Date: 20071026

Docket: IMM-150-07

Citation: 2007 FC 1109

BETWEEN:

VAN MUOI VU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] These reasons follow the hearing on the 23rd of October, 2007, at Toronto, of an application for judicial review of a Decision of an Enforcement Officer in the Canada Border Services Agency, dated the 4th of January, 2007, refusing to defer the removal of Van Muoi Vu (the "Applicant") from Canada. Removal of the Applicant was scheduled for the 8th of January, 2007. The scheduled removal was subsequently stayed by Order of this Court.

[2] This application for judicial review was heard together with another application brought on behalf of the Applicant seeking judicial review of a negative decision on an application for landing from within Canada on humanitarian and compassionate grounds.

BACKGROUND

[3] The Applicant is a forty-eight year old male born in Quang Ninh, Vietnam. He entered Canada on the 22nd of June, 1992 as a permanent resident, together with this wife and daughter. The Applicant and his family members were selected abroad out of a refugee camp in Hong Kong, under the Designated Class, DC 1. The Applicant's daughter was born on the 25th of September, 1989 in Hong Kong in the refugee camp. Both the Applicant's wife and his daughter are now Canadian citizens.

[4] Further, since arriving in Canada, the Applicant and his wife have parented two additional children, both born in Canada and therefore Canadian citizens, the elder born on the 15th of September, 1997 and the younger born on the 27th of March, 2004.

[5] Since arriving in Canada, the Applicant and his wife have struggled to adapt and to maintain their family unit. The Applicant has only a grade 10 education from Vietnam and speaks very little English or French. The Applicant has worked at various jobs, primarily in restaurants but also as a cleaner, a mechanic apprentice and a farm hand.

[6] The Applicant acquired a significant criminal record. In 1993, he was convicted of assault and was fined $250.00. More significantly, in 1994, he was convicted in British Columbia of trafficking in a narcotic (heroin) and received a sentence of 9 months imprisonment. Most significantly, the Applicant was convicted of four offences on the 10th of June, 2002, the offences being operating a grow-op for which he received a 15 month sentence, possession for the purpose of

trafficking for which he received a 12 month concurrent sentence, illegal use of electricity or gas, presumably in conjunction with the grow-op, for which he received a 3 month concurrent sentence and driving with more than 80 mgs. of alcohol in his blood for which he received a fine and a 1 year driving prohibition.

[7] In the result, a Removal Order issued against the Applicant and his removal was scheduled. The Applicant applied for deferral of his removal and that application was denied. This application for leave and for judicial review followed and, based on this application, a stay of the Applicant's removal was granted by this Court.

THE ISSUES

[8] Counsel for the Applicant urged that the Applicant was denied procedural fairness in that the decision maker arrived at the decision under review without providing the Applicant and his solicitor with a reasonable opportunity to complete submissions for the decision maker's review. More important in the view of the Court is the issue of mootness. That issue will be determinative on this judicial review.

ANALYSIS

Mootness

[9] In *Higgins v. Canada (Minister of Public Safety and Emergency Preparedness*)[1], I reviewed the issue of mootness on an application for judicial review with the following background facts

[1] [2007] F.C.J. No. 516; 2007 F.C. 377; April 12, 2007.

similar to those on this application: First in *Higgins*, since the time the deferral of removal was denied, the Applicant had remained in Canada for more than 9 months whereas here the Applicant had remained in Canada since the denial of his request for deferral for almost 8 months to the date of hearing of this judicial review; second, in each case, the Applicant had remained in Canada by reason of a deferral of removal granted by this Court; and third, in each case, the underlying application for leave and for judicial review had matured by leave being granted and had thereafter further matured to the point of hearing.

[10] In *Higgins*, after reviewing the seminal case on mootness, *Borowoski v. Canada (Attorney General)*[2]. I determined that application to be moot. I wrote:

> It is beyond question that: first, the removal arrangements made by the Respondent for the Applicant are no longer relevant; secondly, no removal arrangements for the Applicant are currently in place; and finally, substantially more evidence is now available in relation to any disability that the Applicant's spouse's nine (9) or ten (10) year old son might suffer from, his needs in relation to any such disability and any role that the Applicant plays and is capable of continuing to play in relation to that son. Further, an application for landing of the Applicant from within Canada on humanitarian and compassionate grounds is before immigration authorities and provides a substantially more appropriate platform from which to determine the best interests of the boy than does a request for deferral where the issue for consideration is whether removal at a particular arranged time is "reasonably practicable". Further, it is beyond question that, if the Respondent remains determined to remove the Applicant before his humanitarian and compassionate grounds application is determined, it would be open to the Applicant to request a new deferral of removal, based on all of the current circumstances and evidence and, if that request is denied, a further application for leave and for judicial review would be open to him together with a further motion before this Court seeking a stay of removal pending the final determination of that new application for leave and for judicial review.
>
> The issue of mootness has been the subject of consideration by this Court in the immigration context on a number of previous occasions. In at least one of those cases, it has been applied so that the merits of the application for judicial review were not heard.
>
> Given the foregoing, and given the principles of mootness recited above, the Court is satisfied that consideration of this application for judicial review on its merits

[2] (1989)1 S.C.R. 342.

> would not have the effect of resolving any controversy affecting the rights of the parties to this matter. The issue of the timeliness or untimeliness of any arrangements made in the future to remove the Applicant from Canada would continue to be a live issue between the parties. It simply is not a live issue between the parties at this time and in this context.
>
> This application for judicial review is moot.
>
> Further, against the criteria governing the exercise of discretion to hear a matter notwithstanding that it is moot, the Court finds no basis whatsoever to exercise its discretion to hear this matter.

[11] With appropriate modifications to reflect the fact that the Applicant's application for landing from within Canada on humanitarian and compassionate grounds has here been decided by the Respondent, against the Applicant, and is before this Court on judicial review, simultaneously with this application, I am satisfied that much the same might be said here. The removal arrangements scheduled for January of 2007 are clearly no longer relevant. No removal arrangements in respect of the Applicant are currently in place. The Applicant's three children, now all Canadian citizens, remain in Canada and their best interests have been reviewed and remain open for further review if that is determined to be appropriate. Finally, if a new removal date for the Applicants were scheduled, it would again be open to him to apply for deferral of that removal, based upon the situation that then exists not on the situation that existed when he earlier applied for deferral of removal and was denied that deferral.

[12] I am satisfied that this application for judicial review is moot.

CONCLUSION

[13] Based on the foregoing brief analysis, and based upon the particular facts underlying this application for judicial review, I am satisfied that this Application is moot and I decline to exercise

my discretion to nonetheless hear it on its merits. This application for judicial review will be dismissed as moot.

CERTICIATION OF A QUESTION

[14] In *Higgins, supra,* I certified the following question:

> Where an applicant has filed an application for leave and judicial review of a decision not to defer the implementation of a Removal Order outstanding against him or her, does the fact that the applicants' removal is subsequently halted by operation of a stay Order issued by this Court render the underlying judicial review application moot?

[15] The same question was certified in *Maruthalingam v.* Canada (*Minister of Public Safety and Emergency Preparedness)*[3], a decision that followed my reasoning in *Higgins.*

[16] Counsel for the Applicant herein has requested that I certify the same question here. I will do so.

"Frederick E. Gibson"
JUDGE

Ottawa, Ontario
October 26, 2007

[3] 2007 F.C. 823.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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