Federal Court  Cour fédérale

Date: 20160307

Docket: IMM-2913-15

Citation: 2016 FC 267

Ottawa, Ontario, March 7, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

OSATO OSAKPAMWAN,
(BARRY) EGUAKUN ERHARUY JOHNSON
(BEATRICE) EGUAKUN OGHOSA JOHNSON

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Canada Border Services Agency dated June 20, 2015, wherein an Inland Enforcement Officer [the Officer] refused the Applicants' request for deferral of their removal from Canada to Nigeria.

[2] For the reasons that follow, this application is dismissed as moot.

I. Background

[3] The Applicants entered Canada on March 5, 2013. The Principal Applicant, Osato Osakpamwan, is a Nigerian citizen and obtained Italian permanent residency in 2004. Her two children, the Minor Applicants, were born in 2001 and 2007 respectively. On March 25, 2013, the Applicants initiated a claim for status as Convention Refugees, which was refused by the Refugee Protection Division [RPD] of the Immigration and Refugee Board on November 13, 2013, as they were excluded under Article 1(e) of the Convention because of their status as permanent residents of Italy. On January 29, 2014, the Refugee Appeal Division [RAD] dismissed their appeal, and leave to challenge this decision by judicial review was subsequently denied by the Federal Court. The Applicants state that, since their RPD hearing, their permanent residence status in Italy has lapsed.

[4] Subsequently, the Applicants applied for a Pre-Removal Risk Assessment [PRRA]. On March 10, 2015, they were granted a 60 day deferral of their removal to allow for expedited processing of a spousal sponsorship of the Principal Applicant. This was refused on March 26, 2015 and challenged by judicial review.

[5] On June 18, 2015, the Applicants submitted a request for redetermination of the PRRA, based on the fact that the risk of return to Nigeria had never been assessed, as the RPD, RAD and PRRA officer had all considered only the risk of return to Italy. The Applicants also requested that their removal to Nigeria be deferred due to the pending judicial review of the spousal

sponsorship application, to allow a redetermination of the PRRA, and due to the best interests of the children whose formative years had been in Canada.

[6] On June 19, 2015, the Officer issued the decision refusing the deferral request. On June 22, 2015, the Applicants applied for leave and judicial review and sought a stay of removal from the Court. However, CBSA subsequently cancelled their removal to Nigeria, and they continue to live in Canada. The judicial review of the sponsorship decision was also subsequently resolved, and the sponsorship application is now being redetermined. Neither party has any information on the status of the Applicants' request for redetermination of the PRRA.

II. Impugned Decision

[7] The Officer noted that the pending application for judicial review of the spousal sponsorship does not deter the enforcement of a removal order. The Applicants did not present any evidence to demonstrate that they could not pursue their application for judicial review outside Canada following the enforcement of this removal order. Also, they did not present any evidence to establish that Citizenship and Immigration Canada had agreed to re-determine the PRRA and that a decision would be imminent.

[8] Moreover, the Officer noted that a request to defer removal submitted to an Inland Enforcement Officer is not the appropriate mechanism to advance allegations of risk that one could have reasonably advanced to the RPD and in the PRRA process, namely the prospect that the Applicants allegedly face risk in Nigeria. The evidence postdating the PRRA decision did not

satisfy the Officer that there was a compelling risk in Nigeria that would warrant the delay of removal.

[9] The Officer also referred to being alert and sensitive to the best interests of the Minor Applicants but noted that the Principal Applicant made arrangements to travel with her children and that there was no evidence that, as their sole custodial parent, she would be unable to represent their best interests.

[10] Having reviewed all the evidence submitted, the Officer was not satisfied that it established the exceptional nature of a case that would provide grounds to justify deferral of removal from Canada.

III. Issues and Standard of Review

[11] The Applicants submit the following issues for consideration by the Court:

A. Did the Officer err in denying the Applicants' deferral request when the failure to defer will expose the Applicants to the risk of death, extreme sanction or inhumane treatment?

B. Did the Officer fail to consider and misconstrue relevant evidence?

C. Did the Officer err in that he/she was not alert, alive and sensitive to the short-term best interests of the Principal Applicant's son?

D. Did the Officer err in not considering the new risks that have occurred following the consideration of the Applicants' first PRRA decision that warrant a new review?

E. Was the Officer reasonable in his or her analysis in that there was justification, transparency and intelligibility within the decision-making process and therefore, his or her decision should be allowed to stand?

F. Did the cumulative errors made by the Officer render his or her decision unfair or constitute errors that were central to the issues in the case and therefore warrant another consideration be made by another panel comprised of another officer?

[12] The standard of review applicable to this application is reasonableness (*New Brunswick (Board of Management) v. Dunsmuir,* 2008 SCC 9 at para 47).

[13] Based on the arguments canvassed below, I consider the issues for consideration on this application to be:

A. Is the application moot?

B. Was the Officer's decision reasonable?

IV. Submissions of the Parties

(1) Is the application moot?

A. Respondent's Position

[14] The Respondent notes that the Applicants' removal was cancelled by CBSA and they continue to reside in Canada while awaiting the redetermination of the Principal Applicant's sponsorship and PRRA. As such, the fundamental remedy sought by the Applicants before this Court, which was to defer their removal, has been achieved, rendering the challenge in the application for judicial review moot. The Respondent relies on *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*].

B. Applicants' Position

[15] In support of their position that the Court should hear and decide this application, notwithstanding that their removal was cancelled, the Applicants submit that there continues to be an adversarial relationship between the parties to this application with respect to the circumstances under which the Applicants may be removed from Canada. The question remains as to whether the Applicants may be removed from Canada to Nigeria prior to the completion of an assessment of their risk of return to Nigeria.

[16] On the subject of judicial economy, the Applicants submit that both parties have already expended considerable resources on this application and, absent any indication from the Respondent that there is no intention to remove the Applicants prior to the determination of the

second PRRA, it is apparent that the same issues raised in these materials will arise again in subsequent litigation if/when there is a further attempt to remove the Applicants.

[17] Finally, the Applicants submit that there is no concern that deciding the issues raised in this application would result in this Court intruding into the legislative sphere.

(2) *Was the Officer's decision reasonable?*

A. Applicant's Position

[18] The Applicants submits that they are not in a situation where the negative consequences of the removal can be remedied by re-admittance to Canada. Rather, the Officer should have considered the new evidence provided by the Applicants in their deferral request that arose following the first PRRA decision that exposes them to a risk of serious personal harm if returned to Nigeria. The Applicants emphasize that they have had their risk assessed only in relation to Italy. The Officer should therefore have deferred removal until the PRRA unit has had an opportunity to reassess the PRRA in light of the new information now available that the country to which the Applicants were being removed was Nigeria. They rely on *Shpati v Canada (Minister of Public Safety & Emergency Preparedness)*, 2011 FCA 286 at para 52 and *Etienne v Canada (Minister of Public Safety & Emergency Preparedness)*, 2015 FC 415 at paras 53-55.

[19] Lastly, the Applicants argue that the Officer erred in assessing the best interests of the children affected by the decision.

B. Respondent's Position

[20] The Respondent argues that the Officer considered this matter and noted that there was insufficient evidence that the Applicants face a compelling risk in Nigeria.

[21] The Officer also noted that no evidence was presented that their PRRA application would be redetermined. Taking into account the fact that the mere filing of a Court application does not necessarily affect normal immigration processing and does not preclude the Respondent from enforcing a removal order, it was reasonable for the Officer not to defer removal.

[22] The Respondent also argues that it is not within the purview of an Officer to conduct a full humanitarian and compassionate assessment. The Respondent notes that the Applicants did not submit a humanitarian and compassionate application throughout their time in Canada and argues that they did not present sufficient evidence of exigent personal circumstance relating to the Minor Applicants.

V. Analysis

[23] My decision is to dismiss this application on the basis that it is moot. The parties both rely on *Borowski* for the principles governing the Court's analysis of mootness. In the recent decision in *Harvan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1026, Justice Diner succinctly outlined the relevant principles to be derived from *Borowski*:

> [7] The test for mootness comprises a two-step analysis. The first step asks whether the Court's decision would have any practical effect on solving a live controversy between the parties,

> and the Court should consider whether the issues have become academic, and whether the dispute has disappeared, in which case the proceedings are moot. If the first step of the test is met, the second step is — notwithstanding the fact that the matter is moot — that the Court must consider whether to nonetheless exercise its discretion to decide the case. The Court's exercise of discretion in the second step should be guided by three policy rationales which are as follows:
>
> i. the presence of an adversarial context;
>
> ii. the concern for judicial economy;
>
> iii. the consideration of whether the Court would be encroaching upon the legislative sphere rather than fulfilling its role as the adjudicative branch of government.
>
> (See *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at paras 15-17, and 29-40 [*Borowski*])

[24] The Applicants acknowledge that this proceeding is moot for purposes of the first step in the *Borowski* test. I agree with that position, as the Applicants' removal from Canada has been deferred, and a determination whether the Officer had previously erred in refusing to defer their removal therefore cannot have any practical effect on solving a live controversy between the parties.

[25] I am therefore required to consider, applying the second step in the *Borowski* analysis, whether to exercise my discretion to decide this matter notwithstanding that it is moot. The first policy rationale under that analysis is whether there remains an adversarial relationship between the parties. The Applicants note that no decision has been made on the request for re-determination of their PRRA or even whether it will be re-determined. Nor do they know what they outcome of the sponsorship application will be. They are concerned that they may in the future find themselves in the same position they were in when the impugned decision was made,

facing a removal order, and argue that this represents the sort of adversarial context contemplated by *Borowski*.

[26] In considering this question, I am guided by the decision in *Azhaev v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 219 [*Azhaev*], in which Justice Manson concluded as follows when considering the policy rationale of an adversarial relationship in the context of a moot deferral decision:

> 22 While this Court has room to exercise its discretion to hear the merits of the instant application, as guided by the principles in *Borowski*, I disagree with the Applicant that there is an adversarial context remaining in this matter. In *Borowski*, the Court discussed an adversarial context as one where "collateral consequences" arise in related proceedings. For example, if the resolution of an issue in an otherwise moot proceeding determines the availability of liability or prosecution in a related proceeding between the parties, there remains an adversarial context between them. In the instant application, no collateral consequences will arise as a result of whether the Officer erred in his decision.

[27] I do not consider the present case to be one where the Applicants can establish collateral consequences to result from whether the Officer erred in the impugned deferral decision. As argued by the Respondent, the Applicants are currently residing in Canada with no removal scheduled. The outcome of the sponsorship application and the request for redetermination of the PRRA are unknown. While the Applicants could face a future removal order, that is at this stage entirely speculative. Nor can the Court know what the status or outcome of the sponsorship and PRRA or other relevant circumstances may be at the time of any such removal order.

[28] There is no basis presently to conclude that the Applicants face collateral consequences arising from the particular errors alleged to have been made in the impugned deferral decision. If

the Applicants do in the future face another removal order and in turn request deferral, the enforcement officer considering that request will have to consider the circumstances existing at that time, and if deferral is refused, any challenge to that refusal should be raised in the context of those circumstances and the reasons for that refusal. As one can currently only speculate about any of these future events, I do not consider the necessary adversarial context contemplated by the *Borowski* analysis to presently exist.

[29] Turning to the second policy rationale under *Borowski*, the concern for judicial economy, the Applicants argue that the parties and the Court have already expended substantial resources in the preparation for and hearing of this application. Again, consideration of the Court's analysis of this factor in *Azhaev* is instructive. At paragraphs 23 to 24 of that decision, Justice Manson stated as follows:

> 23 The second factor enunciated in *Borowski*, that of judicial economy, weighs against the Applicant as well. In one sense, judicial economy is related to being mindful of expending scarce judicial resources to hear an academic argument (*Borowski* at para 34). This is not relevant in the instant application, as Court resources have already been allocated. However, *Borowski* does refer to judicial economy in another way: to resolve ongoing uncertainty in the law to facilitate the expeditious resolution of similar cases in the future (*Borowski* at para 35). The Applicant's argument for this Court to exercise its discretion is based largely on this principle. He argues that it will help future litigants, including himself, to develop the jurisprudence on what "personal exigencies" justify a deferral of removal. However, the Court in *Borowski* at para 36 specifically warned against the application of this factor in the manner suggested by the Applicant:
>
> > The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

> 24 I find that this factor also weights against hearing the instant application.

[30] As in *Azhaev*, Court resources have already been allocated to the hearing of this application. On that basis, Justice Manson considered the factor of judicial economy to be irrelevant. However, he also considered this factor from the perspective argued by the applicant in that case, that deciding the moot matter might facilitate expeditious resolution of future disputes, involving that applicant or other litigants. In a sense, this is the same argument raised by the Applicants in the present case, not from the perspective of adding to the jurisprudence for the benefit of litigants generally, but because a decision on the alleged errors in the deferral decision would assist the Applicants if they faced a removal order in the future.

[31] I reach the same decision on this argument as did the Court in *Azhaev*. There is no suggestion that this is the sort of dispute that will have always disappeared before it is ultimately resolved. It is therefore preferable to wait and determine the issues raised by the Applicants in a genuine adversarial context if they do arise again.

[32] I agree with the Applicants that the third factor under *Borowski* analysis, intrusion into the legislative sphere, is not a concern in this case, such that this factor arguably favours the Applicants. However, the first two factors weigh against the Applicants and, considering and weighing all three factors, I do not consider this to be a case where the Court should exercise its discretion to decide the application notwithstanding that it is moot.

[33] Neither party proposed a question of general importance for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2913-15
STYLE OF CAUSE:	OSATO OSAKPAMWAN (BARRY) EGUAKUN ERHARUY JOHNSON (BEATRICE) EGUAKUN OGHOSA JOHNSON V THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 18, 2016
JUDGMENT AND REASONS:	SOUTHCOTT, J.
DATED:	MARCH 7, 2016

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