Federal Court  Cour fédérale

Date: 20150806

Docket: IMM-6999-14

Citation: 2015 FC 942

Ottawa, Ontario, August 6, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

BRIAN PEGITO LONDON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Brian Pegito London has brought an application for judicial review pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. Mr. London challenges the decision of an enforcement officer [the Officer] with the Canada Border Services Agency [CBSA] to refuse his request to defer his scheduled removal from Canada.

[2] Mr. London's request for deferral clearly indicated that he is the primary care-giver to three of his four step-children while their mother is at work. However, the Officer failed to consider the short-term best interests of the children, and did not enquire whether provisions were in place to ensure that they would be adequately looked after in Mr. London's absence. The application for judicial review is therefore allowed.

II. Background

[3] Mr. London is a citizen of Trinidad and Tobago. He entered Canada on December 15, 2004 as a visitor. On July 29, 2006, Mr. London married Mara Fletcher, a Canadian citizen. He is the step-father to her four children, three of whom were under the age of 18 when the Officer made her decision.

[4] Mr. London came to the attention of the CBSA in the course of an investigation and he was arrested on December 18, 2012. On February 12, 2013, he filed a claim for refugee protection. The claim was rejected by the Refugee Protection Division of the Immigration and Refugee Board [the IRB] on May 24, 2013. His appeal to the Refugee Appeal Division of the IRB was also dismissed. Mr. London filed an application for leave and for judicial review of the Refugee Appeal Division's decision with this Court, but leave was denied.

[5] On May 28, 2014, Mr. London submitted an inland spousal sponsorship application for permanent residence.

[6] On September 9, 2014, Mr. London was served with a Direction to Report for removal. His removal was scheduled for October 9, 2014.

[7] On September 17, 2014, Mr. London submitted a request for deferral of his removal. He relied upon his outstanding application for permanent residence and asserted that he was a primary caregiver to three of his four step-children.

[8] On October 2, 2014, the Officer refused Mr. London's request for deferral. On October 3, 2014, Mr. London filed an application for leave and for judicial review of the Officer's refusal, and he also sought a stay of removal. On October, 7, 2014, Justice Martineau stayed Mr. London's removal pending a final determination of his application for leave and for judicial review of the Officer's deferral decision. Leave to commence an application for judicial review of the deferral decision was granted by this Court on March 26, 2015.

III. The Officer's Decision

[9] The Officer noted that her discretion was limited and that she did not have authority to assess the merits of Mr. London's application for permanent residence. The Officer acknowledged that Mr. London had a spouse and four step-children in Canada, but noted that "they are not subjects [*sic*] to any removal arrangements from Canada." Furthermore, the Officer was not satisfied that Mr. London had provided reliable evidence that separation would be "permanent or irreparable."

[10] Based on her review of the information submitted in support of Mr. London's deferral request, the Officer was not satisfied that he had provided sufficient evidence to demonstrate a "genuine exceptional circumstance" that could "only be mitigated by the deferral of his removal." The Officer therefore concluded that deferral was not warranted.

IV. Issues

[11] This application for judicial review raises the following questions:

A. Did the Officer consider the implications for the spousal sponsorship application if Mr. London was removed?

B. Did the Officer reasonably consider the best interests of Mr. London's step-children?

V. Analysis

[12] An enforcement officer's decision to refuse a request to defer removal is subject to review by this Court against the standard of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*] at para 25). An officer's assessment of the best interests of the child [BIOC] in the context of a deferral request is also subject to review against the standard of reasonableness (*Pangallo v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 229 at para 16). This Court will intervene only if the

decision falls outside of the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47).

A. *Did the Officer consider the implications for the spousal sponsorship application if Mr. London was removed?*

[13] Mr. London says that the Officer did not consider evidence which indicated that his wife's earnings may not be sufficient for her to sponsor him from overseas. However, this evidence was not included with the deferral request. It was sent to the CBSA on May 3, 2014, one day after the Officer made her decision. As this evidence was not before the Officer, she cannot be criticised for failing to consider it (*Munar v Canada (Minister of Citizenship and Immigration*), 2006 FC 761 [*Munar 2006*] at para 20). This ground for judicial review cannot succeed.

B. *Did the Officer reasonably consider the best interests of Mr. London's step-children?*

[14] An enforcement officer's discretion to defer removal is limited and should be exercised only in respect of circumstances that are the direct consequence of removal (*Meneses v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 713 [*Meneses*] at para 5). Justice Nadon of the Federal Court of Appeal said the following in *Baron* at para 57:

> The jurisprudence of this Court has made it clear that illegal immigrants cannot avoid execution of a valid removal order simply because they are parents of Canadian-born children... [A]n enforcement officer has no obligation to substantially review the children's best interest before executing a removal order.

[15] This is consistent with earlier jurisprudence of the Federal Court of Appeal which holds that an enforcement officer's duty to consider the BIOC when reviewing a request for deferral is "at the low end of the spectrum, as contrasted with the full assessment which must be made on [a humanitarian and compassionate] application under subsection 25(1)" (*Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 at para 16).

[16] It follows that an enforcement officer's BIOC analysis in the context of a deferral request is not as comprehensive as the one required by an application for humanitarian and compassionate consideration under s 25(1) of the IRPA. Nevertheless, an enforcement officer must still be alert, alive and sensitive to the interests of children where a primary caregiver is facing removal from Canada (*Munar 2006* at para 19). In the words of Justice de Montigny in *Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180 [*Munar*] at paras 37 and 40:

> […] [I]f the best interest of the child is to be taken seriously, some consideration must be given to their fate when one or both of their parents are to be removed from this country. As is often the case, I believe that the solution lies somewhere in between the two extreme positions espoused by the parties. While an absolute bar on the removal of the parent would not be warranted, an approach precluding the removals officers to give any consideration to the situation of a child would equally be unacceptable.
>
> […] I cannot bring myself to the conclusion that the removal officer should not satisfy himself that provisions have been made for leaving a child in the care of others in Canada when parents are to be removed. This is clearly within his mandate, if section 48 of the IRPA is to be read consistently with the *Convention on the Rights of the Child*. To make enquiries as to whether a child will be adequately looked after does not amount to a fulsome [humanitarian and compassionate] assessment and in no way duplicates the role of the immigration officer who will eventually deal with such an application (see *Boniowski v Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1397 (F.C.)).

[17] Given that a removal order is to be enforced "as soon as possible" and a deferral of removal is only temporary, the focus of a BIOC analysis in this context should not be on the children's ultimate best interests, but rather on their best interests in the "short-term" (*Munar* at para 40; *Khamis v Canada (Minister of Citizenship and Immigration),* 2010 FC 437 at para 31). When considering a child's short-term best interests, an officer should be satisfied that "provisions have been made for leaving a child in the care of others" and should enquire whether a child will be "adequately looked after" when a parent is removed from Canada (*Munar* at para 40). If an officer fails to do so, then he or she has not been alert, alive and sensitive to the children's best interests and has failed to exercise his or her discretion appropriately (*Munar* at 41).

[18] Mr. London's deferral request confirmed his responsibility as the primary caregiver to three adolescent step-children when their mother is working and the following submissions were squarely before the Officer:

> I am counsel representing Brian London in immigration matters.
>
> On September 9, 2014, you served Brian London with a Direction to Report for removal for the following reasons.
>
> On July 29, 2006, he married Mara Elizabeth Fletcher, a citizen of Canada and on May 28, 2014 he applied for permanent residence under the inland sponsorship program.
>
> He is eligible to receive first-stage approval within 5 months of May 28, 2014, the date upon which the Case Processing Centre in Mississauga, Ontario received his application.
>
> Mara London, nee Fletcher has four children. Three of these children, namely, her daughter, Mercedes Patrice Fletcher, born March 22, 1997 (age 17) her son, Tyrick Renie Fletcher, born July 30, 1999 (age 15), and her son, Dominic Christian Fletcher, born

> June 25, 2001 (age 13) are living with her and their step-father Brian London. They are all attending school
>
> A fourth child, Devon William Fletcher, has been living by himself since August 9, 2013.
>
> Mr. London's wife, Mara, has been working as a Baristas [*sic*] for Starbucks Coffee Company in Scarborough, Ontario since August 19, 2013. She works from 2:00 p.m. to 10:30 p.m.
>
> Mr. London looks after the children while his wife is at work.

[19] At the time of the deferral request, three of the four children were still under the age of 18. It was therefore incumbent upon the Officer to perform an assessment of their short-term best interests (*Kozomara v Canada (Minister of Citizenship and Immigration)*, 2015 FC 715 at para 30). The deferral request included letters from the three children indicating that they have a particularly close relationship with Mr. London and that he plays an active role in their lives. He tutors them in a wide-range of activities, including music, sports, carpentry, and their academic studies. The Officer was required to treat these "immediate interests fairly and with sensitivity" (*Hernandez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1131 at para 46). However, the Officer's decision was silent regarding the specific interests of the three step-children:

> I acknowledge that relocation may be difficult at this time. I acknowledge that you have a spouse and four step-children born in Canada. As an Enforcement Officer, the best interests of any child affected by the enforcement of a removal order are of paramount importance when assessing a request to defer removal. As Canadians, your spouse and children are entitled to all rights, benefits and services available to all citizens. I must note that they are not subjects [*sic*] to any removal arrangements from Canada. You have not provided any reliable reasonable evidence indicating that any separation arising from your removal from Canada, as scheduled, will be permanent and irreparable. Your allegations of

> risk in your countries of citizenship are not supported by any corroborated evidence.

[20] The Officer was obliged to enquire whether provisions were in place to ensure that the three step-children would be adequately looked after in Mr. London's absence. Her failure to do so suggests that she did not fully consider the submissions before her and was not alert, alive and sensitive to their best interests.

[21] Furthermore, the Officer improperly imposed upon Mr. London the requirement to demonstrate that separation would be "permanent and irreparable." As Justice Rennie remarked in *Meneses* at para 8:

> Turning to the second item of concern, the Officer's observation that there was no evidence that the separation would be indefinite, this is clearly an error in the exercise of discretion. There is no requirement that the separation be permanent**.**

[22] For these reasons, the Officer's decision did not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47). The application for judicial review is therefore allowed.

VI. Conclusion

[23] The application for judicial review is allowed and the matter is remitted to a different enforcement officer for re-consideration of the best interests of Mr. London's step-children.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is remitted to a different enforcement officer for re-consideration of the best interests of Mr. London's step-children. No question is certified for appeal.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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