Federal Court  Cour fédérale

Date: June 2, 2022

Docket: IMM-4074-21

Citation: 2022 FC 809

Ottawa, Ontario, June 2, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

FERENC TAMAS SALLAI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Under review is a decision made by an Inland Enforcement Officer [the Officer] of Canada Border Services Agency denying the Applicant's request for a deferral of the execution of the Order removing him to Hungary.

[2] For the reasons that follow, this application will be dismissed.

[3] On June 29, 2021, this Court stayed the execution of the removal Order pending final disposition of this application for review. I note that in so doing the Court applied the tripartite test explained in *Toth v Canada (Minister of Employment and Immigration),* (1988), 86 NR 302 (FCA) [*Toth*]; namely, that (i) there is the existence of a serious issue to be determined by the Court, (ii) irreparable harm which will ensue, and (iii) the balance of convenience in issuing such order lies in his favour. The decision underlying that motion was a review of a decision not to defer removal, the proper test that ought to have been used is that stated by this Court in *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682 [*Wang*], and approved by the Federal Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness),* 2009 FCA 81 [*Baron*]. A higher threshold is required for the serious issue. For a stay to be granted, the Court will have identified at least one issue that carries with it the likelihood of success on the underlying application. It is not enough for the Court to simply find that an issue is not frivolous or vexatious (see *Wang* at paras 10-11).

[4] Although not raised by the parties in this application, I suspect that the application of the lower standard expressed in *Toth* may explain why, notwithstanding the finding of a serious issue on the stay motion, I have concluded that the decision under review is reasonable and justified.

Background

[5] The Applicant Mr. Ferenc Tamas Sallai is a citizen of Hungary and is of Roma ethnicity. He arrived in Canada on August 2011, and filed a refugee claim based on discrimination

amounting to persecution due to his Roma ethnicity. His former partner Ms. Erika Horvath and their son Frank joined him and applied separately for asylum.

[6] The Applicant was convicted several times between 2014 and 2019. On November 16, 2016 and August 19, 2016, Citizenship and Immigration Canada [IRCC] issued two reports on inadmissibility pursuant to subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[7] The Applicant submitted a Pre-Removal Risk Assessment [PRRA] application. On June 22, 2018, this PRRA was rejected. The Applicant filed an application for judicial review and a stay was granted. In April 2019, the judicial review of the PRRA was denied (see *Sallai v Canada (Minister of Citizenship and Immigration)*, 2019 FC 446).

[8] On December 2019, the Applicant's son Frank acquired permanent residency in Canada, as did his mother Ms. Horvath.

[9] On June 2019, the Applicant applied for permanent residence based on humanitarian and compassionate consideration [H&C]. In April 2021, the Applicant submitted a second PRRA application. Neither application has yet been determined.

[10] On May 28, 2021, a direction to report for removal was issued. The removal from Canada was scheduled for June 30, 2021.

[11] On June 3, 2021, a deferral removal request was received and on June 10, 2021, the Officer issued the decision denying the deferral of the execution of the removal order.

The Deferral Decision

[12] The Officer noted the bases advanced by the Applicant for the deferral request: (1) the pending PRRA and risks associated with COVID-19, (2) the pending H&C, and (3) best interest of child [BIOC].

[13] The Officer considered all three.

[14] The Officer recited the facts of the case, including the Applicant's "extensive criminal history." The Officer set out the dates of some 41 charges (many of which were withdrawn) and convictions between November 25, 2014 and February 9, 2019. They included mischief under $5,000, theft from mail, possession of property obtained by crime, possession of break-in instruments, theft, failure to comply with probation orders, and theft over $5,000.

[15] The Officer examined the pending PRRA, submitted in April 2021, which followed a previous PRRA submitted in March 2017. The Officer observed that their task is "[…] assessing whether compelling evidence has been presented to justify the delay of removal for the assessment of allegations of new of risk or new evidence of risk that postdates the PRRA." The Officer noted that they "[…] do not find that there has been sufficient new personalized risk alleged" and that "[…] Hungary is not a country with Temporary Suspension of Removals (not a TSR country)."

[16] The Officer engaged with the Applicant's submission with respect to COVID-19 and the impact on Roma. The Officer referred to statistical data supplied by the World Health Organization with respect to COVID-19, and concluded that they are not convinced that the Applicant would be "[…] at a personal higher risk of contracting COVID-l9 in Hungary than in Canada." The Officer further stated "[…] as there is no foreseen resolution to the pandemic, this deferral of removal request, based on COVID-19 general risks are not likely to be short term in nature. Therefore a request of deferral of removal with a general risk and no short term specific resolution would not be appropriate."

[17] The Officer noted the Applicant's submission on the pending H&C application, and indicated being satisfied that it will continue to be processed even after the Applicant's removal from Canada. The Officer also communicated with IRCC to ask their anticipated processing time for the Applicant's H&C application and the Officer indicated that IRCC does not expect that a stage one decision will be taken in the near future.

[18] The Officer addressed the Applicant's submissions about the best interest of the child. The Officer stressed sympathy for the child's current psychological state, emotions of stress and anxiety, but stated that "[…] these emotions are an inherent part of the removals process." The Officer added that the child is a permanent resident and therefore benefits from support from federal and provincial programs. The Officer indicated that "[c]hildren are resilient and although not ideal, there are many platforms available to this family to maintain visual, verbal and written contact while they are apart. When safe to do so, they also have the ability to arrange physical meetings in the location of their choice, within legal immigration parameters." The Officer

further found that the best interest of the child will be assessed in the formal process of the H&C application, and that "[they] have not been presented with evidence to warrant the deferral of removal for the best interest of the child."

[19] The Officer concluded that "[…] [they] do not feel that a deferral of the execution of the removal order is appropriate in the circumstances of this case."

Issues

[20] The Applicant raises two issues: (1) whether the Officer's decision to refuse the Applicant's deferral request is unreasonable because they fettered their discretion, and (2) whether the Officer's decision to refuse the Applicant's deferral request is unreasonable because they failed to properly assess the short-term best interests of the Applicant's minor son contrary to the jurisprudence of the Supreme Court and international law.

[21] I concur with the Respondent that the proper issue (and one which includes the two specific issues above described) is whether the Officer's decision is reasonable.

Analysis and Discussion

[22] The Applicant cites *Poyanipur v Canada (Minister of Citizenship and Immigration),* [1995] FCJ No 1785 and *Prasad v Canada (Minister of Citizenship and Immigration),* 2003 FCT 614 at paragraph 32 [*Prasad*] to show that removal officers have some discretion to consider a broad range of circumstances. The Applicant further submits that an Officer is mandated to

exercise discretion to defer removal where there are compelling circumstances (citing *Mauricette v Canada (Minister of Citizenship and Immigration)*, 2008 FC 420 at para 23).

[23] The Applicant submits that "[t]he officer's decision does not meaningfully engage with or consider the evidence before them", and "[…] the officer improperly fettered their discretion by failing to appreciate the Applicant's individual circumstances" (citing *Prasad* at para 13; *Hardware v Canada (Minister of Citizenship and Immigration)*, 2005 FC 88 at para 14; *Katwaru v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1045 at paras 30-31).

[24] On the pending second PRRA application, the Applicant indicates that "[…] removal to the country of risk before the risk assessment is complete, would render his application null and void." The Applicant submits that the Officer failed to appreciate the Applicant's argument and concerns, and that the evidence before the Officer was clear and non-speculative evidence of discrimination amounting to persecution of the Roma community in Hungary. The Applicant adds that this discrimination has worsened in light of the COVID-19 pandemic.

[25] The Applicant argues that, in the case of his on-going PRRA, it is not enough for a decision-maker to state that they have considered all the evidence when they omit evidence contradicting their findings of fact. The Applicant further alleges that noting that Hungary is not a TSR country suggests that the Officer was of the view that the Applicant's PRRA would be unsuccessful thus no analysis by the Officer is required.

[26] With regards to the risk associated with COVID-19, the Applicant argues that the Officer relied on statistics improperly analyzed and that the Officer relied on external groups, incorrectly applying the legal test for state protection. The Applicant also submits that the Officer does not understand the reality of the lives of Roma people in Hungary, as the Officer suggests that the Applicant would be as safe in Hungary from COVID-19 as he was in Canada without considering the unequal access to healthcare for people with Roma ethnicity. The Applicant also alleges that the Officer misunderstood the task as the Applicant never requested for the removal to be deferred until after the pandemic.

[27] On the pending H&C Application, the Applicant cites the IRCC's own statistics to state that the "[…] the likelihood of success after removal deteriorates from a 40-67% chance pre-removal to a 0.3-8% chance post-removal […]." The Applicant argues that the impact of the pandemic on IRCC and a backlog in the system is the only explanation for the H&C not yet having been decided. These are beyond his control.

[28] The Applicant alleges that the Officer failed to engage with the statistics that he provided with respect to the likelihood of his H&C application being accepted after removal to Hungary, and specifies that he did not argue that the application would not process after removal, but rather that "[…] the act of removal itself prejudices the Applicant's H&C because the approval rate hovers around 3-4% after Applicants are removed, as opposed to over 50% when Applicants are still in Canada" (citing *Cvetkovic v Canada (Minister of Public Safety and Emergency Preparedness)*, 2020 FC 402 at para 49).

[29] I agree with the Minister of Public Safety and Emergency Preparedness that the Officer reasonably considered the pending second PRRA application. Specifically, I agree that "[t]he Applicant filed the PRRA recently, over a year and a half after his PRRA bar expired and put no evidence before the Officer that a decision was imminent." In his second PRRA, the Applicant alleged risk due to his Roma ethnicity and relied on generalized country condition documentation, as he did in his first PRRA. It was therefore reasonable for the Officer to find insufficient evidence of a new risk that a deferral should be granted.

[30] I also agree with the Minister that the Applicant "[…] did not demonstrate that his personal circumstances created a heightened risk for COVID-19 such that the Officer should have granted a deferral to allow the Applicant's second PRRA to be determined." The Officer considered the impact of COVID-19 on Roma communities in Hungary and reasonably found that there are organizations in Hungary providing support to the Roma during the pandemic. The Officer was not required to conduct a full PRRA assessment, but rather was required to consider whether the risks related to COVID-19 were such that a deferral should be granted to allow the PRRA to be determined. The Officer did just that.

[31] The Officer reasonably considered the pending H&C application. The jurisprudence holds that 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 (See *Baron* at paras 50, 51, 69 and *Dwyer v Canada (Minister of Public Safety and Emergency Preparedness)*, 2020 FC 919 at paras 48 to 49).

[32] The jurisprudence also illustrates that an officer is not entitled to defer removal when a decision on a pending application is unlikely to be imminent (see *Forde v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 1029 at para 40). It is important to note that the Officer did not only rely on the fact that the decision had not yet surpassed IRCC's estimated processing time of 26 months, but additionally reached out to IRCC to inquire whether a stage one decision was likely imminent.

[33] I give little weight to the Applicant's argument as to statistics of approval rates of H&C applications post-removal. This Court in *Barco v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 421 at paragraph 26, noted that the success rates of H&C applications inside and outside Canada can be logically explained by the fact that applicants with strong H&C factors may be less likely to be removed from Canada in the first place. Moreover, I agree with the observation of Justice Diner in *Dosa v Canada (Citizenship and Immigration)*, 2019 CanLII 391 (FC) at paragraph 3, that "[t]he Officer was not compelled to analyse these statistics […] there is no obligation under the law to have an individual remain in Canada during processing."

[34] The Applicant submits that the Officer ignored Frank's short-term best interests and failed to consider that *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] holds that while an enforcement officer does not need extensively review the best interests of a child, the immediate best interests affected by a removal must be treated fairly and with sensitivity.

[35] The Applicant submits that "[…] the Officer erred in that their decision is silent on the short-term best interests of Frank and disregards the evidence of the significant negative impacts on Frank's mental health if his father is removed to Hungary." The Applicant reminds the Court that the Officer was provided with two reports on Frank's mental health which engaged with concerns arising from separation from his father. He highlights the psycho-diagnostics evaluation report, which is consistent with Frank's handwritten letter written in 2016, and with social-science research on the impact that deportation of parents has on children.

[36] The Applicant submits that the Officer's comment that the best interest of the child will be assessed in the H&C application suggests that the Officer "[…] may wash their hands of the BIOC […]."

[37] The Applicant adds that, by neglecting to do a robust analysis of the best interest of the child, "[…] the Officer demonstrates a lack of sensitivity to Frank's best interests, particularly in stating that Frank's mental health struggles 'are an inherent part of the removals process'."

[38] The Federal Court of Appeal in *Lewis v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FCA 130 [*Lewis*] considered the implications of *Kanthasamy* when BIOC arguments are raised in support of a deferral request.

[39] Justice Gleason concluded at paragraph 61 that "[…] under the existing case law, enforcement officers may look at the short-term best interests of the children whose parent(s) are

being removed from Canada, but cannot engage in a full-blown H&C analysis of such children's long-term best interests."

[40] Justice Gleason also noted at paragraph 74 that "[…] Kanthasamy applies only to H&C decisions made under section 25 of the [Act] and, even there, does not mandate that the affected children's best interests must necessarily be the priority consideration."

[41] While looking at the BIOC analysis, the first question is whether the Officer has identified and defined the best short-terms interests of the child. In a case such as this where a child is staying with one parent in Canada while the other is removed, it is arguable that there are two interests which are closely linked: (1) the child's well-being with regards to mental health and development, and (2) the presence of both parents in the child's life.

[42] Regarding the child's mental health, the Officer noted the stress and anxiety that may negatively affect Frank's psychological state due to his father's removal. I do not accept the submission that the Officer demonstrates a lack of sensitivity to Frank's best interest by stating that emotions of stress and anxiety are an inherent part of the removal process. This observation is often made, including by the Federal Court of Appeal in *Baron* at paragraph 69: "[…] one of the unfortunate consequences of a removal order is hardship and disruption of family life."

[43] It is misleading to suggest that the Officer's comment that the H&C application will continue to be processed and "[…] the best interest of the child will be assessed in this formal process" means that the child's short-term interests were not assessed in the deferral of removal

assessment. The Officer did addressed the short-term interests of the child – the fact that the removal of his father would cause mental distress. The longer term interests will be assessed in the H&C application.

[44] No question was posed for certification by the parties.

JUDGMENT in IMM-4074-21

THIS COURT'S JUDGMENT is that the application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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