yet another time.

IV. Issues

[19] Mr. Dwyer identifies the following five issues, which go to the question of the reasonableness of the Decision:

- Did the officer fail to adequately deal with the imminent birth of Mr. Dwyer's fourth child?
- Did the officer fail to properly assess the best interests of the children overall?
- Did the officer err by fettering his/her discretion?
- Did the officer err by focusing on the timeliness of an H&C decision?
- Did the officer fail to adequately deal with Mr. Dwyer's psychological and medical assessment?

V. Standard of Review

[20] A removal officer's decision to refuse to defer an applicant's removal is reviewable on a standard of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 at para 25 [*Baron*]).

VI. Analysis

[21] Mr. Dwyer had requested a deferral of four-weeks to allow him to attend the birth of his fourth child. Alternatively, he requested a deferral until his H&C application was decided. He had also put forward that the best interests of his unborn child, his other children and his nieces and nephews favoured deferring his removal.

[22] The role of a removal officer in the deferral scheme is not to determine whether someone has the right to live in Canada, but rather when the individual must leave Canada (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 at pp 211 and 212 [*Baker*]; *Williams v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 274, [2011] 3 FCR 198 at paras 30 to 35 [*Williams*]). Removal officers are mainly responsible for the practicalities of the person's departure, i.e. costs, travel documents, or compelling circumstances, and have limited discretion to grant a deferral of removal.

A. *Did the officer fail to adequately deal with the imminent birth of Mr. Dwyer's fourth child?*

[23] Mr. Dwyer asserts that the officer, other than mentioning the imminent birth of his fourth child in the Decision, failed to deal with how that birth may affect the deferral decision.

[24] The Respondent makes the point that any consideration regarding the birth of Mr. Dwyer's fourth child is moot as the birth has now taken place. Also, as there is no evidence from the mother of that child (who is neither Mr. Dwyer's present wife, i.e., the mother of his second child and third child, nor the mother of his first child), there is no evidence to suggest that his removal would have any impact at all on the child following birth.

[25] I agree with the Respondent that how the officer may have dealt with the issue of the unborn child is now moot. Mr. Dwyer asserts that this case does not involve unique facts, and given the importance of the issue relating to the unborn child, I should none the less address it. I am not convinced, and thus I cannot see why I should exercise my discretion to address this issue (*Forde v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1029 at paras 48–49

[*Forde*]; *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 1989 CanLII 123 (SCC) at p 353; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at para 17; *Baron* at para 44).

[26] I accept, as was stated by Justice Barnes in *Kaur v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 549 at paragraph 5 [*Kaur*], that "[a] pregnancy and the likely birth of a child are relevant and, in many cases, compelling facts that must be taken into account . . . " however this is not one of those cases. That said, the situation in *Kaur* did not involve a deferral of a removal order, where the discretion of the removal officer is very limited.

[27] In any event, pregnancy alone does not justify a deferral of removal (*Hwara v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1035), and Mr. Dwyer has not shown any "special or compelling" circumstances in relation to the pregnancy militating in favour of granting his deferral request (*Domingo v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 425 at paras 50–51 [*Domingo*]).

[28] That said, and to dispel any concern on the part of Mr. Dwyer, this is not to say that the present application as a whole is moot even though he had initially requested a stay for only four-weeks; I agree that there still remains a live controversy between the parties, in particular the pending H&C application and the remaining issues raised in support of the present application (*Baron* at para 45).

B. *Did the officer fail to properly assess the best interests of the children overall?*

[29] I should first state that although the duty to consider the best interests of the children falls on the low end of the spectrum for removal officers (*Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, [2007] 4 FCR 3 at para 16), they still have to be "alert, alive and sensitive" to the short-term best interests of the children (*Baker* at para 75; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 FCR 229 at para 61 [*Lewis*]; *Ismail v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 845 at para 15 [*Ismail*]).

[30] Moreover, the fact that a child was unborn at the time of the deferral request does not negate the obligation of the removal officer to undertake a short-term best interests of the child analysis (*Hamzai v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1108 at para 33; *Ismail* at para 17); however, a removal officer is not required to consider the best interests of an unborn child where, as is the case here, the applicant did not identify any short-term interests in relation to that child (*Ren v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1345 at para 41).

[31] Mr. Dwyer argues that the officer did not come to grips with the realities of his wife and their two children, who are wholly dependent on Mr. Dwyer for financial support, or the realities of his sister, who provided a letter attesting to how Mr. Dwyer stepped in to assist her, as a single mother, and has acted as a father figure to her two children (as mentioned, Mr. Dwyer's five-year-old nephew has since succumbed to cancer).

[32] Mr. Dwyer submits that the officer only paid “lip service” to the short-term best interests of the children as a whole and that simply “acknowledging” and “noting” the evidence is not sufficient to demonstrate that the officer properly considered the short-term best interests of the children; the officer must analyze the evidence (*Acevedo v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 401 at para 35; *Ismail* at para 15).

[33] He also submits that the officer’s finding that the children will be with their mothers, that they have Canadian citizenship, and that they can remain in contact with him and visit him in Jamaica, ignores the evidence that was before the officer. Mr. Dwyer states that Jamaica has one of the highest murder rates in the world and that for this reason it is unlikely that his children will visit him if he is forced to leave Canada.

[34] To be clear, in this case, no short-term interests of the children (his nieces, nephews, children or unborn child) were identified by Mr. Dwyer in the deferral request (*Forde* at paras 52 to 62); those interests were referred to in the letter from Mr. Dwyer’s wife and in the letter from Mr. Dwyer’s sister.

[35] In any event, I disagree with Mr. Dwyer.

[36] First of all, this is not a situation where the children themselves are being deported, as was the case in *Schleicher v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 482, [2018] 1 FCR 141 at paragraph 39. The officer did not “fail to assess the children’s best interests”. I accept that a removal officer must be “alert, alive and sensitive” to the short-term

needs of the children affected by a removal (*Lewis* at para 88), however, there is no evidence that the officer failed to do so in this case.

[37] As to the letters from his wife and sister, I note that they are both dated October 2017, about three-months prior to when Mr. Dwyer filed his H&C application. They have not been updated. I raise the issue because I am not certain how current the sentiments expressed in his wife's letter truly are given that Mr. Dwyer shortly thereafter fathered his fourth child with another woman, who, it would seem, has not filed any supporting letter on his behalf.

[38] As for his sister, although Mr. Dwyer's efforts to assist her are commendable, there is a presumption that the officer did consider the letter, and I can see nothing in her letter which directly contradicts any of the officer's findings in the Decision (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC)).

[39] In any event, the concerns expressed by Mr. Dwyer's wife and sister cannot truly be characterized as short-term interests militating in favour of deferral of the removal order.

[40] I accept that a removal officer must take into account the emotional suffering of the children if a parent is removed; a removal officer simply acknowledging that another parent will be left in Canada to take care of the children and that thus the children will receive the minimum requirements of care is not sufficient to meet the threshold of being "alert, alive and sensitive" to the best interests of the children (*Bozik v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 69 at para 14).

[41] However, in my view, the officer did give consideration to the effect the removal of Mr. Dwyer would have on the children. Given that two of the four children in question do not reside with Mr. Dwyer (assuming he still lives with his wife), and neither do his nieces or nephews, it was certainly reasonably open to the officer to come to the following conclusion:

> . . . the children will remain in the care of their mothers and parents as they do have status in Canada. While I acknowledge that Mr. Demar Lynford Dwyer would like to continue his relationship with all the children, the children will remain under the care of their mothers and parents and they have their love and support. . . . I believe that with the love and support of their mothers and parents, the children will have every opportunity to become independent, capable and caring individuals.
>
> . . . I note that his removal may cause some hardship upon his family and I note that they would be separated. I note however that insufficient evidence was submitted . . . to warrant a deferral of removal from Canada.

[42] Citing *Nguyen v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 225, the Chief Justice in *Forde* stated that hardship and disruption to family life are the typical adverse consequences of a parent's removal when the children are left behind in Canada, but that this generally was not sufficient to justify deferral of removal. This is particularly the case when the parent being removed poses a public safety risk (*Forde* at para 60). That is certainly the case here.

[43] Finally, Mr. Dwyer cites *Baptiste v Canada (Citizenship and Immigration)*, 2015 FC 1359 at paragraph 16 [*Baptiste*], for the proposition that the best interests of the children, especially younger children, requires that the parents be given reasonable opportunity to determine how best to respond to the abrupt separation and ensure that there are acceptable coping mechanisms in place for the children.

[44] I accept the proposition in *Baptiste*, however, in this case, Mr. Dwyer is not being removed from his children with only three-weeks' notice. Even putting aside for the moment that his initial removal order was issued in December 2014, the most recent efforts to remove him from Canada began on January 15, 2019, when he was notified to meet the CBSA the following week in order to arrange for his removal. He obtained a series of postponements and deferral request considerations before finally being notified to report for his removal on April 15, 2019.

[45] Mr. Dwyer also argued that his limited financial abilities and the fact that he needed more time to find a place in Jamaica to live militated in favour of a further deferral of his removal. From my perspective, in particular given his immigration history, it seems to me that three-months was not unreasonable under the circumstances in which Mr. Dwyer found himself, including as regards the children.

[46] In short, I am satisfied that the officer addressed the issue of the best interests of the children—not only Mr. Dwyer's own children but also his nieces and nephews—as a whole. I find nothing unreasonable in the officer's findings on this issue. Although the officer could have been more thorough in his analysis, his findings on this issue are nonetheless tenable "in light of the relevant factual and legal constraints that bear upon it" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 101).

C. *Did the officer err by fettering his/her discretion?*

[47] Mr. Dwyer argues that the issue of the officer's fettering of discretion is tied to the issue of the birth of his fourth child. As that issue has become moot without any compelling reason for

me to exercise my discretion to nonetheless deal with it, it is not necessary for me to deal with this third issue.

D. *Did the officer err by focusing on the timeliness of an H&C decision?*

[48] A removal officer has very limited discretion, and, generally, a pending H&C application is not sufficient to defer or quash a removal order because a successful H&C application can allow readmission into Canada at a later time (*Baron* at paras 50, 51 and 69). The Court must keep in mind that the Respondent is bound by section 48 of the Act to execute a valid removal order, with little discretion on the timing of that removal, and that a pending H&C application will not justify deferral unless it is based on a threat to personal safety (*Baron* at paras 49 and 51; *Sorubarani v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 382 at para 24 [*Sorubarani*]).

[49] It is only were there are "special considerations" may an H&C application which is not based upon a threat to personal safety possibly justify deferral of a removal order. One such special consideration is where the H&C application was brought on a timely basis but not yet determined due to a backlog in the system (*Williams* at paras 35 and 36).

[50] A removal officer should consider the circumstances related to the H&C application and its potential impact on the removal order. In short, the removal officer is required to ask (i) was the H&C application submitted in a timely fashion and (ii) is a backlog in the department the reason why the H&C application has not yet been determined? As stated by Justice Zinn, "it is

only if the answer to both questions in ‘yes’ that the officer should turn his mind to whether the deferral is warranted” (*Williams* at para 38).

[51] Here, the removal officer did not specifically assess whether Mr. Dwyer’s H&C application was filed in a timely manner, nor whether a backlog in the system relating to the assessment of H&C applications was the cause of any delay. What the removal officer stated was simply that:

> I note that Mr. Demar Lynford DWYER submitted his H&C application to the IRCC on 10 January 2018 which is currently outstanding …While I have considered that Mr. Demar Lynford DWYER submitted his H&C application, I note that the CIC website [website cited] states that applications inside Canada under Humanitarian and Compassionate category may take 31 months. I note that insufficient evidence was submitted to this office to show that the decision on this application is imminent. I also note that submission of an H&C application to Immigration and Refugees Canada is not meant to be an impediment to removal.
>
> [Emphasis added.]

[52] The officer cited two materials that offer guidance on this issue:

> Instruction Guide 5291 (Applying for Permanent Residence from Within Canada – Humanitarian and Compassionate Consideration in manual chapter IP 5 – 3.2), which states:
>
> > If you are under a removal order and decide to submit an application for permanent residence based on H&C, it will not delay your removal from Canada. You must leave on the specified removal date. We will continue to process your application and we will notify you of the decision in writing.
>
> Inland Processing Manual 5:
>
> 5.24 Applicants under a removal order

> Persons under a removal order who submit an H&C application and pay the appropriate fee are entitled to a decision on that application. However, there is no stay of removal unless a positive Stage 1 assessment has been made (R233).

AND

Stage 1 assessment cannot be completed prior to removal

> If the Stage 1 assessment cannot be completed prior to Mr. Dwyer's removal from Canada, it will be made after the removal and the applicant will be informed of the decision.

[53] After noting that it was beyond his/her "authority to perform an adjunct H&C evaluation", the officer stated that he/she had "reviewed the specific considerations brought forward in the deferral request, bearing in mind that a deferral of removal is intended to obviate or address temporary practical impediments to removal and is not meant to be a long term reprieve".

[54] The officer listed the evidence that he/she considered in addressing this issue, in particular the statements of support for Mr. Dwyer, the fact that he has friends and family in Canada and wishes to continue improving himself and his life in this country, and his immigration history, but in the end concluded that although removal from Canada "may cause a period of adjustments for [Mr. Dwyer], he is an adult responsible father of 4 children, capable of making responsible decisions". The officer also noted that Mr. Dwyer "was aware of his removal for many years, since he was issued his removal order and he had plenty of time to prepare for his removal".

[55] What Mr. Dwyer focuses on to ground his argument that the officer's decision was unreasonable was the following statement by the officer: "I note that the CIC website [cites website address] states that applications inside Canada under Humanitarian and Compassionate category take 31 months. I note that insufficient evidence was submitted to this office to show that the decision on this application is imminent".

[56] Mr. Dwyer submits that the threshold for assessment is not whether the H&C application decision was imminent, but rather whether it was filed in a timely manner (*Katwaru v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1045 at paras 30–35 and *Laguto v Canada (Citizenship and Immigration)*, 2013 FC 1111 at para 35) because timeliness is within Mr. Dwyer's control, whereas imminence is within the government of Canada's control.

[57] Mr. Dwyer argues that as the H&C application was filed in a timely manner and the delay in its determination was caused by the backlog in the system, the officer should have considered the "special circumstances" that he faced, in particular that if he were to be removed from Canada and eventually his H&C application were to be accepted, he may not be able to return to Canada to rejoin his family on account of past criminality. He cites *Williams* where Mr. Justice Zinn states: "[j]ust as the applicant's criminality is a relevant factor that weighs against a deferral, in my view, it is also a relevant factor in circumstances where there are issues of future family reunification in Canada" (*Williams* at para 39).

[58] Consequently, Mr. Dwyer argues that as part of the "special circumstances" favouring a deferral in Mr. Dwyer's case, his criminality and the fact that he may not be readmitted to

Canada following a successful H&C application is a relevant consideration for a removal officer, a consideration that was never addressed in the Decision.

[59] Mr. Dwyer cites *Bhagat v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 45 at paragraphs 16–18 [*Bhagat*], for the proposition that merely concluding that an H&C application is subject to a 31-month processing period and that a decision is not imminent does not constitute a proper assessment of whether an application was filed in a timely manner.

[60] First of all, *Bhagat* did not determine whether reference to the imminence of an H&C decision, as opposed to its timing, was proper. *Bhagat* was a stay decision on a removal order, and in that context, the Court stated: "[i]t is clear the Enforcement Officer calculated timeliness not in terms of when the H&C application was filed but when it would be decided. This approach raises a serious issue."

[61] What is clear is that it is open to a removal officer to consider the imminence of an H&C application, where he/she does not indicate whether the application was filed in a timely manner, as in many cases, "the imminence of a decision may be a reflection of whether the application had been filed in a timely manner" (*Jonas v. Canada (Citizenship and Immigration)*, 2010 FC 273 at para 21).

[62] In circumstances where the H&C application was not filed in a timely manner, it is open to the removal officer to consider the imminence of a decision in the pending H&C application (*Sorubarani v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 382 at para 29).

[63] In this case, I must agree with the Respondent that the H&C application was not filed in a timely manner.

[64] Mr. Dwyer filed his H&C application on January 10, 2018, that is, over one-year after his application to reopen his abandoned IAD appeal was dismissed, about nine-months after this Court dismissed his leave application, and nearly two-years after his PRRA application was dismissed, and provided no explanation for the significant delay.

[65] Citing *Forde*, this Court, in *Gafoor v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 893 at paragraphs 19–21, noted that a removal officer does not have the discretion to defer removal when a decision on an outstanding application is not imminent, particularly when it was not filed in a timely manner. As was the case in *Gafoor*, a 31-month processing time would confirm, at least as of the date of the Decision, that the H&C application was not "imminent or overdue" and thus that the officer's decision is not unreasonable.

[66] Finally, as stated earlier, Mr. Dwyer's H&C application was still pending at the date of the hearing before me.

E. *Did the officer fail to adequately deal with Mr. Dwyer's psychological and medical assessment?*

[67] Mr. Dwyer disputes the officer's finding that the psychological assessment was written for immigration purposes and that he would be able to find treatment for his psychological condition in Jamaica. He also disputes the officer's findings that his sickle cell anemia is a common condition in Jamaica and that Mr. Dwyer was being treated for such ailment prior to coming to Canada.

[68] Mr. Dwyer argues that the officer ignored his statement to the psychologist to the effect that his treatment in Jamaica was poor, resulting in him being constantly in and out of the hospital, while in Canada, his condition was properly managed. However, the mere fact that the medical care provided in Canada was better than that provided in the home country is not grounds for deferral of a removal order (*Gumbura v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 833 at para 14).

[69] Mr. Dwyer also cites *Danyi v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 112 at paragraph 38, which cites *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*], for the proposition that an applicant's mental health was not adequately assessed (in an H&C assessment context or a deferral of removal context) if the officer did not turn his/her mind to the psychological impact of a removal on the mental health of that applicant. Mr. Dwyer argues that "the officer focused on the availability of treatment rather than the imminent risk to his life" which would result as a consequence of the removal from Canada (see also *Tiliouine v Canada (Public Safety and Emergency*

Preparedness), 2015 FC 1146 at para 12; *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 37).

[70] I agree with Mr. Dwyer that a removal officer cannot focus exclusively on whether treatment is available in the country of removal and ignore the effect of removal from Canada on his mental health (*Kanthasamy* at para 48; *Jaramillo Zaragoza v Canada (Citizenship and Immigration)*, 2020 FC 879 at para 54 [*Jaramillo Zaragoza*]). The Court in *Kanthasamy* concluded that the possible deterioration of mental health is a relevant consideration regardless of whether treatment is available in the country of removal (*Kanthasamy* at para 48).

[71] However, consideration as to the effect of removal on an applicant's mental health is predicated upon there being an assessment of such impact as part of the evidence. Here, Mr. Dwyer submitted a letter from a psychologist that is dated December 4, 2017 (just prior to his H&C application, as with the letters from his wife and sister).

[72] After setting out Mr. Dwyer's history and concerns, the psychologist concluded by stating the following: "In consideration of the foregoing, it is my professional opinion that Mr. Dwyer would experience undue and undeserved psychological hardship in the event of being returned to Jamaica." Unlike the situations in *Kanthasamy* or *Jaramillo Zaragoza*, no mention was made of the nature of Mr. Dwyer's psychological ailment or of how the return to Jamaica will lead to such hardship or consequences on his mental health.

[73] I find that that statement by the psychologist, without any description of how the assessment proceeded, how long the assessment took, what testing was done, what methodology was employed in conducting the assessment, or how the diagnosis was reached, does not raise any issue of adverse psychological effects as a result of the removal itself. Consequently, I see no reason for the officer to have addressed it.

[74] In any event a removal officer deeming a report to have been written for immigration purposes may be a relevant consideration in giving it appropriate weight (*Damo v Canada (Public Safety and Emergency Preparedness)*, 2019 CanLII 86320 (FC); *Hernadi v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 126350 (FC)).

[75] On the issue of the medical treatment Mr. Dwyer could receive in Jamaica for his sickle cell anemia and other diseases, the onus is on Mr. Dwyer to provide persuasive evidence that such medical treatment is not available in the home country (*Spooner Romero v Canada (Citizenship and Immigration)*, 2019 CanLII 843; *Bruce v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 721 at para 11 [*Bruce*]). It is certainly not the duty or responsibility of the officer to sift through the documents to find evidence that treatment would not be available in Jamaica (*Bruce* at para 11).

[76] Here, Mr. Dwyer simply did not provide persuasive evidence in respect of the medical care in Jamaica. The only evidence of available medical treatment in Jamaica was from health care workers and medical practitioners in Canada.

[77] Consequently, I find that the officer's determination that there was not enough evidence to show that Mr. Dwyer could not obtain medical care in Jamaica was reasonable, as was the fact that the officer did not delve into the impact the removal would have on Mr. Dwyer's psychological health.

[78] The fact remains that Mr. Dwyer did not request deferral because of a risk of suicide. He requested deferral to remain in Canada for the birth of his son and until his H&C application was determined.

VII. Conclusion

[79] In the immortal words of Justice Shore: "[Mr. Dwyer] has used all the remedies that he is entitled to in Canada, and all his applications have been dismissed until now. The balance of convenience, therefore, lies in favour of the Minister" (*Domingo* at para 1).

[80] On the whole, while the officer's decision to refuse Mr. Dwyer's request for deferral of his removal from Canada could have been somewhat more thorough, the reasons therein are such that they are logically consistent and defensible in fact and law (*Vavilov* at para 101). I find that the refusal to defer Mr. Dwyer's removal was not unreasonable.

JUDGMENT in IMM-2028-19

THIS COURT'S JUDGMENT is as follows:

1. The style of cause is amended to name the Minister of Public Safety and Emergency Preparedness as the proper respondent.

2. The application for judicial review is dismissed.

3. There are no questions for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2028-19
STYLE OF CAUSE:	DEMAR LYNFORD DWYER v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN MONTREAL, QUEBEC AND TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 25, 2020
JUDGMENT AND REASONS:	PAMEL J.
DATED:	SEPTEMBER 22, 2020

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