Federal Court  Cour fédérale

Date: 20111214

Docket: IMM-3399-11

Citation: 2011 FC 1430

Ottawa, Ontario, December 14, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

SHAKELA BABOOLALL

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] The applicant seeks to set aside a decision rendered by a Canada Border Services Agency (CBSA) removals officer (the Officer) refusing to defer her removal from Canada pending disposition of a pending application for humanitarian and compassionate (H&C) relief under section 25 of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*). For the reasons that follow, the application is dismissed.

Facts

[2] The applicant, Mrs. Shakela Baboolall, arrived in Canada in 1974 when she was six years of age. She has never regularized her status in Canada. She is now 43 years old, and the mother of three Canadian born children aged 22, 15 and 13. The applicant's history in Canada is unfortunate and complicated. The applicant has been convicted of numerous criminal offences, including criminal negligence causing bodily harm, failure to stop at the scene of an accident and being unlawfully at large. Her interactions with the CBSA and Citizenship and Immigration Canada (CIC) are numerous. She has been subject to removal since 2006, but was successful, on two prior occasions, in obtaining a deferral of removal. She has made several failed judicial review applications. She has filed H&C applications and sponsorship applications which have either been incomplete, not pursued by the applicant or refused by the government. She has been married for 16 years to a Canadian who sought to sponsor her from within Canada. When that was refused, her spouse sought to sponsor her from abroad. She did not attend the interview in the Canadian embassy in Trinidad and Tobago, citing her responsibilities to care for her children.

[3] For what is an otherwise long story which shall not be repeated here, the applicant became subject to a removal order which was to be executed on May 31, 2011. On May 30, 2011, Justice Sean Harrington granted a motion to stay removal pending adjudication of the underlying judicial review application which is the subject of this decision.

Issue

[4] The issue in this case is whether the decision of the Officer to refuse the applicant's request for deferral of removal withstands scrutiny on a reasonableness standard: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. The applicant argues that the Officer's discretionary decision was unreasonable because the Officer fettered her discretion, ignored evidence, made serious factual errors or came to an unreasonable decision when she decided not to defer the applicant's removal from Canada.

Analysis

[5] Turning to the first argument, the applicant contends that the "…enforcement officer did not take into consideration the fact that the applicant now has a pending humanitarian and compassionate application as well as a pending Temporary Resident Permit application." This argument is not supported by the decision.

> Counsel is requesting a deferral of Ms. Shakela Baboolall's removal to allow for the processing of her outstanding H&C application received on 23 November 2010. I note that on 16 January 2011, Ms. Shakela Baboolall's H&C application was referred to CIC Scarborough for a more in-depth review. According to the CIC processing website…H&C applications can take approximately 15 months for further processing after they have been transferred to a local CIC.
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> I further note that Ms. Shakela Baboolall has been aware of her impending removal for quite some time, as her Deportation Order was issued 16 December 2004, and she has been scheduled for removal on two previous occasions. I note that M. Shakela Baboolall's H&C application was not submitted until after the second time Ms. Shakela Baboolall signed her Direction to Report advising of her scheduled departure date, and approximately 6 years after being ordered deported from Canada. In considering this, as well as the above mentioned timeframe and factors, I do not consider this application to be timely. Further I note that counsel has failed to provide any evidence to demonstrate that a decision on this

> application is imminent. Further to this, I note that the submission of an H&C Application, in and of itself, is not an impediment to removal, nor does it delay an individual from being removed from Canada. I note that this clearly outlined in the application and instruction guide (IMM 5291).
>
> Parenthetically, I find it important to note that Parliament has not enacted, in the Immigration and Refugee Protection Act (IRPA), a provision to stay the enforcement of a removal order due to an outstanding H&C application. According to Public Policy under subsection 25(1) of IRPA, an outstanding H&C application does not warrant a deferral of removal, nor does it constitute a stay under section 50. Moreover, as per section 233 of the Immigration and Refugee Protection Regulations, there is no stay of removal where there in an outstanding H&C application that has not been approved in principle by the minister.
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> Having said that, and while I note that it is beyond my authority to conduct an adjunct H&C evaluation, I have carefully considered the grounds raised in the deferral request….

[6] It is clear that the Officer considered the H&C application, and did so substantively. Thus the first prong of counsel for the applicant's first argument falls away.

[7] In respect of the second prong of her first argument, that is, the failure to take into account a pending temporary resident permit (TRP), the Officer found as follows:

> According to the deferral request submissions, counsel asserts that on 22 September 2010, Ms. Shakela Baboolall also submitted an application for a Temporary Resident Permit (TRP). I note that counsel has not presented any evidence that a TRP application has been submitted or received at CPC Vegreville. I am willing to concede that some time may elapse until the receipt of an application is reflected on FOSS. However, I note that counsel asserts a TRP application was sent to CPC Vegreville on 22 September 2010, the same day as her H&C application. I note that Ms. Shakela Baboolall's H&C application is reflected in FOSS, thus allowing me to infer that a TRP application was neither submitted nor received at CPC Vegreville along with the H&C application. As stated above, Ms. Shakela Baboolall did have a TRP application at the Canadian Visa Office; however she was advised that the application was not

> able to be considered until she confirmed her departure from Canada to determine her inadmissibility.
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> Nonetheless, I find that if Ms. Shakela Baboolall did in fact submit a TRP application to CPC Vegreville on 22 September 2010, the application was submitted approximately 6 years after she was ordered deported from Canada. I note that the application was also submitted after Ms. Shakela Baboolall was scheduled for removal for the third time, after she had received negative PRRA and after her overseas family class sponsorship was refused and the IAD appeal was dismissed As such I do not find the TRP application timely and I am not satisfied that it provides reasonable grounds for a deferral of Ms Shakela Baboolall's removal.

[8] Once again, it is clear that the Officer considered the applicant's Temporary Resident Permit application and provided reasons proportionate to that consideration. Counsel's argument that the Officer failed to "take into consideration the fact that the applicant now has a pending humanitarian and compassionate application as well as a pending Temporary Resident Permit application", therefore, fails. Neither a pending H&C application nor a pending TRP application is an impediment to removal.

[9] Second, the applicant argues that the Officer erred because she did "…not assess the extreme hardship the applicant would face if forced to return to Guyana and await processing of her application in a country foreign to her." *Hardship* informs the standard applied in H&C applications, which is commonly known to require an evaluation of an applicant's likelihood to suffer an unusual, undeserved, or disproportionate hardship if forced to apply for Canadian permanent residency outside of Canada. In this context, I cannot improve on the analysis provided by Justice Yves de Montigny in *Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180, [2006] 2 FCR 664 wherein he held:

> …I am of the view that the filing of an H & C application cannot automatically bar the execution of a removal order, even if it results in the separation of a child from his or her parent(s). Similarly, removals officers cannot be required to undertake a full substantive review of the humanitarian circumstances that are to be considered as part of an H & C assessment. Not only would that result in a "pre H & C" application", to use the words of Justice Nadon in *Simoes*, but it would also duplicate to some extent the real H & C assessment. More importantly, removals officers have no jurisdiction or delegated authority to determine applications for permanent residence submitted under section 25 of the IRPA. They are employed by the Canadian Border Services Agency, an agency under the auspices of the Minister of Public Safety and Emergency Preparedness, and not by the Department of Citizenship and Immigration. They are not trained to perform an H & C assessment.

[10] It was neither the responsibility nor jurisdiction of the Officer to analyze the hardship the applicant would suffer should removal not be deferred. This the Officer clearly recognized, and stated in her decision: "…I note that it is beyond my authority to conduct an adjunct H&C evaluation." Nevertheless, the Officer did examine the immediate impact removal would have on the applicant:

> …I have also carefully considered the hardship that Ms. Shakela Baboolall may face as result of her deportation from Canada to Guyana. I note that counsel provided one additional page on 09 May 2011 again requesting that Ms. Shakela Baboolall's removal be deferred until her outstanding H&C application and TRP application are finalized due to her extreme establishment in Canada. I also acknowledge counsel's assertion that Ms. Shakela Baboolall has absolutely no ties to Guyana as she has not returned there since she was a young child. I would like to note that while Ms. Shakela Baboolall has resided in Canada for many years with her husband and three sons, this does not confer any temporary resident status upon her.

[11] Third, the applicant argues that "…the enforcement officer did not properly assess the best interest of the children…". For the same reasons provided in respect of hardship above I find this

argument has little merit. In *Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, [2007] 4 FCR 3 the Federal Court of Appeal noted:

> …there is no analogy between the statutorily defined functions of a PRRA officer and the role of a removals officer. The latter has a limited but undefined discretion under section 48 with respect to the travel arrangements for removal, including its timing ("as soon as reasonably practicable"). 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).

[12] Given the Court of Appeal's holding in *Varga* and the limited nature of the best interests of the child analysis a removals officer is expected to conduct, I find the analysis conducted by the Officer sufficient and reasonable:

> In making this decision, I have also carefully considered the best interests of Ms. Shakela Baboolall's three children, Arial, Anthony, and Christon, ages 22, 15, and 13 respectively. I have also carefully considered the hardship Ms. Shakela Baboolall may face as result of her return to Guyana, her country of birth which she left at the age of 4.
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> […]
>
> Moreover, I find it important to note that Ms. Shakela Baboolall stated in the 24 May 2011 interview that Mr Johnson would be taking care of their sons after she was removed from Canada. She stated that Mr. Johnson is currently working as a computer engineer in Mississauga, and has done so for the past year. In considering this, I am confident that the children will be properly cared for during this time of transition, and with the potential support of extended family and friends they will have every opportunity to grow up to be confident, caring, and capable individuals.
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> […]
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> I note that Ms. Shakela Baboolall and her family have been given more than a sufficient amount of time to prepare for her impending removal. I note that her removal scheduled for 31 May 2011 is the third scheduled removal for Ms Shakela Baboolall each time she has

> spoken to making arrangements for her children to remain in Canada. Moreover, while it may mean that Mr Johnson has to make-arrangements with his work schedule, the family was advised of this and should have begun to make the appropriate arrangements. It is important to note that as Canadian Citizens Ms. Shakela Baboolall's husband and three sons are able to travel to Guyana to visit her during this time of separation should they so choose.
>
> I acknowledge that leaving her family is quite difficult for Ms. Shakela Baboolall and I sympathize with her. However, I note counsel's statement that it is "not feasible for Ms. Baboolall to depart Canada." I find it important to note that Ms. Shakela Baboolall's removal from Canada does not necessarily imply that the family will be separated indefinitely. Mr. Johnson can submit another overseas family class sponsorship for his wife.

[13] It is clear that, to the extent she was required to do so, the Officer considered the best interests of the applicant's children and that the conclusion reached was, given the age of the children, the fact that their father would remain with them and was the principle wage earner, reasonable.

[14] Fourth, the applicant urges that removal to Guyana would expose her to inhumane treatment as contemplated by *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311. She has lived in Canada almost all of her life. She knows nothing of Guyana, its culture or language. She has aunts and uncles remaining there, but her mother and siblings are in Canada. She has no means of support in Guyana. Her ability to return to Canada is problematic given her criminal record. At issue, therefore, is whether the applicant falls within this limited exception in *Baron*. In *Baron*, Nadon JA said: "In Reasons which I find myself unable to improve, [Mr. Justice Pelletier] made the following point []…[and]…I agree entirely with [his] statement of the law:

> 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.

[15] In my view, it would be antithetical to Parliament's purposes and objectives as expressed in the *IRPA* to allow a person to gain the benefits of residency in Canada simply through the passage of time. Put otherwise, with exceptions, and there will be exceptions, the gradual accretion of establishment factors cannot amount, in the end, to legal entitlement to remain in Canada. To allow the passage of time to become, in and of itself, a determinative factor in the exercise of the removal officer's discretion would, in effect, reward delay, prevarication and avoidance. In this regard, it is, I think, important to maintain a clear demarcation between what Parliament has authorized as the mechanisms by which foreign nationals can gain admission to Canada, and the conduct of the executive in the administration of the *Act*. Put otherwise, delay on the part of government departments in allowing a case to linger for decades cannot be relied on by an applicant to create a supplemental avenue of recourse for admission to Canada beyond that contemplated by Parliament. As Justice Yves de Montigny observed in *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 at para 21:

> It would obviously defeat the purpose of the Act if the longer an applicant was to live illegally in Canada, the better his or her chances were to be allowed to stay permanently, even though he or she would not otherwise qualify as a refugee or permanent resident. This circular argument was indeed considered by the H & C officer, but not accepted; it doesn't strike me as being an unreasonable conclusion.

[16] In reaching this conclusion, I have no doubt that the applicant will face challenges upon return to Guyana. However, at each step in the immigration process, the applicant made a decision whether her best interests lay in challenging the decision, or pursing a further application for H& C relief or in returning to her country of origin. There were risks inherent in each course, and in this case the applicant chose to seek to remain in Canada by every mechanism possible. That this makes return more difficult cannot be turned into a reason compelling the deferral of her removal.

[17] The application is dismissed.

[18] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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