Federal Court  Cour fédérale

Date: 20130422

Docket: IMM-2983-12

Citation: 2013 FC 405

Toronto, Ontario, April 22, 2013

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ALFONSO RUSSO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] Mr. Alfonso Russo (the "Applicant") seeks judicial review of the decision of S. Behrue (the "Officer") of the Canada Border Services Agency (the "CBSA"). In that decision dated March 29, 2012, the Officer refused the Applicant's request for deferral of his removal from Canada that was scheduled for March 30, 2012. Upon motion, the removal was stayed by Order of Justice Shore on March 29, 2012.

BACKGROUND

[2] The Applicant came to Canada in 1967 as a permanent resident, along with his family. He was ten years old at the time. He has resided in Canada since 1967. The Applicant has a history of mental health issues. He was diagnosed as Bipolar Type II in December 2011 and has been prescribed anti-depressant and anti-psychotic medication to deal with that illness.

[3] In July 2007, the Applicant was convicted of assault with a weapon. Allegedly, the charge arose from an incident in a store when the Applicant waved a fondue fork at a store clerk. It appears that this behaviour was related to his mental illness. Justice Shore referred to this event in his Order granting a stay of removal.

[4] The Applicant failed to appear for an interview in December 2007. On July 25, 2008, the Applicant was found inadmissible pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") and was ordered deported.

[5] An arrest warrant for removal was issued on May 19, 2009. In June 2009, the Refugee Protection Board, Immigration Appeal Division (the "IAD"), appointed a designated representative, pursuant to section 167(2) of the Act to assist the Applicant in his proceedings before it. In August 2009, the IAD issued a two-year conditional stay of the deportation order. One condition of the stay was that the Applicant was to be supervised by the Toronto Bail Program. The Applicant failed to appear for oral interviews before the IAD in January 2010 and April 2010.

[6] By letter dated April 21, 2010, that Program withdrew its supervision because the Applicant had stopped taking his medication and was increasingly uncooperative. The CBSA requested a review of the conditions of the stay of the deportation order on September 22, 2010.

[7] The Applicant failed to appear at a hearing before the IAD scheduled for October 24, 2011. On October 24, 2011, the IAD cancelled the stay of the removal order and dismissed the Applicant's appeal. On November 17, 2011, he was arrested and detained. He applied for a Pre-Removal Risk Assessment on January 9, 2012. A negative decision was rendered in this regard on February 13, 2012.

[8] The Applicant submitted a request for deferral of his removal on March 26, 2012, which was refused on March 29, 2012.

[9] In refusing to defer the Applicant's removal, the Officer noted that the Applicant had applied for permanent residence in Canada on humanitarian and compassionate ("H&C") grounds only four days before his scheduled removal. He found that given the processing time for such applications, no decision was imminent. He also said that some of the Applicant's actions seemed to indicate a wanton, deliberate, and calculated disregard for the immigration process.

[10] The Officer considered the Applicant's mental health. He had before him a letter from a general practitioner. The Officer afforded this letter little weight on the grounds that it was

undated, and as such, it was not clear if it reflected the Applicant's current condition. I note, however, that this letter is in fact dated and the date is March 26, 2012.

[11] As well, the Officer noted that the removals officer had inquired with the Migration Integrity Assistant ("MIA") in Rome who reported that if the Applicant had a medical condition and no family or support in Italy, he would be admitted to the nearest hospital, and then to a long-term care facility. The CBSA provided the Applicant with information about a shelter near the airport in Rome and arranged an escort to Italy and a week's worth of medication.

SUBMISSIONS

[12] The Applicant argues that the Officer improperly relied on extrinsic evidence which was not disclosed to him, thereby giving rise to a breach of procedural fairness. This evidence consisted of the opinion from the MIA in Rome; a letter from a Mr. Sharp with the Toronto Bail Program suggesting that the Applicant does not comply with his bail conditions and that one of his brothers in Canada wants him returned to Italy; an undisclosed note in the Certified Tribunal Record ("CTR") that suggests the Applicant would be given asthma medicine to take to Italy rather than medication for his psychiatric conditions; and finally, information from the Italian consulate in Italy that suggests a lack of available facilities in Italy to provide care for the Applicant.

[13] The Applicant argues that the CTR is incomplete because although the Officer refers to correspondence dated March 16, 2012, with the MIA in Rome, the CTR does not include any

correspondence on that date or containing the direct quotation relied on by the Officer. The Officer relied on this correspondence to conclude that medical care would be available to the Applicant.

[14] The Applicant submits that the omission of material evidence from a CTR is sufficient ground to overturn a decision, relying on the decision in *Li v. Canada (Minister of Citizenship and Immigration)* (2006), 54 Imm.L.R. (3d) 189. He argues that the missing information is important because other documents in the CTR contradict the Officer's finding as to the availability of care. The Officer concluded that he "would" be placed in a long-term care facility while the MIA correspondence says that he "may" be placed in such a facility.

[15] The Applicant further argues that the Officer ignored relevant evidence, that is, evidence about his mental health condition. He also submits that the Officer made unreasonable conclusions in light of the evidence, in particular in finding that the IAD had considered H&C factors and in finding that the Applicant was aware of the nature of his immigration proceedings.

[16] Finally, the Applicant also submits that the Officer's reasons are inadequate and fail to meet the standard of justification, transparency, and intelligibility as discussed in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 47 and *Okbai v. Canada (Minister of Citizenship and Immigration)* (2012), 405 F.T.R. 315 at paras. 23-24.

[17] The Minister of Citizenship and Immigration (the "Respondent") submits that the Officer committed no breach of procedural fairness and that the decision to refuse deferral of removal is

reasonable, having regard to the limited discretion granted by section 48 of the Act. While the Officer may consider compelling or special personal circumstances, he is not authorized to consider H&C factors in deciding whether to defer removal and an outstanding H&C application is no bar to removal.

DISCUSSION AND DISPOSITION

[18] The first matter to be addressed is the applicable standard of review. For questions of procedural fairness, the standard is correctness; see the decision in *Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at para. 43. The standard of review for a decision refusing to defer removal is reasonableness; see the decision in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2010] 2 F.C.R. 311 (F.C.A.) at para. 25.

[19] The Applicant raises two issues of procedural fairness, that is, reliance by the Officer on extrinsic evidence without giving him an opportunity to respond and the omission of material from the CTR.

[20] As a general rule, evidence that is otherwise publicly available is not considered "extrinsic" evidence. In this regard I refer to the decisions in *Jiminez v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1078 at para. 19 and *Level v. Canada (Minister of Public Safety and Emergency Preparedness)* (2008), 324 F.T.R. 71. However, the extrinsic evidence at issue here is not generally available to the public. Some of the documents relied on by the

Officer concerned only the Applicant, for example the letter from the Toronto Bail Program and the correspondence from the MIA in Italy. In my opinion the failure to disclose this extrinsic evidence was a breach of procedural fairness.

[21] The absence of documents from the CTR is also problematic. I agree with the Applicant that the missing information is material and highly relevant. The Officer made a clear finding that adequate health care would be available for the Applicant in Italy, yet the document upon which he purportedly relied is not in the record. The Applicant is suffering from a severe mental illness. It is not sufficient for the Officer to make a statement about the availability of health services for a severe mental illness without being able to show the evidence he relied upon, and the record is silent in that regard. This is a reviewable error against the standard addressed in *Li*, *supra*, para. 15.

[22] The Officer, in my opinion, failed to appreciate the personal circumstances of the Applicant, the critical factor of his illness that led to the criminal charge against him and the loss of the stay of deportation by the IAD. The only recourse available to the Applicant to stay in Canada is his pending H&C application which is based upon his personal circumstances, including the length of time he has been in Canada.

[23] The Officer was provided with a copy of the Applicant's H&C application, as part of the documentation submitted in support of the deferral request. In his decision upon the deferral request, the Officer noted that the H&C submissions advanced by Counsel closely paralleled those considered by the IAD. The Officer commented specifically that the IAD had considered

the Applicant's mental health. The Officer noted that this seemed to be the prevailing H&C factor.

[24] The Officer failed to appreciate the evidence before him. He had a letter from the Applicant's doctor that was dated March 26, 2012. The Officer dismissed this letter out of hand, saying that "I note that this letter is undated and therefore I am unable to assess if it is a current reflection of Mr. Russo's current medical condition."

[25] The letter is dated March 26, 2012. It says that the Applicant suffers from major depressive disorder with psychotic features and that he does not have the coping skills to live in a country he has not been in for many decades. The deferral request is also dated March 26, 2012. It is hard to imagine what more the Officer may have wanted in terms of timeliness.

[26] In my view, the Officer erred by assuming that the Applicant's H&C submissions had been considered by the IAD. Those submissions were not presented to the IAD whose most recent involvement with the Applicant dealt only with the termination of the stay of deportation. That stay had been granted by the IAD in August 2009. The Officer's conclusions relative to the H&C considerations relevant to the Applicant were not reasonable.

[27] It is not necessary for me to fully address the last argument raised by the Applicant, that is, the argument concerning the sufficiency of the Officer's reasons. In light of my observations above, I have concluded that the Officer's decision does not meet the standard of reasonableness as discussed in *Dunsmuir, supra*.

[28] In the result, this application for judicial review is allowed, the Officer's decision is set aside and the matter is remitted to another officer for determination. There is no question for certification arising.

JUDGMENT

This application for judicial review is allowed, the Officer's decision is set aside and the matter is remitted to another officer for determination. There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2983-12
STYLE OF CAUSE:	ALFONSO RUSSO v. MPSEP
PLACE OF HEARING:	Toronto, Ontario
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APPEARANCES:

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