Federal Court  Cour fédérale

Date: 20100218

Docket: IMM-429-08

Citation: 2010 FC 174

Toronto, Ontario, February 18, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

BALROOP SOOKDEO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of the decision made by a Canada Border Services Agency (CBSA) enforcement officer on February 1, 2008, refusing to defer the applicant's removal to his country of citizenship, Trinidad and Tobago. For the reasons that follow, the application is dismissed.

[2] As a preliminary matter, the applicant's supplementary affidavit, filed the day before the hearing, was struck from the record as it contained information that was not before the enforcement officer when he made his decision. The information was not, in any event, relevant to a judicial review of the officer's decision. In addition, the Minister of Citizenship and Immigration was improperly named as a respondent and the style of cause is amended accordingly.

Background

[3] Mr. Balroop Sookdeo, the applicant, arrived in Canada in 2005 with his wife and two children. A third child was born in Canada in 2006.

[4] The applicant made a refugee claim on March 7, 2006 and was found not to be a Convention refugee on July 21, 2006. The applicant did not seek leave for judicial review of that decision. An application for Humanitarian and Compassionate (H&C) consideration was made in June 2007 and remains outstanding. A removal order was issued.

[5] A Pre-Removal Risk Assessment (PRRA) issued in August 2007 found the applicant to be not at risk in returning to Trinidad and Tobago. The removal order then became enforceable.

[6] The applicant failed to appear at a pre-removal interview on October 12, 2007. A warrant for his arrest was subsequently issued. The applicant was arrested on December 5, 2007 during a routine traffic stop and released on a cash bond on December 8, 2007. The applicant was provided with a *Direction to Report* on January 15, 2008 for removal scheduled for February 5, 2008. His

wife and children were not served as they continued to evade immigration authorities and the applicant refused to disclose their location. An active warrant remained outstanding for Mrs. Sookdeo.

[7] On January 24, 2008 the applicant requested a deferral of his removal through a brief letter from his counsel. The grounds cited in support of the request, without elaboration, were the pending H&C application, harm to the family if the applicant were to be removed without them and the best interests of the Canadian-born son. On January 31, 2008 the applicant advised the enforcement centre that his son would be travelling with him.

Decision Under Review

[8] The enforcement officer's notes to file dated February 1, 2008 refer to each of the grounds cited in the request for deferral. The officer noted that the request contained no submissions or evidence that there were any new risks to be expected from a return to Trinidad. While the H&C application remained pending, it was only some five months since it had been referred to the local office and the average processing time was 30 months. Accordingly, a decision was not imminent. The only information submitted about harm to the family was that the applicant was the principal breadwinner. The officer noted that the applicant was no longer authorized to work. With regard to the best interests of the Canadian-born child, the officer commented that while the child had the right to remain in Canada, it was his father's preference that his son travel with him. In the result, the officer was satisfied that a deferral was not appropriate in the circumstances of the case.

Issues

[9] At the hearing, the parties agreed that as the removal order and H&C determination remained pending there continued to be a live controversy and the application was not, therefore, moot: *Baron v. Minister of Public Safety and Emergency Preparedness*, 2009 FCA 81, [2009] F.C.J. No. 314, at paras. 43-45.

[10] The remaining issues are whether the enforcement officer's consideration of the best interests of the Canadian-born child was reasonable and whether it was unreasonable to refuse to defer the applicant's removal from Canada pending the determination of his outstanding H&C application.

Analysis

[11] I adopt the views of Justice Yvon Pinard on the applicable standard of review of an enforcement officer's decision refusing to defer an applicant's removal from Canada. At paragraphs 15-16 of his reasons in *Turay v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1090, [2009] F.C.J. No. 1369, Justice Pinard states:

> **15** The applicable standard of review of an enforcement officer's decision refusing to defer an applicant's removal from Canada is that of reasonableness (*Baron v. Minister of Public Safety and Emergency Preparedness*, 2009 FCA 81). The court should intervene if the decision of the removals officer was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 47). If the court concludes there has been a faulty analysis of the best interests of the children, the enforcement officer's decision will be rendered unreasonable (*Kolosovs v. Minister of Citizenship*

and Immigration, 2008 FC 165).

> **16** The removals officer's source of power is subsection 48(2) of the Act which imposes a positive obligation on the Minister to execute a valid removal order. However, even on the narrowest reading of subsection 48(2) there are a number of variables that can influence the timing of a removal on a practicable basis as affirmed by Justice Denis Pelletier in *Wang v. Canada (M.C.I.)*, [2001] 3 F.C. 682 (T.D.). There are only two categories of factors that can affect the officer's decision: factual (practicable) and legal (reasonable). This was expressed in *Cortes v. Minister of Citizenship and Immigration* (2007), 308 F.T.R. 69, at paragraph 10:
>
> > ... removal must occur as soon as practicable, but only as soon as the practicability of the removal is reasonable. ...
>
> It is well-established that the "enforcement officer's discretion to defer removal is limited" (*Baron, supra*, at paragraph 49).

[12] The applicant submits that it was unreasonable to refuse deferral when the effect of the applicant's removal would have been to leave the wife and children destitute as they would have lost the principal breadwinner in the family. In those circumstances, it is submitted, removal should have been deferred until the determination of the family's H&C application.

[13] The applicant relies on *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 to argue that the enforcement officer was not "alert, alive and sensitive" to the best interests of the Canadian-born child. The enforcement officer did not acknowledge that the child was only about 16 months at the time of the decision. If the applicant took the child with him, he submits that it would have been difficult to take care of such a young child while he would be looking for a job. It is submitted that removal in these circumstances would be contrary to Canada's obligations under the *Convention on the Rights of the Child.*

[14] It is trite law that the discretion of an expulsion officer is very limited: *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] F.C.J. No. 295, at paras. 45 and 48; *John v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 420, [2003] F.C.J. No. 583, at para. 17. As the respondent argued in this matter: removal is the rule while deferral is the exception.

[15] While the officer should consider a pending H&C determination as a relevant factor, it does not serve as a bar to removal. The officer can consider the circumstances directly affecting travel arrangements and other compelling individual circumstances, such as personal safety or health: *Prasad v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 614, [2003] F.C.J. No. 805, at para. 32; *Padda v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1081, [2003] F.C.J. No. 1353, at paras. 8 and 9. A removals officer is not meant to act as a last-minute H&C assessment tribunal: *Davis v. Canada (Minister of Citizenship and Immigration)*, (2000), 100 A.C.W.S. (3d) 463, [2000] F.C.J. No. 1628, at para. 4.

[16] The best interests of a Canadian-born child are only one factor to be considered in the assessment of whether a removal is practical in the circumstances. As was stated by Justice Pinard in *Turay*, above, at para. 21, this consideration need only concern the child's short term interests and not in any great detail. In *Varga v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, [2006] F.C.J. No. 1828, at para. 16, it was stated by the Federal Court of Appeal that:

> 16 … Within the narrow scope of removals officers' duties, their obligation, if any, to consider the interests of affected children is at the low end of the spectrum, as contrasted with the full assessment which must be made on an H&C application under subsection 25(1). [My Emphasis]

[17] The enforcement officer must be satisfied that the removal would not place the child at risk: *John*, above, at para. 13. In this case, the officer turned his mind to the question of whether the child could travel to Trinidad with his father or remain in Canada with the rest of the family. There was no evidence or submissions before him that the child would lack for care if he were to stay in Canada nor any indication that the child faced an imminent risk of harm should he go to Trinidad where the applicant has a large extended family.

[18] The applicant cites *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165, [2008] F.C.J. No. 211, at para. 14, for the proposition that the enforcement officer must provide a meaningful critical analysis of the child's real life situation. In *Kolosovs*, one of the children suffered from diabetes and required special care which was provided by the applicant. There is no evidence of analogous circumstances in the present case. While the child was very young, the situation presented to the officer was that the child could either remain in Canada with the mother or accompany the father, which was the applicant's preference. Based on the information provided to him, the officer had no reason to consider whether the child's needs would serve as a practical impediment to removal.

[19] The argument that removal of a parent of Canadian-born children pending the outcome of an H&C determination is contrary to Canada's obligations under the *Convention on the Rights of the Child* was found by the Federal Court of Appeal to be "without merit" in *Baron*, above, at para. 57. In addition, the Court stated the following:

> 57 … The jurisprudence of this Court has made it clear that illegal immigrants cannot avoid the execution of a valid removal order simply because they are the parents of Canadian-born children (see: *Legault v. M.C.I*, 2002 FCA 125, para. 12; see also with respect

> to international law: *Baker*, supra; *Langner v. M.E.I.*, [1995] F.C.J. No. 469 (C.A.) (QL)). I might add that the officer went further than required in her consideration of the children's best interests. As I stated in *Simoes*, supra, an enforcement officer has no obligation to substantially review the children's best interest before executing a removal order. I believe that Pelletier J.A.'s Reasons in *Wang*, supra, support this view. [My Emphasis]

[20] In this case, the officer's determination of the practicability of removal, after considering all of the relevant factors, including the interests of the Canadian-born child, was reasonable.

[21] Accordingly, this application is dismissed. No serious questions of general importance were proposed by the parties and none will be certified.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that:

1. This application for judicial review is dismissed;
2. The style of cause is amended to delete the reference to the Minister of Citizenship and Immigration leaving the sole respondent as the Minister of Public Safety and Emergency Preparedness; and
3. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-429-08
STYLE OF CAUSE:	BALROOP SOOKDEO v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
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