Date: 20090910

Docket: IMM-3608-08

Citation: 2009 FC 891

Ottawa, Ontario, September 10, 2009

PRESENT: The Honourable Louis S. Tannenbaum

BETWEEN:

Dasha Susan CARUTH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
and
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Jean-Pierre Duhaime (officer, also known as "removal officer" or "enforcement officer") of the Canada Border Services Agency (CBSA) wherein he set the applicant's removal date as August 24, 2008.

[2] Leave was granted by Madam Justice Hansen on April 9, 2009.

Facts

[3] The applicant was born on June 27, 1975 in Kingstown, St. Vincent. She arrived in Canada on May 9, 2002 and filed a claim for refugee protection on July 10, 2003. Her claim was based on her fear of a man who was allegedly obsessed with her. She believed him to be responsible for a fire that was set at her sister's house, where she was living at the time, which caused the death of two of her sister's children.

[4] On March 12, 2003, her claim was refused because the Refugee Protection Division of the Immigration and Refugee Board (RPD) found she was not credible. Her application for leave and judicial review of the RPD's decision was dismissed on July 18, 2003, because the applicant failed to file an application record.

[5] On August 18, 2003, a removal order against the applicant became effective.

[6] On November 21, 2006, the applicant did not show up to an immigration meeting scheduled to update her immigration file and make arrangements for her removal.

[7] On February 8, 2007, an immigration warrant was issued for her arrest.

[8] In May of 2007, the applicant discovered that she suffers from end-stage chronic renal failure. She continues to receive dialysis treatment for her condition at the Verdun Hospital three times a week for three hours and 30 minutes each visit.

[9] The applicant has worked as a domestic worker since she first arrived in Canada. She was never on welfare until after she became ill in May of 2007.

[10] When the applicant first started treatment, she used a health card under a false identity. Once it expired, the hospital requested a new card and at this point she revealed her true identity.

[11] On November 20, 2007, the applicant applied for a pre-removal risk assessment (PRRA). The application was refused on June 4, 2008.

[12] On July 16, 2008, the applicant was interviewed by the officer. On July 30, 2008, the officer set her departure date for August 24, 2008. It is this decision that is under review in this application.

[13] On August 21, 2008, Madam Justice Hansen granted a stay of the applicant's removal pending resolution of the within application for leave and judicial review.

[14] The applicant has two sisters who are landed immigrants and live in Montreal – Andrea and Laverne. The applicant lives with her sister Andrea and Andrea's five children. The applicant's two children live in St. Vincent with another one of her sisters. The applicant's mother died in St. Vincent last year and the applicant says she has never been close with her father who lives in New York.

Relevant Statutory Provisions

[15] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 :

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.
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

Decision under Review

[16] On July 30, 2008, the officer set the applicant's removal date as August 24, 2008.

[17] The officer's reasons are made up of his notes from his interview of the applicant. The notes state:

1. The subject showed up alone to her interview result given.
2. Also a date of departure from Canada.
3. She maintains that she has health problems.
4. I have sent the medical report of the treating doctor to our doctor in Ottawa.
5. New meeting date given to the subject.
6. Answer of the doctor in the file. Treatment in Barbados or Jamaica.
7. I have given the subject a date of departure.

[18] In the affidavit of Dr. Walter Waddell, the Medical Officer at the Department of Citizenship and Immigration who reviewed the applicant's file, Dr. Waddell confirms that dialysis treatment is not available in St. Vincent but the applicant may obtain treatment for her disease in Barbados or Jamaica and both public and private care are available.

Issues

[19] The applicant does not expressly list the issues, but she presents arguments under the following headings:

- Medical status and required treatment;
- Establishment and the right to protection of the family;
- Risk of persecution and lack of state protection; and
- Canada's human rights obligations.

[20] The respondent frames the issue as:

- Did the officer fail to exercise his discretion, ignore relevant evidence or otherwise act contrary to the law?

[21] I wish to re-frame the issues as follows:

1. What is the applicable standard of review?
2. Was the officer's decision reasonable?

Position of the Applicant

[22] The applicant stresses that dialysis is not available in St. Vincent and Dr. Marc Ghannoum, Chief of Nephrology at the Verdun Hospital, states that without dialysis, she would die within two weeks.

[23] The applicant submits that it is clear from the officer's decision that he did not take into account the fact that she will face certain death upon her return to St. Vincent. The applicant points to what is said to be a similar case: *Blair v. Canada (Citizenship and Immigration)*, 2008 FC 800 at paragraph 20. The applicant submits the officer did not consider the irreparable harm the applicant would face were she returned to St. Vincent.

[24] In her reply submissions, the applicant states she is unable to travel to Barbados or Jamaica and she cannot receive medical care in those two countries without paying for it. While cross-border treatment in Canada is paid for by Medicare, in St. Vincent, it is impossible for the applicant's medical care in Jamaica or Barbados to be paid for.

[25] The applicant cites the case of *D. v. the United Kingdom* dated April 21, 1997, wherein the European Court of Human Rights held that deporting a man with HIV-AIDS back to St. Kitts would violate article 3 of the *U.N. Convention Against Torture*. Similarly, the applicant submits that removal to St. Vincent coupled with the fact that she would be unable to receive proper medical care and therefore will certainly die is inhuman treatment and thus a violation of the *Convention Against Torture*.

[26] The applicant also points to a decision of Justice MacKay wherein he granted a stay of deportation because the citizen of the Philippines was undergoing dialysis treatment: *Adviento v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 543, [2002] F.C.J. No. 717.

[27] Since the applicant obtained a stay from Justice Hansen on August 21, 2008, she believes that she should be allowed to stay in Canada permanently.

Establishment and the right to protection of the family

[28] The applicant asserts that in making his decision, the officer did not consider the high level of establishment she has in Montreal, nor did he take into account the principle of the protection of the family.

[29] The applicant has been living in Montreal for six years and has worked as a domestic worker since her arrival in Canada. She only went on welfare when she became ill in May of 2007. She lives with her sister Andrea and her five nieces and nephews. She is like a second mother to the children.

[30] The applicant states that the right to family life is a fundamental right both in Canadian and International law: paragraph 3(1)(*d*) of *IRPA*; articles 23 and 24 of the *UN International Covenant on Civil and Political Rights*; and article 16 of the *Universal Declaration of Human Rights*.

Risk of persecution and lack of state protection

[31] The applicant states that she fears Mikey Dirotee, an obsessive man who was following her and threatening her life back in St. Vincent. The applicant says she complained to the police numerous times about Mr. Dirotee's harassment, but nothing was ever done. Protection is said not to be available in St. Vincent for victims of domestic violence. On this point the applicant points to the U.S. Department of State Country Report for St. Vincent and the Grenadines, 2007; Freedom House's country report from 2005; and the case of *Codogan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 739.

[32] The applicant submits there is no internal flight alternative for women in St. Vincent and points to excerpts of the UNHCR guidelines on state protection, personal circumstances, and psychological trauma. The applicant submits it is unreasonable and a clear error in law to find that there is state protection available on such minimal evidence.

Canada's human rights obligations

[33] The applicant submits the decision of the officer violates:

- sections 7 and 12 of the Charter;
- article 3 of the *U.N. Convention Against Torture and other forms of Inhuman or Degrading Treatment or Punishment* (1984);
- The right of a refugee not to be returned to a territory where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion, as stated in the Convention relating to the Status of Refugees;

- The right to a simple, brief procedure whereby the courts will protect the applicant from acts of authority that, to his prejudice, violate fundamental constitutional rights, as required by article 18 of the American Declaration of the Rights and Duties of Man; and
- The right not to be deported except in pursuance of a decision reached in accordance with law, as enshrined in article 13 of the International Covenant on Civil and Political Rights.

For these reasons the applicant submits the officer's decision should be quashed and the matter should be referred back for re-assessment.

Position for the Respondent

[34] The respondent says it is trite law that enforcement officers have a very limited discretion. The discretion is restricted to deferring removal only in the presence of compelling circumstances and the officer's role is not to conduct a full H&C assessment: *Griffiths v. Canada (Solicitor General)*, 2006 FC 127 at paragraphs 26 and 28. While officers are granted the discretion to fix new removal dates, they are not intended to defer removal to indeterminate dates. The scope of an officer's discretion cannot be changed by virtue of the type of requests made: *Baron v. Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paragraphs 80 and 81.

[35] In response to the applicant's reliance on *Adviento*, the respondent points out that the case was later dismissed at the judicial review stage. At paragraph 37 of the decision, the following is stated about the scope of an enforcement officer's discretion: "It would be contrary to the purposes

and objects to the Act to expand, by judicial declaration, a removal officer's limited discretion so as to mandate a "mini H&C" review prior to removal."

[36] The respondent notes that the officer was diligent and sought the opinion of a medical officer, Dr. Waddell, who has the expertise to assess the applicant's health issues and is knowledgeable in renal diseases. Dr. Waddell recognized the serious health problems of the applicant but confirmed that the treatment she requires is available and accessible in Barbados or Jamaica under a public or private health care regime. It is said to be clear that the officer refused to defer removal because treatment was available in Barbados or Jamaica.

[37] According to the respondent, transborder treatment is not tantamount to an absence of treatment.

[38] The respondent submits that extending the presence of a foreigner without status in Canada indefinitely is beyond the discretion of the officer: *Mekarbèche c. M.C.I.*, 2007 CF 566 at paragraph 40.

The allegations of risks of abuse are not pertinent

[39] As for the allegations of domestic violence, the respondent points out that the RPD found serious problems with the applicant's credibility in this regard. The applicant cannot now rely on the same allegations which were disbelieved.

[40] Additionally, at the PRRA stage, the applicant relied exclusively on her health problems and did not raise any other risk. The negative PRRA decision was not challenged by the applicant and is now final.

The allegations of establishment are not pertinent

[41] The respondent states that it is hard to understand why the applicant did not apply for permanent residency on humanitarian and compassionate grounds. Instead, she used the Medicare card of another person and came to the immigration authorities when that card expired.

[42] Additionally, the respondent notes that the applicant chose to stay in Canada on her own accord after her refugee claim was denied in March of 2003 and the departure order became effective on August 18, 2003. This is clearly not a situation where the prolonged stay in Canada was beyond the control of the applicant.

[43] Moreover, the applicant has family in St. Vincent, including a sister and her own two children who were born in 1994 and 1999.

[44] The respondent characterizes the applicant's allegations as blaming the officer for not having done an H&C assessment and a risk assessment, however, those are outside the purview of the officer. The officer's decision was based on the facts and was not unreasonable, according to the respondent.

Analysis

What is the applicable standard of review?

[45] Recently, Justice Nadon for the majority of the Federal Court of Appeal stated he cannot see how it could be disputed that the standard of review of an enforcement officer's decision refusing to defer an applicant's removal from Canada is reasonableness. See *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81; (2009), 387 N.R. 278 at paragraph 25.

Was the officer's decision reasonable?

[46] The respondent is correct that the discretion of the officer is limited. In *Baron*, Justice Nadon with Justice Desjardins concurring, stated "It is trite law that an enforcement officer's discretion to defer removal is limited." See paragraph 49. Justice Nadon cited his reasons in *Simoes v. Canada (M.C.I.)*, [2000] F.C.J. No. 936 at paragraph 12 (T.D.), wherein he stated:

> In my opinion, the discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding whether 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.

[47] As for the applicant's medical condition, the evidence is clear that it is serious and she requires regular dialysis treatments. The officer rightly asked for a medical officer's opinion. The evidence the medical officer, Dr. Waddell, received was that the applicant may obtain treatment for her disease in Barbados or Jamaica.

[48] It is to be noted that the applicant is a citizen of St. Vincent. She is being deported to St. Vincent. While the officer referred the medical problem of the applicant to Dr. Waddell of C.I.C. to confirm the opinion of her own doctor in Montreal, it seems that Dr. Waddell while confirming the opinions of the applicant's doctor concerning her illness, went beyond the request and informed the officer that treatment while not available in St. Vincent could be had in either Barbados or Jamaica.

[49] While it may be true that such treatment is available in Barbados or Jamaica, the brutal fact is that she is being deported to St. Vincent and not to Barbados or Jamaica. Moreover, there is nothing in the record to establish that the applicant has any connection to Barbados or Jamaica.

[50] As applicant's counsel argued before the undersigned, the treatment required by the applicant in order to prevent her sure death within a very short period of time is also available in France and Japan, and I would add the United States. However, this is irrelevant since she is ordered to be deported to St. Vincent, not to Barbados, Jamaica, France, Japan or the United States.

[51] I believe the officer's decision not to defer removal unless there were assurances that the authorities in Barbados were prepared to accept the applicant for the required treatments three times per week, was unreasonable. There is nothing in Dr. Waddell's affidavit which indicates that he communicated with the medical authorities in Barbados to assure that she would be accepted, nor how the treatments would be paid for.

[52] There is also the question of transportation to and from Barbados three times each week. How is the applicant, who the evidence now establishes is unemployed, going to arrange for this?

[53] While it is true that the officer could not defer the removal indefinitely, he could have fixed another date in order for the above questions to be resolved before deporting the applicant.

[54] For the above reasons, I am prepared to grant the application for judicial review.

JUDGMENT

THIS COURT ORDERS that the decision of removal officer Jean-Pierre Duhaime dated July 30, 2008 is rescinded and set aside for all purposes. The matter is referred back for redetermination by a different officer. In that redetermination, the officer should take into consideration the issues referred to in paragraph 51 and 52 of the reasons for judgment herein. There are no questions for certification.

"Louis S. Tannenbaum"
Deputy Judge

AUTORITIES CONSULTED BY THE COURT

1. *Adjei c. Canada (Ministre de l'Emploi et de l'immigration)*, [1989] 2 C.F. 680, 7 Imm. L.R. (2d) 169 (C.A.)

2. *Blair v. Canada (Citizenship and Immigration)*, 2008 FC 800

3. *D. v. the United Kingdom*, European Court of Human Rights, 146/1996/767/964, April 21, 1997

4. *Adviento v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 543, [2002] F.C.J. No. 717

5. *Country Report for Saint-Vincent and the Grenadines*, U.S. Department of State, 2007

6. *Doreitha Codogan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 739

7. *Simoes v. M.C.I.*, [2000] F.C.J. No. 936, par. 12 (FC) (QL)

8. *Williams v. M.C.I.*, [2002] F.C.J. No. 1133, par 21 (QL), 2002 FCT 853

9. *Prasad v. M.C.I.*, [2003] F.C.J. No. 805, par. 32 (QL), 2003 FCT 614

10. *Adviento v. M.C.I.*, [2003] F.C.J. No. 1837, par. 45 (QL), 2003 FC 1430

11. *Griffith v. Canada (Solicitor General)*, [2006] F.C.J. No. 182, par. 26 (QL), 2006 FC 127

12. *Uthayakumar v. M.P.S.E.P.*, [2007] F.C.J. No. 1318, par. 12 to 14 (QL), 2007 FC 998

13. Gyan v. *M.P.S.E.P.*, [2007] F.C.J. No. 1023, par. 10 to 12 (QL), 2007 FC 771

14. *Griffiths v. Canada (Solicitor General)*, 2006 FC 127, par. 26 and 28

15. *Mekarbèche c. M.C.I.*, 2007 CF 566, par. 40

16. *Bains v. Minister of Employment and Immigration* (1990), 109 N.R. 239, paras 2-3 (F.C.A.)

17. *Canada (Minister of Employment and Immigration v. Golebiewski*, [1992] F.C.J. No. 270, par. 3 (C.A.) (QL)

18. *Krishnapillai v. Canada*, [2002] 3 F.C. 74, 2001 FCA 378, par. 10

19. *Baron v. Canada (Public Safety and Emergency Preparedness)*. 2009 FCA 81, paras. 80 to 81, 387 N.R. 278 at par. 25

20. *Wang v. M.C.I.*, 2001 FCT 148, paras. 31, 32 and 45

21. *Huerto v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 172

22. *Jimenez c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 1999 CanLII 8997 (C.F.)

FEDERAL COURT

SOLICITORS OF RECORD

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