Date: 20061018

Docket: IMM-4798-05

Citation: 2006 FC 1240

Ottawa, Ontario, October 18, 2006

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

DUNG TRAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY and EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Dung Tran is a citizen of Vietnam and has been returned to that country. An expulsions officer refused to defer his removal upon request. Mr. Tran seeks judicial review of that decision.

[2] Mr. Tran has a history of serious criminality, on the basis of which he was deemed inadmissible to Canada. He was ordered removed in 1994. Mr. Tran has made a claim for refugee status and four applications for landing on humanitarian and compassionate (H&C) grounds, all of which were denied. A fifth H&C application remains pending. A pre-removal risk assessment was

also negative. Leave for judicial review of that assessment was denied. Mr. Tran's removal was then scheduled for March 22, 2005. He sought a stay of execution of the removal order which was denied on March 21, 2005 by Justice Yves de Montigny. Mr. Tran failed to appear for removal forfeiting bonds in the process. A warrant was issued for his arrest.

[3] Following his arrest on the warrant, Mr. Tran's removal was rescheduled for August 15, 2005. While in detention he retained the services of his present counsel who submitted a request for deferral on July 25, 2005. The expulsions officer handling the file refused the request on July 29, 2005. On August 12, 2005, a motion for a stay pending determination of the outstanding H&C application was dismissed by Justice Yvon Pinard. The applicant was removed on August 15, 2005.

[4] The expulsions officer's July 29, 2005 decision was set out in the standard refusal letter citing s.48 of the *Immigration and Refugee Protection Act,* S.C. 2001 C. 27 (IRPA). The letter concludes:

> Having considered your request, I do not feel that a deferral of the execution of the removal order is appropriate in the circumstances of this case.

[5] No request was made of the officer to provide reasons for the decision and the certified record contains no notes to file to further explain the decision. The officer's affidavit explaining her decision was filed by the respondent on the second stay motion and was part of the record in these proceedings.

PRELIMINARY MATTERS

[6] As a preliminary matter, the respondent objected to the filing of an affidavit from the applicant's wife, Khanh Vu Tran, sworn August 14, 2006, in so far as it recounted events that occurred after the applicant's removal. In the course of oral argument, counsel for the applicant conceded that the impugned content of the affidavit was not properly admissible within the recognized exceptions to the principle that judicial review of a decision is to be conducted on the basis of the material that was before the decision maker when it made its decision: *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario,* [2003] 1 F.C. 331, 2002 FCA 218 at para.30, leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 316. Accordingly, those portions of the affidavit were given no further consideration.

[7] As a further preliminary matter, the respondent submits that Mr. Tran's affidavit sworn August 5, 2006 prior to his removal and filed as part of the application record has been improperly altered in that the applicant's spouse and children were added to the style of cause. In the course of oral argument, counsel for the applicant advised the Court that this was an error on his part. While improper, it was not material to the outcome of these proceedings.

ISSUES

[8] The issues in this proceeding as they appear to the Court are as follows:

1. Is this case moot and if so, should the Court exercise its discretion to consider the merits?

2. Did the officer deny the applicant procedural fairness by failing to provide adequate reasons?

3. Did the officer deny the applicant procedural fairness by fettering her discretion?

4. Did the officer err in failing to consider relevant factors such as the best interests of the child, and the pending H&C claim?

1. Mootness

[9] On its face, this application is moot. Mr. Tran has been declared inadmissible and removed from Canada. The sole authority under which he could return to this country were the Court to conclude that the expulsions officer erred in refusing to defer removal appears to be that set out in s.52 (1) of IRPA which requires authorization by an officer "or in other prescribed circumstances". There is no indication that Mr. Tran would be authorized to return or that there are any prescribed circumstances which might allow that. Without deciding the question as it was not argued before me, it is doubtful that the Court has the jurisdiction to direct that this be done in the circumstances of the present case.

[10] My colleague Justice Luc Martineau has recently addressed this question in *Figurado v. Canada (Solicitor General),* 2005 FC 347, [2005] F.C.J. No. 458 at paras. 26-27 (QL) [*Figurado*]. He found, in the context of the judicial review of a pre-removal risk assessment, that the Court's power to order the return of an applicant to Canada is expressly limited by s.52(1) of the IRPA.

[11] While s.52(2) of the IRPA prescribes that the return of a foreign national at the expense of the Minister is warranted in the case where a removal order has been subsequently set aside in a judicial review, it does not apply in the present case.

[12] The validity of the removal order is not in issue in these proceedings. Mr. Tran sought deferral pending the outcome of his most recent H&C application. That application seeks an exemption under s.25 (1) of the IRPA from the operation of the statute stemming from the finding of criminal inadmissibility. It does not call into question the validity of the order. In any event, it was not within the limited scope of the expulsions officer's discretion to review the validity of the order.

[13] The parties did not come to court prepared to argue the question of mootness as it was not raised as an issue in their written submissions. As set out by the Supreme Court in *Borowski v. Canada (Attorney General)***,** [1989] 1 S.C.R. 342, [1989] S.C.J. No. 14 (QL), the Court retains discretion to consider the merits of a case that fails to meet the "live controversy" test when the circumstances suggest that the mootness doctrine should not be enforced. In this instance, the adversarial relationship between the parties remained alive throughout the hearing, and deciding the merits will have no adverse impact on the use of judicial resources. As a result, I will exercise my discretion to decide the merits.

2. Adequacy of the reasons

[14] The applicant submits, in essence, that the officer failed to provide adequate reasons by providing no reasons at all. He points to the lack of any "notes to file" in the certified record and to the brevity of the decision letter. This issue requires a determination of the content of the duty of fairness that the officer owed the applicant. The appropriate standard of review of such a determination is correctness: *Jang v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 486, [2004] F.C.J. No. 600 at para. 9 (QL). The content of the duty of fairness will always vary depending on the facts, and must be determined on the circumstances of each case: *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] F.C.J. No. 174 at paras. 40-41 (QL).

[15] If the applicant or his counsel had regarded the decision-letter as an inadequate explanation for the refusal to defer, a request should have been made for an explanation. Counsel acknowledged at the hearing that no request for reasons was made. The duty of fairness normally requires reasons to be given on the request of the person to whom the duty is owed and, in the absence of such a request, there will be no breach of the duty of fairness: *Liang v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No.1301 at para.31 (QL) [*Liang*].

[16] In *Boniowski v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1161, [2004] F.C.J. No. 1397 (QL), I expressed the view that, given the limited purpose of a removals officer's function under s.48 in the statutory scheme, the content of the duty of fairness was minimal. While it was preferable that notes be kept, the reasons requirement was fulfilled in a decision letter where the officer indicated that she had received and reviewed the applicant's submissions, and her decision was not to defer removal.

[17] The function of reasons is to allow an individual adversely affected by an administrative tribunal's decision to know the underlying rationale for the decision: *Liang v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1501, [2003] F.C.J. No. 1904 at para. 42 (QL). In the particular circumstances of this case, the applicant could not have been under any misapprehension as to the reasons why his request for deferral was being refused.

3. Procedural Fairness: fettering of discretion

[18] The applicant argues that the officer fettered her discretion by relying on the decision of Justice de Montigny on the first stay motion with respect to his finding that irreparable harm had not been established. This submission is based on a statement in the officer's affidavit to the effect that there had been no changes since the last time the matter was set for her to arrange the applicant's departure. The applicant submits that the removal officer, therefore, fettered her discretion by considering that the matter had already been predetermined and ignored new evidence before her. The applicant submits that the separation of the family should have been freshly considered, in addition to the health of one of the applicant's children for whom the applicant provided on-going support, and the financial hardship the family would suffer upon separation.

[19] The officer's discretion is limited to considering whether removal is "reasonably practicable" in the circumstances. Even a limited discretion may be fettered, giving rise to a breach of procedural fairness, if the officer considers herself bound to reach a certain conclusion. There is nothing however in the officer's affidavit to support such a finding. She clearly asserts that she

came to her own conclusion after considering the request before her. Her referral to her earlier considerations is reasonable in the circumstances in light of the fact that she is the same officer that made them. Further she references both the fact that the circumstances are not different, and that they also do not justify a deferral in any event.

4. Consideration of relevant factors

[20] The applicant submits that the officer should have considered the effects of separation on the applicant's family, the health of one child who is developmentally delayed, and the financial hardship that separation would impose. The applicant asserts that the officer erred in not considering these factors, particularly in light of Canada's international obligations, notably the Convention on the Rights of the Child, as acknowledged by subsection 3(3)(f) of the IRPA. He cites *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1341, [2003] F.C.J. No. 1695 (QL) [*Martinez*] and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 in support of this contention.

[21] The applicant further submits that a pending H&C application is an accepted reason to defer removal. The applicant cites *Martinez* and *Simoes v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 936 (T.D.) (QL) [*Simoes*] for this proposition. The applicant highlights that in the present case an H&C application had been filed in 2004, and had not yet been resolved when the officer made her decision.

[22] I note that the Court in *Martinez* at para. 12 recognized that a removals officer is not required to conduct a full scale humanitarian and compassionate review and that, in most circumstances, a pending H&C application will not justify the deferral of a removal. Decisions since *Martinez* have also clarified that international treaties have an interpretive role, however subsection 3(3) (f) of the IRPA does not domestically incorporate these international obligations: *Munar v. Canada (Minister of Citizenship and Immigration),* 2005 FC 1180, [2005] F.C.J. No. 1448 at paras. 27-28 (QL) [*Munar*].

[23] Justice Nadon observed in *Simoes* that *Baker* did not require that an expulsions officer conduct a substantive review of children's best interests. That was the mandate of the H&C officer. Justice Nadon further noted that the scope of the discretion that an expulsions officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, a removal officer may consider various factors such as illness, other impediments to traveling, and pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system. No one factor however is determinative.

[24] In *Boniowski,* above, I expressed the view at paragraph 20 that:

> …an enforcement officer retains a flexible discretion and may take into account a variety of factors with regards to the timing of removal, including any problems associated with the removal of a child with their parents, or whether provisions have been made for leaving a child in the care of others in Canada when parents are to be removed. However, **the purpose of the legislation is not to provide for a substantive review by removals officers of the humanitarian circumstances that are to be considered as part of an applicant's H&C application**. [Emphasis added].

[25] The factors described by the applicant, namely the effects of separation on the applicant's family, the health of one child who is developmentally delayed, and the financial hardship that separation would impose, fall within the unfortunate but common consequences of deportation. They do not meet the narrow scope outlined above regarding what the officer may consider within the scope of his or her discretion.

[26] In this instance, the applicant has failed to establish that the officer's decision was patently unreasonable. The application is dismissed. No serious questions of general importance were proposed and none will be certified.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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