Federal Court  Cour fédérale

Date: 20160720

Docket: IMM-5174-15

Citation: 2016 FC 845

Ottawa, Ontario, July 20, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

EMMANUAL ONESON ANIMODI
KEMMERY MARIA ANIMODI

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This application seeks judicial review of a decision of an Enforcement Officer [the Officer] of the Canada Border Services Agency [CBSA] dated November 20, 2015, refusing to defer the removal of the Applicants to Angola that had been scheduled for November 24, 2015.

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

I. Background

[3] The Applicants, Mr. and Mrs. Animodi, are citizens of Angola who came to Canada with their eldest daughter in 1997. They also have two Canadian born children. They made refugee claims that were rejected in 1998, following which they unsuccessfully sought judicial review of that decision.

[4] In 2001, Mr. and Mrs. Animodi applied for permanent residence within Canada on Humanitarian and Compassionate [H&C] grounds. Their application was approved in principle but subsequently denied as a result of Mrs. Animodi being convicted of fraud in April 2004 arising from improper receipt of social welfare payments.

[5] Mr. and Mrs. Animodi were issued temporary resident permits in December 2009, which were valid for one year. The Minister of Citizenship and Immigration refused to further extend those visas, which decision was unsuccessfully challenged by judicial review.

[6] In 2012, Mr. and Mrs. Animodi filed a second H&C application, which was refused in February 2014. They also received a negative Pre-Removal Risk Assessment [PRRA] and in April 2014 filed applications for judicial review of both the H&C and PRRA decisions.

[7] Mr. and Mrs. Animodi were scheduled for removal from Canada in June 2014 but requested a deferral, which was refused. They then sought and obtained a stay of removal

pending the result of their judicial review applications. In July 2015, those applications were dismissed, following which their removal from Canada was scheduled for November 24, 2015.

[8] In the meantime, Mr and Mrs. Animodi had filed a third H&C application in September 2014, and on October 15, 2015 they applied for temporary resident permits. They have not yet received any of these decisions, although their eldest daughter received an approval in principle of her H&C application in December 2014. On November 11, 2015 they requested deferral of their removal until they received a decision on their third H&C application and pending stabilization of Mrs. Animodi's medical condition as described later in these Reasons. The refusal of that deferral on November 20, 2015 is the decision under consideration in this application for judicial review. On the same date, Justice Fothergill issued a stay of removal pending the outcome of this application.

II. Impugned Decision

[9] In his decision, the Officer reviewed the Applicants' immigration case history and then considered the pending H&C application, based on establishment and best interests of the children, and Mr. and Mrs. Animodi's medical conditions.

[10] The Officer observed that there was no credible corroborated evidence to demonstrate that Mr. and Mrs. Animodi's presence in Canada was required for the processing of their H&C application, or that a decision on that application was imminent. He also noted that it was not within his mandate to perform an H&C evaluation but that he had reviewed the specific

considerations brought forward in the deferral request, being the best interests of the children, establishment in Canada and hardship.

[11] The Officer acknowledged the Applicants would have established many ties to Canada over 18 years and that removal and relocation may be difficult, but held that this alone did not warrant deferral. He recognized that removal was a difficult experience, especially in relation to children, and stated that he was alive and sensitive to the best interests of the children, but noted that arrangements had been made to allow the Applicants to travel with their children. The Officer observed that there was no evidence that the Applicants would be unable to represent the children's best interests in the country of citizenship, especially in relation to their education, and that the children would continue to have the love and support of their parents during the period of relocation and adjustment. He then noted that the best interests of the children were already considered in the previous H&C application and that the two Canadian born children would have the right to return to Canada in the future.

[12] Turning to the medical issues, the Officer acknowledged Mrs. Animodi's epilepsy and that, according to the deferral request, her seizures had become more uncontrollable, as she had been unable to afford to pay for her required medication, and that it was advised that she cannot travel. He referred to reviewing the medical notes provided by counsel, including psychological assessments. As he was not qualified to medically assess the merits of the medical documentation, the CBSA had obtained a medical opinion. That opinion, provided by Dr. Louvish on November 16, 2015, was in turn disclosed to counsel with an invitation to make submissions.

[13] The Officer referred to Dr. Louvish's opinion that, in the absence of any objective medical evidence such as clinical notes and records from hospital ER documenting Mrs. Animodi's clinical presentation during and/or after seizures, it was reasonable to conclude that her complaints of uncontrollable seizures would not preclude her from traveling via commercial airliner. The Officer noted that Dr. Louvish also considered the psychological assessment of Mr. Animodi and concluded that both were medically fit for travel.

[14] The Officer also referred to additional medical evidence submitted by counsel on November 17, 2015, which was reviewed by Dr. Louvish and did not affect his opinion. He then referred to reviewing the deferral request that had been submitted in June 2014 and the evidence submitted concerning availability of care for Mrs. Animodi in Angola. On June 17, 2014, a Dr. Theriault had reviewed the medical information then provided and opined that Mrs. Animodi was medically fit to travel and that medical care would be available in Angola. The Officer found that no objective medical opinion was provided to contradict Dr. Theriault's opinion and noted that CBSA had arranged a nurse to travel with Mr. and Mrs. Animodi on the flight to Angola.

[15] The Officer concluded that Mrs. Animodi was medically fit to fly to Angola with the care of a nurse provided by CBSA and that medical care can be sought upon her return. He therefore did not feel that a deferral of removal was appropriate in the circumstances of this case.

III. Issue and Standard of Review

[16] Both parties framed their arguments in terms of the reasonableness of the Officer's decision. The sole issue in this application is whether the Officer's decision is reasonable.

IV. Analysis

A. *Decision on Stay Motion*

[17] As a preliminary pint, I wish to address Mr. and Mrs. Animodi's arguments based on the stay of removal that the Court granted on November 20, 2015, pending the determination of this application for judicial review. In considering whether the Applicants had established a serious issue as is required to grant a stay, Justice Fothergill applied the elevated version of that test that is applicable where the stay motion seeks essentially the same relief as in the underlying application for judicial review. Relying on *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*] at para 67, he observed that the Court must conclude that the Applicants had put forward "quite a strong case". Referring to Mr. and Mrs. Animodi's arguments surrounding the Officer's reliance on Dr. Louvish's opinion and failure to consider the best interests of their Canadian born children, Justice Fothergill was satisfied that they had met the elevated test.

[18] The Applicants rely on these findings in support their arguments in this judicial review. However, it is trite law that the decision on a stay motion does not represent a pre-determination of the outcome of the subsequent judicial review. In keeping with that principle, even though he

was applying the elevated standard prescribed by *Baron*, Justice Fothergill expressly stated that he was not expressing a view on the ultimate merits of Mr. And Mrs. Animodi's application for leave and judicial review of the Officer' decision. I therefore turn to those merits.

B. *Humanitarian and Compassionate Application / Best Interests of the Children*

[19] Mr. and Mrs. Animodi submit that the Officer failed to consider the best interests of the children, as he did not discuss any of the documentation submitted on this issue and dismissed their interests with boilerplate language. They note that their Canadian born children have never lived in Angola and do not speak the Portuguese language, but they would have no choice but to accompany their parents, because there is nobody else who can provide for them in Canada. They question how their children could be educated in a language they do not understand. Mr and Mrs. Animodi's position is that the Officer did not consider these factors in reaching his decision.

[20] They also argue that the Officer did not properly consider the impact of their pending H&C application. While they acknowledge that the existence of an H&C application will not, on its own, suffice to warrant a deferral of removal, they refer to factors that they submit take their application outside the usual circumstances. Mr and Mrs. Animodi emphasize that they have been in Canada for 19 years, that their eldest daughter's H&C application has received approval in principle, that Mrs. Animodi will be in a position to apply for a pardon next year, and that their counsel had requested to have temporary resident permits issued and their H&C application expedited. While acknowledging that this is their third application, they say these

new factors bode well for its chances of success and should have been taken into account by the Officer.

[21] I cannot find the Officer's treatment of the pending H&C application, including his consideration of the best interests of the children, to be unreasonable. As submitted by the Respondent, the Federal Court of Appeal has stated that, absent special considerations, an H&C application will not justify deferral of removal unless based on a threat to personal safety, and an enforcement officer has no obligation to substantially review the best interests of the children before executing a removal order (see *Baron*, at paras 51 and 57).

[22] In the case at hand, the Officer's review of Mr. and Mrs. Animodi's immigration history included identification of their previous H&C applications, their pending application, and the fact that their eldest daughter's application had been approved in principle. In his H&C analysis he concluded that the submissions in the deferral request did not provide corroborated evidence to demonstrate that Mr. and Mrs. Animodi's presence in Canada was required for the processing of their H&C application, or provide evidence that a decision on that application was imminent. Those submissions in support of the deferral request, as contained in Mr. and Mrs. Animodi's counsel's letter dated November 11, 2015, refer to the pending H&C application, their daughter's approval in principle, the urgent request for issuance of temporary resident permits, and Mrs. Animodi's upcoming eligibility for a pardon. Given the Officer's express reference to these submissions and their evidentiary value, it cannot be concluded that those factors were overlooked. Nor was it unreasonable to conclude that these submissions do not demonstrate that a decision would be imminent.

[23] As for whether these factors bode well for success in the third H&C application and whether or not the history of the previous applications suggests likelihood of success, I do not think the Officer can be faulted for not weighing into such a prediction. He noted the history of the previous applications but observed that it is beyond his authority to perform an adjunct H&C evaluation, which I consider to be consistent with the guidance in *Baron*.

[24] Notwithstanding the Officer's observation that it was not within his mandate to perform an H&C evaluation, he stated that he reviewed the specific considerations brought forward in the deferral request, namely the best interests of the children, establishment in Canada and hardship. This again appears to be a reference to the letter dated November 11, 2015 from Mr. and Mrs. Animodi's counsel. While I agree with their submission that the Officer's subsequent reasons contain language that can be regarded as "boilerplate", and while this is to be discouraged, I do not read the reasons as demonstrating a failure to consider the particular circumstances of the children in this case. The Officer notes that the Applicants have been in Canada for 18 years and would have established many ties to Canada. His reasons demonstrate an understanding that the children are to accompany their parents in traveling to Angola, he notes that a best interests of the child analysis was already considered in the previous H&C application, and he observes that the two children who are Canadian citizens will have the right to return to Canada in the future.

[25] While Mr. and Mrs. Animodi did not advance this point in oral argument, their Memorandum of Argument also refers to a psychological assessment they submitted, arguing it demonstrates their children would be psychologically devastated if forced to return to Angola

with their parents. This document was not mentioned by the Officer in his analysis of the best interests of the children. A decision maker is not required to refer to every piece of evidence that has been considered, although the more important the evidence that is not mentioned and analyzed, the more willing a court may be to infer that a finding was made without regard to that evidence (see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35 at paras 16-17). In this case, the Officer referred to having reviewed the specific considerations brought forward in the deferral request, as well as all the documents provided by counsel in support. The deferral request refers to the family having severe psychological effects because of their impending removal from Canada. I also note that the Officer's reasons, when canvassing Mrs. Animodi's medical condition, state that he reviewed the psychological assessments. Reviewing the decision as a whole, I cannot infer from the reasons that this point was overlooked.

[26] While the Officer concluded that there was no evidence that their parents would be unable to represent the children's best interests in Angola, especially in relation to their education, he did not expressly refer to Mr. and Mrs. Animodi's educational concerns arising from the fact that they do not speak the Portuguese language. This point is contained in the September 23, 2014 submissions in support of the H&C application, which were part of the documentation before the Officer, but it was not highlighted in the November 11, 2015 submissions in support of the deferral request. The Officer's analysis of the best interests of the children was limited, took into consideration the fact that such interests had already been considered in the previous H&C application, and recognized that the merits of the pending H&C application would be considered by Citizenship and Immigration Canada. Given the

guidance from *Baron* that the Officer had no obligation to substantially review the children's best interests, I cannot conclude the lack of an express reference to the educational impact of the language concern to take the Officer's analysis outside the reasonable range.

C. *Mrs. Animodi's Medical Condition*

[27] The Applicants argue that the Officer did not properly consider Mrs. Animodi's medical condition and the lack of availability of medical care in Angola. They submit that it was unreasonable for the Officer to prefer the opinion of Dr. Louvish, rather than the three physicians whose opinions had been submitted on their behalf, particularly as their three physicians had examined Mrs. Animodi and Dr. Louvish had not.

[28] I have reviewed the various medical reports that were before the Officer and can find no reviewable error in his decision to rely on the opinion of Dr. Louvish. Dr. Louvish considered the various reports submitted on behalf of Mr. and Mrs. Animodi and concluded that Mrs. Animodi was medically fit be repatriated to Angola by commercial airliner. In reaching that opinion, he refers to the absence of objective medical evidence of her seizures. It was not an error for the Officer to rely on Dr. Louvish's opinion in an area that, as noted by the Officer, is outside his expertise (see *Gonzalez v Canada (Minister of Public Safety and Preparedness)*, 2014 FC 1178 [*Gonzalez*] at paras 13 to 19). As in *Gonzalez*, I consider the Applicants' argument on this issue to be asking the Court to re-weigh the evidence. While the Court might not have reached the same conclusion as the Officer in considering the same evidence, this does not make the Officer's decision unreasonable.

[29] The Applicants also argue that the Officer did not properly consider the lack of availability of medical care for Mrs. Animodi in Angola. They rely on Mrs. Animodi's evidence and country condition documentation referred to in written submissions in support of the deferral of removal that was sought in June 2014. The Officer preferred the opinion provided by Dr. Theriault in 2014, finding that no objective medial opinion had been provided to contradict that of Dr. Theriault on the availability of medical care in Angola. Again, the Applicants' argument amounts to a request that the Court re-weigh the evidence.

[30] Mr. and Mrs. Animodi also take the position that the Officer reached inconsistent conclusions in finding that she was well enough to travel but should also be accompanied by a nurse. I do find there to be an inconsistency in the Officer's conclusion. He noted that Dr. Theriault had recommended a nurse escort and that CBSA had arranged for one to be available. The Officer was relying on the opinions of Dr. Louvish and Dr. Theriault and reached a conclusion in keeping with those opinions.

[31] Conscious of the limited discretion available to CBSA officers to defer removals, and the deference that should be afforded to their decisions, I have found nothing in the evidence or the Officer's decision that takes the decision outside the reasonable range. As such, this application for judicial review must be dismissed.

[32] Neither party proposed a question for certification for appeal, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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