Federal Court  Cour fédérale

Date: 20110421

Docket: IMM-4153-10

Citation: 2011 FC 486

Ottawa, Ontario, April 21, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

AHMED KORAYEM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the July 13, 2010 decision of an Enforcement Officer (the Officer) of the Canadian Border Services Agency (CBSA), rejecting the Applicant's request for deferral of his removal from Canada until his humanitarian and compassionate (H&C) application is determined.

[2] Based on the reasons below, this application is dismissed.

I. Background

A. *Factual Background*

[3] The Applicant, Ahmed Korayem, is a citizen of Egypt. He came to Canada on a student visa in 1999 for pilot training at the Brampton Flight Centre. In June 2000, the Applicant began renting a room in the home of the Aguero family. The Aguero family consisted of Mrs. Aguero, an immigrant from Peru, her eldest daughter Claudia, who was born in Argentina but came to Canada as a four year old, and her two sons, Paul and Michael who were both born in Canada.

[4] When his student visa expired in September 2000, he returned to Egypt to renew his Egyptian passport and his Canadian student visa. He returned to Canada in October 2001 and resumed living with the Aguero's. Affidavits of the Applicant and all three of the Aguero children explain how the Applicant's role in the family evolved over the years from being a mere tenant to acting as an older brother figure.

[5] In March 2002, the Applicant made a refugee claim. The Applicant claimed that he had spent all of his money trying to become a pilot in Egypt. However, he was unable to pass the exams and was asked to leave the school. His family was allegedly very ashamed of him. The claim was denied in April 2003. His application for leave and judicial review of that decision was denied in September 2003. In October 2004, the Applicant submitted a Pre-Removal Risk Assessment

(PRRA) application. He received a negative decision in May 2005. Consequently, the Applicant received a direction to report for removal June 5, 2005. However, the Applicant failed to report for removal and a warrant was issued for his arrest.

[6] In his affidavit, the Applicant claims to have over-stayed with the intention of re-applying for permanent residency. However, in October 2005 the Aguero family was involved in a car accident. Mrs. Aguero was killed. Her three children survived.

[7] Claudia, who was 20 at the time of the accident, obtained full legal guardianship of her two minor brothers. Although she was a college student with no income, she also inherited her mother's financial liabilities. The Applicant claims to have stepped in to offer financial and emotional support to the family with the goal of keeping the family together in their home. By all accounts, it is at this time that the Applicant became an integral part of the Aguero family. He worked full time in the construction industry and attended college part-time, graduating as a Project Manager from Humber College in June 2009. In 2009 he also married Melissa Lopez Casanova, an American citizen.

[8] The Applicant's successful evasion of immigration authorities ended in January 2010 at which point a warrant was executed for his arrest. He came to the attention of the CBSA when he was charged with Domestic Assault. The Applicant was granted bail, but was detained by CBSA until March 31, 2010. On April 8, 2010 the Applicant filed an application for Permanent Residence on H&C grounds.

[9] In June 2010, the Applicant was directed to report for removal on July 23, 2010. He requested a deferral of his removal. This request was denied on July 13, 2010. This is the decision presently under review.

B. *Impugned Decision*

[10] The Applicant based his deferral request on:

(a) The best interests of the Aguero children;

(b) The outstanding H&C application;

(c) The intent of the Applicant's spouse to submit a spousal sponsorship application once she is approved for permanent residency through the skilled workers program;

(d) The outstanding application for a United States Visa from within Canada;

(e) Establishment in Canada;

(f) Risk/undeserved hardship in Egypt.

[11] The Officer noted that the Applicant was under an enforceable removal order and that the CBSA has a statutory obligation to enforce removal orders as soon as is practicably possible – customarily as soon as a negative PRRA decision is delivered. The Applicant was given his negative PRRA decision in May 2005.

[12] The Officer noted that he had little discretion to defer removal, and that this discretion had to be exercised while continuing to enforce a removal order as soon as reasonably practicable.

[13] The Officer sympathized with the situation of the Aguero family, but noted that the children were, at the time of the decision, 26, 20 and 18, and therefore all legal adults in Ontario. The Officer acknowledged that the removal would be very difficult for the Aguero's, but that they would continue to reside in Canada with each other, and have access to a broad range of programs offered by the Canadian government. He was not satisfied that a deferral was warranted on the ground of the best interests of the Aguero children.

[14] There was insufficient evidence to demonstrate that a decision on the H&C application was imminent. Furthermore, the submission of an H&C application, in and of itself, is not an impediment to removal and does not warrant a deferral of removal. The Officer concluded that the Applicant's H&C application would continue to be processed even after his removal to Egypt. Similarly, the intent to submit a spousal sponsorship application was not, in and of itself, an impediment to removal. As for the outstanding application for a U.S. visa from within Canada, which the Officer noted was only mailed to the U.S. consulate on May 12, 2010, there was no evidence that a decision was imminent. As a result, the Officer was not satisfied that a deferral of removal was warranted on any of these grounds.

[15] The Officer acknowledged that the Applicant is an active and respected member of his community who has resided with the Aguero family continuously since 2005. However, he submitted a PRRA application in October 2004. At that time he was informed that a determination on his PRRA application would be made in three to six months and that should the decision be negative he would be expected to confirm his departure from Canada in two to three weeks. The timeframe was made clear to the Applicant so that he could make appropriate arrangements for

himself and his family members. The Applicant had ample time to prepare for his potential removal from Canada. Consequently, the Officer was not satisfied that a deferral of removal was warranted on this ground.

[16] As for the risk associated with returning to Egypt, the Officer determined that they had previously been considered by the Immigration and Refugee Board (IRB) and a PRRA officer. He was not satisfied that any alleged risk was new or sufficiently personalized. The Officer again referred to his limited discretion, and concluded that he could only defer removal if it would expose the Applicant to a risk of death, extreme sanction, or inhumane treatment and based on the information provided he was not satisfied that a deferral of removal was warranted. He concluded that there was no impediment to the removal of the Applicant.

C. *Federal Court Stay Decision*

[17] The Applicant was granted a stay of removal pending the outcome of this application by Justice Russel Zinn on July 22, 2010.

II. Issues

[18] The Applicant raises the following issues:

(a) Whether the Officer erred by concluding that the test for irreparable harm was not met;

(b) Whether the Officer should have based his decision on the best interest of the Aguero family and the well being of the children;

(c) Whether the Officer should have based his decision on the fact that the Applicant is a member of the Aguero family;

(d) Whether the Officer should have based his decision on any hardship to the Aguero family;

(e) Whether the Officer neglected to consider any hardship the Applicant would face if he returned to Egypt before a decision was rendered on the H&C application;

(f) Whether the Officer erred in not finding that the stay for removal should have been granted pending the Application for Canadian Permanent Residence based on Humanitarian and Compassionate grounds;

(g) Whether the Officer, in light of his decision, ought to have made a finding that there was: a) a serious question to be determined, b) irreparable harm, and c) balance of convenience favours the Applicant;

(h) Whether the Officer erred by concluding that the Aguero family will be provided with government assistance.

[19] Considering that this is an application for judicial review of a decision refusing to defer removal, the issues properly before the Court are best summarized as:

(a) Did the Officer fetter his discretion?

(b) Did the Officer fail to consider the relationship of the Applicant to, and unique circumstances of, the Aguero family?

(c) Did the Officer fail to consider hardship to the Applicant if he were returned to Egypt prior to the consideration of his H&C application?

(d) Did the Officer consider the pending H&C application?

III. Standard of Review

[20] The appropriate standard of review to apply to the Officer's decision refusing to defer the Applicant's removal from Canada is the standard of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 at para 25). Judicial deference to the decision is appropriate where the decision demonstrates justification, transparency and intelligibility within the decision making process, and where the outcome falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

IV. Argument and Analysis

Preliminary Matter – Affidavit Included Evidence Not Before the Decision Maker

[21] The Respondent requests that material filed as part of the affidavit of Erona Naraine dated August 18, 2010 be struck since it was not before the decision-maker.

[22] As argued by the Respondent, this evidence, consisting of a copy of an excerpt from a UK Border Agency Country of Origin document, is irrelevant for judicial review. It was not before the Officer, and therefore should not be considered by this Court. Additional evidence may be submitted on issues of procedural fairness and jurisdiction only (*Dezameau v Canada (Minister of Citizenship and Immigration)*, 2010 FC 559, 369 FTR 151 at para 13). Accordingly, this evidence is struck from the record.

A. *Did the Officer Fetter his Discretion?*

[23] The Federal Court of Appeal recently reviewed the discretion of a removal officer to defer removal in *Baron*, above. The law is clear that an enforcement officer's discretion to defer removal is very limited. In determining when it is "reasonably practicable" for a removal order to be executed, a removal officer might consider such things 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. The mere presence of an H&C application does not constitute a bar to removal (*Baron*, above, at paras 49 and 50. See also *Simoes v Canada (Minister of Citizenship and Immigration.)*, [2000] FCJ No 936 (TD) (QL), 7 Imm LR (3d) 141, at para 12).

[24] In *Baron*, above, at para 51 the Court of Appeal was unable to improve upon the decision of Justice J.D. Denis Pelletier in *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682 (FC) describing the limits of a removal officer's discretion:

> -There are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths.
>
> -The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act. In considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission.

> -In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.
>
> -Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application.
>
> [Emphasis in original]

[25] In the present matter, it is clear that the Officer considered all of the relevant facts that were before him. The Officer applied the correct standard to the evidence. The Officer concluded that none of the outstanding applications were in and of themselves a sufficient reason to defer removal.

[26] In making submissions that the Officer committed a reviewable error, the Applicant listed several considerations that, in his mind, the Officer disregarded. I am unable to agree with any of the Applicant's allegations of error on the part of the Officer, however much sympathy I have for the position of the Applicant and the Aguero family. It is settled law that a removal officer is not to conduct a "mini" H&C assessment when dealing with a request to defer removal (*Chetaru v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 436 at paras 18-20).

[27] The Officer's decision in this matter was entirely reasonable. I have examined the Applicant's submissions in more detail as follows.

B. *Did the Officer Reasonably Consider the Applicant's Relationship with the Aguero Family?*

[28] The Applicant submits that the Officer failed to duly consider the unique situation in which he finds himself with respect to his support for the Aguero family. In the Applicant's opinion, the Officer erred in neglecting to consider all of the risks and hardship that the Aguero family will face should he be removed to Egypt.

[29] It seems, based on the record, that the Applicant provided much needed support and stability to the Aguero family following the death of Mrs. Aguero. This is laudable. The Officer turned his attention to this fact and the circumstances of the family, noting that the Applicant had contributed to the family's emotional and financial well-being.

[30] The Respondent submits, however, that the Applicant is not even related to the Aguero's. I recognize that the argument can be made that the Applicant is a *de facto* member of the Aguero family. Even in this case, the Officer rightly acknowledged that all Aguero children were, at the time of the decision, legal adults in the province of Ontario. They have each other for support. They are also all Canadian citizens eligible to benefit from a range of social programming that is available to all Canadians.

[31] I take the Respondent's point that caselaw has previously held that an officer's obligation to consider the best interests of the children, when it comes to minor children, is at the low end of the spectrum. Moreover, as held in *Simoes*, above, removal officers are only required to consider the short-term interests of those children (at para 38). In the present matter, certainly the removal of the

Applicant will be difficult for the Aguero's. The Officer recognized as much, and their affidavits attest to the difficulty they faced while the Applicant was detained in 2010. But considering that all of the children are all legal adults and Canadian citizens, who can choose to remain together for emotional support, it cannot be said that the Officer was unreasonable in coming to the conclusion that a deferral was not warranted.

[32] The Applicant submits that the Officer ignored the fact that the Aguero's are ineligible for government financial assistance. As the Respondent submits, such evidence was not put before the Officer, and the Officer cannot be said to have erred in failing to consider evidence that was not before him.

C. *Did the Officer Consider the Risk of Hardship that the Applicant Would Face in Egypt?*

[33] The Applicant submits that the Officer failed to consider the hardship he would face if he were to return to Egypt. Specifically, the Applicant argues that the Officer failed to consider that he would be unable to hold an Egyptian passport as he never completed the obligatory military service.

[34] I must accept the Respondent's submissions on this point. The Applicant's request for deferral does not mention this issue, nor is it brought forward in any of the documents submitted in support of his request. Once again the Officer cannot be said to have erred in failing to consider evidence that was not before him. As I held in *Sribalaganeshamoorthy v Canada (Minister of Citizenship and Immigration)*, 2010 FC 11 at para 37:

> [37] […] It is illogical to expect the Visa Officer to make references to objective country condition documentation that was not

> submitted. The fact that some country condition documentation may support the Applicant's case does not impose a duty upon the Visa Officer to search for and produce that evidence on the Applicant's behalf.

[35] The Officer did otherwise consider the risks alleged in the Applicant's request, but concluded that these risks were already considered by the IRB and a PRRA officer and that the risks were neither new nor sufficiently personalized in nature. The Officer's conclusion was reasonable.

D. *Did the Officer Consider the Pending H&C Application?*

[36] As mentioned above, an outstanding H&C application is not in and of itself an impediment to removal. However, a timely filed H&C application may be grounds for a stay of removal. In the present matter, the Officer noted that the H&C application was filed in April 2010, and consequently, a decision on the application was not imminent. Furthermore, the Officer properly determined that the H&C application would continue to be processed after the Applicant's removal. There is no error on the part of the Officer in this regard.

[37] The Applicant disagrees with result of the Officer's reasoning and essentially asks the Court to reweigh the evidence and come to a different conclusion. However, the Officer's decision must be reviewed on a standard of reasonableness. This Court is unable to substitute its judgment for that of the Officer. Given that the decision was justified, transparent and intelligible, it must stand despite any degree of sympathy the Court might feel for the Applicant and the Aguero family.

V. Conclusion

[38] No question was proposed for certification and none arises.

[39] In consideration of the above conclusions, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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