Federal Court Cour fédérale

Date: 20130626

Docket: IMM-8122-12

Citation: 2013 FC 709

Ottawa, Ontario, June 26, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

G.M.

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of an Enforcement Officer (Officer) of the Canada Border Services Agency (CBSA), dated 14 August 2012 (Decision), which denied the Applicant's request for a deferral of his removal from Canada.

BACKGROUND

[2] The Applicant is a Hungarian man of Roma ethnicity. In 2001, he entered Canada and made a claim for refugee protection. In 2003, his claim was denied, and the Applicant left Canada in 2004.

[3] After returning to Hungary, the Applicant began working for a prominent Roma rights activist and politician who eventually became a Member of the European Parliament. They worked closely together, developed an intimate relationship, and are now married. After getting married, the Applicant took his wife's name.

[4] The Applicant and his wife fled to Canada in 2011. His wife arrived first with her children, and they made a refugee claim upon arrival. The Applicant's wife provided CBSA officials at the airport with the Applicant's airline information and a copy of his passport, which included his birth certificate and married name. She also explained that the Applicant would be arriving three days later, would not claim refugee status because of his earlier refusal, and would seek to enter Canada as a visitor. The Applicant arrived three days later, and was given a six-month visitor's visa upon arrival. Ordinarily, the Applicant would have made a refugee claim that would have been joined with his wife's. However, his previous refugee claim made him ineligible to make another one.

[5] In June, 2012, the Applicant was ordered deported. He submitted an application for a Pre-Removal Risk Assessment (PRRA), which was refused on 30 July 2012. On 10 August 2012 the Applicant made a request that his removal be deferred until his wife's refugee claim could be dealt with. His deferral request was denied on 14 August 2012.

DECISION UNDER REVIEW

[6] The Decision under review consists of a letter to the Applicant dated 14 August 2012 (Refusal Letter) and the Officer's Notes to File (Notes).

[7] The Refusal Letter states that the CBSA has an obligation under subsection 48(2) of the Act to carry out removal orders as soon as reasonably practicable. The Officer found that a deferral was not appropriate in the Applicant's case.

[8] The Notes start by reviewing the Applicant's immigration history. The Officer noted that the Applicant changed his name after being deported and re-entered Canada using that name. He returned to Canada without obtaining an Authorization to Return to Canada (ARC).

[9] The Applicant's counsel submitted that his wife had a very strong refugee claim, but the Officer noted that it was not possible to perform an adjunct assessment of her claim, and that no date was provided for her hearing. The Officer noted that a deferral cannot be for an indefinite period of time, and that the appeal process for a refugee claim is potentially extensive.

[10] The Applicant stated that his wife and daughters rely on him for both financial and emotional support, but the Officer pointed out that the Applicant was not permitted to pursue employment in Canada. When arrested by immigration officials, the Applicant reported that he was unemployed and relied on the social assistance of his wife and daughter. His wife also reported having the assistance of other family members in Canada.

[11] The Applicant submitted a psychological assessment which states that his wife is suffering from post-traumatic stress disorder, depression and panic attacks, and that his wife and daughters would suffer emotionally and psychologically from his removal. The Officer noted that the Applicant plays an important role in his family's lives, and that separation is an inherent and unfortunate part of the removal process. However, the Applicant's wife did elect to be his unpaid legal representative before the IRB, which indicates her ability to function. She also had a pending refugee claim and so has access to social assistance.

[12] The Officer stated that the separation of the family and the best interests of the children had been considered, and noted that the Applicant committed a notable violation of the Act by changing his name and returning to Canada without authorization. The Officer was not satisfied that a deferral of removal was warranted, and refused the Applicant's request.

STATUTORY PROVISIONS

[13] The following provisions of the Act are applicable in this proceeding:

Enforceable removal order	**Mesure de renvoi**
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.

ISSUES

[14] The Applicant raises the following single issue in this application:

a. Did the Officer erroneously impute an intention to contravene the Act by the Applicant's name change?

STANDARD OF REVIEW

[15] The Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[16] The decision of an officer to grant a deferral request is extremely discretionary, and the standard of review applicable to a deferral request is reasonableness (*Mejia v Canada (Minister of Citizenship and Immigration)*, 2012 FC 980 at paragraph 22).

[17] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 59.

Put another way, the Court should intervene only if the Decision 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."

ARGUMENTS

The Applicant

[18] The Applicant submits that the Officer erred by concluding that he changed his name prior to returning to Canada in order to gain illegal entry into the country. The Applicant's wife had provided immigration officials with all his information, as well as a copy of his passport which contains both his birth and married name. The Applicant was given a 6-month temporary resident permit, which he applied to extend. This information was all before the Officer, and demonstrates that the Applicant believed he was lawfully in Canada.

[19] The Officer placed significant weight on the name change as evidence that the Applicant had committed a "notable violation" of the Act. The Officer highlighted the sexist comments of previous decision-makers in detention reviews who had found it unusual that the Applicant had taken his wife's last name.

[20] The Applicant submits it was an error for the Officer to place any weight on this factor when balancing the compelling interests in this case. It is impossible to know how the Officer would have decided this case but for the factual misconception that underpins the Decision. The Applicant submits that this error taints the entire Decision, rendering it unreasonable.

The Respondent

[21] In written submissions, the Respondent says that a review of the Certified Tribunal Record (CTR) provides nothing that confirms that the Applicant's wife told CBSA officials at the airport about the Applicant's impending arrival. In fact, the document titled "Investigator Report" dated 24 May 2012 includes a note under "Entry Particulars" which confirms that the Applicant was granted temporary resident status under his new name, but is critical of him returning without proper authorization.

[22] The Notice of Arrest of 24 May 2012 states that the Applicant changed his name and could not provide an explanation for why he took his wife's name and not the other way around. The document titled "Minister's Delegate Review" of 1 June 2012 states that the Applicant "returned [without] consent. Subject concedes to allegation." There is nothing in the CTR that indicates CBSA officials were aware that the Applicant was about to enter Canada as a previously-deported person under a new name.

[23] The Respondent submits that, given the concern expressed by CBSA officials that the Applicant returned to Canada as a previously-deported person without prior authorization, it is likely that the Applicant did not disclose his previous name and immigration history in Canada at the port-of-entry when he was admitted as a visitor under the name [G.M.]. It is unlikely that officials would have admitted him as a visitor if they had been aware of his history.

[24] The Applicant says that CBSA officials made "sexist and stereotypical comments" about his changing his name, but when he was given an opportunity to explain he could not do so (see Officer Bean's Notes). Given that the passport was obtained just before the Applicant left for Canada, that

the Applicant failed to obtain authorization to return, and that he likely did not disclose at the port-of-entry that he was previously deported from Canada under a different name, it was not unreasonable for CBSA officials to question the Applicant about his name change. Considering the Applicant could not provide an explanation, it was reasonable for CBSA officials to draw a negative inference as to his intentions considering all the circumstances of the case.

[25] However, even if it is accepted that the Applicant's wife told CBSA officials about the Applicant's imminent arrival, the Applicant was still required to obtain authorization before returning to Canada. As the Federal Court said in *Khakh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 710 at paragraphs 15-17:

> Failed refugee claimants such as the applicants are subject to removal from Canada once their claim has been finally determined. Section 223 of the Immigration and Refugee Protection Regulations, S.O.R./2002-227 (the Regulations) outlines three types of removal orders, namely, departure orders, exclusion orders and deportation orders.
>
> Under subsection 224(2) of the Regulations, a foreign national who is issued a departure order must leave Canada within 30 days of the order becoming enforceable. Failure to do so results in the departure order becoming a deportation order.
>
> This transformation is significant. Under section 224 (1) of the Regulations, a foreign national subject to an enforced departure does not need to obtain authorization under subsection 52(1) of the Act in order to return to Canada. However, once a departure order becomes an enforceable deportation order, removal from Canada carries significant consequences. Section 226 of the Regulations, which governs deportation orders, states that a foreign national subject to an enforced deportation order cannot return to Canada at any point in the future without first obtaining written authorization to do so.

[26] The Court also said in *Andujo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 731 at paragraphs 26-30:

Subsection 52(1) of the IRPA states that "if a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances." By requiring an ARC, section 52 of the IRPA sends "a strong message to individuals to comply with enforceable departure orders", as described in the Guidelines:

> ... A permanent bar on returning to Canada is a serious consequence of non-compliance. Consequently, an Authorization to Return to Canada (ARC) should not be used as a routine way to overcome this bar, but rather in cases where an officer considers the issuance to be justifiable based on the facts of the case.
>
> Individuals applying for an ARC must demonstrate that there are compelling reasons to consider an Authorization to Return to Canada when weighed against the circumstances that necessitated the issuance of a removal order. Applicants must also demonstrate that they pose a minimal risk to Canadians and to Canadian society. Merely meeting eligibility requirements for the issuance of a visa is not sufficient to grant an ARC.

(CIC, Operation Manual, OP 1 Procedures, 28 August 2009).

The Applicant cannot justify her non-compliance by the fact that she decided to wait in Canada and benefit from a PRRA and that the notice under section 160 of the IRPR was issued after the removal order became a deportation order. In *Revich v Canada (Minister of Citizenship and Immigration)*, 2005 FC 852, 180 FTR 201, Justice Danièle Tremblay-Lamer held that it was not unfair for the Respondent to notify the Applicant of her right to apply for a PRRA after the departure order issued against her had already become a deportation order. As stated by the Counsellor, the IRPA imposed an obligation on the Applicant to obtain a certificate of departure within the prescribed time limit, and ignorance of this requirement is no excuse for failing to comply with it. The Court relies on the decision of Justice Blais, in *Chazaro*, above, at paragraph 22.

[…]

The Applicant also asserted that acceptance under the Certificate Program normally constitutes a compelling reason for returning to

> Canada. The Respondent did not dispute that this factor may constitute a compelling reason; however, having a compelling reason to return to Canada falls under the factor "Reasons for the request to return to Canada." This factor itself is only one of the three important factors identified by the Operation Manual OP1 (AR at p 23). The two other factors are the severity of the violation and the cooperation with the authorities. The Counsellor was of the view that these two factors outweighed the Applicant's reasons for the request to return to Canada. This result was one possible, reasonable outcome according to the facts of the case and the Court must not intervene.

[27] Subsection 226(1) of the Regulations requires individuals who have been previously deported to obtain written authorization before returning to Canada. Subsection 226(1) says:

226. (1) Deportation order – For the purposes of subsection 52(1) of the Act, and subject to subsection (2), a deportation order obliges the foreign national to obtain a written authorization in order to return to Canada at any time after the deportation order was enforced.	226 (1) Pour l'application du paragraphe 52(1) de la Loi, mais sous réserve du paragraphe (2), la mesure d'expulsion oblige l'étranger à obtenir une autorisation écrite pour revenir au Canada à quelque moment que ce soit après l'exécution de la mesure.

[28] Neither the Applicant nor his wife ever stated that they were unaware that the Applicant required authorization to return to Canada. In fact, at one of the Applicant's detention hearings, his wife said that it was not possible for them to apply for authorization for the Applicant to return to Canada and so decided to come to Canada three days apart (see Affidavit of Jillian Schneider, Exhibit A, Statutory Declaration of Eric Blenkarn). The Respondent submits that this indicates an acknowledgement that the Applicant was aware of the requirement for authorization, but simply chose to return to Canada regardless.

[29] Efforts made by the Applicant's wife to advise immigration officials that the Applicant was coming to Canada do not excuse his failure to obtain prior authorization, nor does the fact that immigration officials did not realize the Applicant was a previously deported person when he was given a temporary resident permit. The reasons for the Applicant's name change are superfluous; the fact is that the Applicant was required to obtain prior authorization before returning to Canada under any name. The Applicant failed to do so, and this was a significant violation of the Act.

[30] In *Chazaro v Canada (Minister of Citizenship and Immigration)*, 2006 FC 966 at paragraphs 20-22, the Court emphasized that claimants have an obligation to understand the consequences of a removal order, and that ignorance of those consequences is not an excuse for non-compliance:

> The applicant submitted that the officer should have taken into consideration the fact his former lawyer did not explain to him that he had to leave and that he did not receive a letter from the Department advising him he had to leave because his claim for refugee protection had been rejected.
>
> When reading the officer's decision once again, I am convinced that he took the applicant's submissions into consideration. In considering this application, I have taken into account the written submission of the applicant, documents on file as well as the interview notes. I am not satisfied that the applicant's submission that he did not understand the requirements of the departure order reasonably explains his failure to depart within 30 days.
>
> I believe that the officer was right in not considering that the applicant had a weighty argument when he stated that he did not know he had to leave. The applicant had a document entitled "Departure Order." Although this document did not specify a precise date for departure, it did mention that it would: [TRANSLATION] "become a removal order if not confirmation of departure is issued during the applicable period specified in the regulation." The applicant was aware of the departure order and he should have known that he had the obligation to leave following the dismissal of his application for judicial review.

See also *Sharpe v Canada (Minister of Citizenship and Immigration)*, 2009 FC 843 at paragraph 12.

[31] The Applicant does not dispute that he returned to Canada without prior authorization. He told CBSA officials that his lawyer told him he had a "right" to enter Canada and make a refugee claim, but as the case law above demonstrates, ignorance of the terms of a removal order is not an excuse for non-compliance with their terms. Therefore, the Officer's statement that the Applicant had violated the Act by changing his name and returning to Canada without authorization is not an incorrect or erroneous statement. Not only that, it was not the central factor on which the Officer's Decision turned, and the Applicant has raised no other errors in this application.

[32] An Officer has a very limited discretion to grant deferrals of removal orders in situations such as illness, travel impediments, pending H&C applications, medical concerns, or termination of a child's school year (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paragraphs 49-51). As the Federal Court said in *Ramada v Canada (Solicitor General)*, 2005 FC 1112 at paragraph 7:

> I have some reluctance in granting this application for judicial review, out of concern for imposing on enforcement officers an obligation to engage in an extensive analysis of the personal circumstances of persons subject to removal orders. Obviously, officers are not in a position to evaluate all of the evidence that might be relevant in an application for humanitarian and compassionate relief. Their role is important, but limited. In my view, it is only where they have overlooked an important factor, or seriously misapprehended the circumstances of a person to be removed, that their discretion should be second-guessed on judicial review.

[33] The Officer considered each of the factors raised by the Applicant in his deferral request, including his wife's psychological state and the support the Applicant provides to his family.

[34] The only area of the Decision contested by the Applicant is the Officer's statement that the Applicant "committed a notable violation of the IRPA, in that he changed his name and returned to

Canada without authorization." There is no error in this statement; the Applicant did change his name, and he did return to Canada following deportation without first obtaining an ARC.

[35] Not only was the Officer's statement not erroneous, a review of the Decision demonstrates that the Applicant's violation of the Act was only one of many factors considered. The Officer came to a reasonable Decision, and it should be left undisturbed.

The Applicant's Reply

[36] The Applicant submits that the evidence in the Affidavit of Jillian Schneider was not before the Officer, and as such it should be given no weight in this application (*Ontario Assn. of Architects v Assn. of Architectural Technologists of Ontario*, 2002 FCA 218). The Officer does not refer to this evidence anywhere in the Decision and there is no reason to believe that this evidence was considered.

[37] The Applicant argues that the Officer's language in the Decision strongly suggests that the Applicant changed his name in order to return to Canada illegally. The Respondent suggests that there is no error because the facts that the Applicant changed his name and returned to Canada without prior authorization are both technically correct. The Applicant states that the two things cannot be separated in the way the Respondent suggests, and that the "notable violation" found by the Officer was the combination of the name change and the return without authorization. The Officer's obvious implication was that the Applicant changed his name in order to thwart efforts to identify him upon re-entry to Canada.

[38] Contrary to the Respondent's submissions, the Officer's finding that the Applicant had committed a "notable violation" of the Act was a determinative factor in the Decision. It is clear from the balancing exercise near the end of the Decision that the Officer placed great weight on the fact that the Applicant changed his name and then re-entered Canada without authorization. The Officer placed great weight on a conclusion of impropriety that was unsupported by the evidence. Further, the fact the Officer failed to consider that the Applicant's wife notified CBSA of the Applicant's arrival to Canada was material to the Decision, and was not considered.

ANALYSIS

[39] The Applicant raises the issue that the Officer erroneously imputed an intention to contravene the Act on the part of the Applicant when he changed his name.

[40] The Applicant says that the Officer placed significant weight on the name change as evidence of a "notable violation" of the Act. The Applicant's position is that the Officer "clearly erred in placing any weight on this factor in assessing and then balancing the compelling interests in this case":

> It remains unknown how the [Officer] would have decided this case without this factual misconception that underpins the decision. As a result, the emphasis placed on this factor taints the entire decision….

[41] It is indeed the case that the Officer failed to consider the Applicant's wife's evidence on this point. On her arriving in Canada in November 2011, the Applicant's wife advised the Officer who interviewed her that the Applicant would arrive three days later and that he had changed his name after they married. This was certainly a matter that required consideration if the Officer intended to base his Decision to refuse a deferral of removal on this factor. A reading of the

Decision as a whole, however, reveals that this factor does not "underpin" the Officer's conclusions in the way alleged by the Applicant.

[42] The mistake occurs when the Officer says that "[G.M.] committed a notable violation of the IRPA in that he changed his name and returned to Canada without authorization." However, the refusal to defer is reached after "taking into consideration this case as a whole, including the file information and deferral request submissions…." The Officer's point, in my view, is that the Applicant has returned to Canada illegally.

[43] In the Officer's analysis, the "notable violation" is that the Applicant "failed to obtain an ARC" before returning to Canada. This is highly material to this part of the analysis and the Applicant takes no issue with it.

[44] The Applicant says that it is a matter of balancing and that, had the Officer not made the mistake about the Applicant's motives for changing his name, a decision could have been made in his favour. However, even if the wife's evidence on the Applicant's name change had been taken into account, I cannot see how this could, reasonably, have made a difference to a Decision in which so many other factors and findings counted against the Applicant, including that he entered Canada illegally because he failed to obtain an ARC, and the Applicant does not challenge any other finding or aspect of the reasons.

[45] The name change issue has to be examined in the context of the Officer's limited discretion to defer. There was simply no reason why the Applicant could not travel. The Officer was not conducting an H&C analysis. The Federal Court of Appeal has said that illegal entry can be considered by a removals officer (see *Baron v Canada (Minister of Public Safety and Emergency*

Preparedness), 2009 FCA 81**)**, and on these facts, there was little in the Applicant's favour to warrant a positive decision.

[46] Counsel agree there are no questions for certification on this file, and the Court concurs.

[47] The Applicant has also requested that the following portions of the record be sealed:

a. CTR — pages 5 and 6;

b. Application Record — pages 8, 9, and 12;

c. CTR — pages 13, 15, 72, 76 and 78;

d. Application Record — pages 13 and 15;

e. CTR — pages 18 to 20 and 81 to 83;

f. Application Record — pages 18 to 20;

g. CTR — pages 37 to 46;

h. Application Record — pages 37 to 46;

i. CTR — pages 54 to 56 and 85 to 87;

j. Application Record — pages 54 to 56;

k. CTR — pages 88 to 98;

l. Application Record — pages 72 to 82;

m. CTR — pages 107 and 118;

n. Applicant's Memorandum of Argument — page 85.

[48] The rationale for sealing is that these materials are private information related to the Applicant's wife, her psychological assessments, the wife's knowledge of secret evidence, and personal secrets that are presently before the RPD in proceedings that are *in camera*. Justice Gagné

has already ordered that this kind of information should be sealed when she considered the stay motion. The Respondent has raised little by way of objection and, has agreed that some of the information should be sealed notwithstanding the importance of the open-court principal.

[49] Considering the importance of the RPD *in camera* process, Justice Gagné's prior consideration of these matters, and the risks to the Applicant's wife if this information remains public, the Court agrees that the information set out above should be sealed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

3. The following materials shall be sealed:

   a. CTR — pages 5 and 6;

   b. Application Record — pages 8, 9, and 12;

   c. CTR — pages 13, 15, 72, 76 and 78;

   d. Application Record — pages 13 and 15;

   e. CTR — pages 18 to 20 and 81 to 83;

   f. Application Record — pages 18 to 20;

   g. CTR — pages 37 to 46;

   h. Application Record — pages 37 to 46;

   i. CTR — pages 54 to 56 and 85 to 87;

   j. Application Record — pages 54 to 56;

   k. CTR — pages 88 to 98;

   l. Application Record — pages 72 to 82;

   m. CTR — pages 107 and 118;

   n. Applicant's Memorandum of Argument — page 85.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-8122-12
STYLE OF CAUSE:	**G.M.**
	- and -
	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	June 26, 2013

APPEARANCES:

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