Federal Court  Cour fédérale

Date: 20180112

Docket: IMM-2940-17

Citation: 2018 FC 28

Ottawa, Ontario, January 12, 2018

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

LOVINA NJIDEKA MBAOGU

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ms. Mbaogu, is seeking judicial review of the June 27, 2017 decision of a Canada Border Services Agency [CBSA] Inland Enforcement Officer [the Officer], refusing to reconsider her decision not to defer Ms. Mbaogu's removal from Canada [Decision].

[2] Following a refusal by this Court to hear a motion to stay the removal order, Ms. Mbaogu was removed from Canada on July 5th, 2017 to her home country of Nigeria.

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

I. **Background**

[4] Ms. Mbaogu had been living in Canada since November 2, 2009, having entered with her husband who was working as a medical doctor in Canada. The marriage ended soon after her arrival in Canada as a result of her husband's physical, sexual and emotional abuse. When her son was born in December 2009, she was already separated from her husband, who subsequently returned to Nigeria in 2011.

[5] Ms. Mbaogu obtained a divorce in April 2013 and at some point in that year learned that her husband had withdrawn his spousal support application of her. As a result, she was subject to removal.

[6] Ms. Mbaogu made a refugee claim on May 14, 2013, based on a fear of further abuse by her former husband in Nigeria. The RPD found she was not in need of protection. Leave to apply for judicial review of that decision was denied on August 13, 2013.

[7] Ms. Mbaogu filed several applications thereafter, including two for permanent residency on humanitarian and compassionate [H&C] grounds, and a Pre-Removal Risk Assessment. They were all unsuccessful. A third H&C application was submitted by Ms. Mbaogu in January 2017, for which a determination is still pending.

[8] The process to remove Ms. Mbaogu from Canada began in August 2016. Her removal was verbally deferred twice by the Officer while Ms. Mbaogu sought to obtain sole custody of her son, which was finally secured on April 3, 2017. By then, Ms. Mbaogu had decided to leave her son in Canada. Once the Officer confirmed that Ms. Mbaogu's aunt would be the child's

guardian, removal was scheduled for around July 3, 2017. CBSA proceeded to make travel arrangements.

[9] On June 17, 2017, Counsel wrote to the Officer requesting that Ms. Mbaogu be allowed to buy her own plane ticket and that she be afforded flexibility on the timeline. No supporting documents were provided and no alternative date of departure was proposed. The reasons given for the request were hard to discern but they appeared to be based on the pending H&C application, the best interests of the child and something the Officer believed to be "liability of removal". The Officer considered these factors and being satisfied that a deferral was not warranted, she refused the request by letter dated June 21, 2017, and served Ms. Mbaogu with a Direction to Report for removal on July 5, 2017.

[10] On June 27, 2017 a further letter was sent by counsel for Ms. Mbaogu to the Officer, this time requesting a three-month deferral of removal. On June 29, 2017, the Officer again denied Ms. Mbaogu's request.

[11] On July 4, 2017 Ms. Mbaogu applied for leave and judicial review of the Decision. A motion for stay of the removal was also filed on that day, but was denied. Ms. Mbaogu was removed to Nigeria on July 5, 2017, as scheduled.

II. **The Decision under Review**

[12] In the June 27, 2017 letter, Ms. Mbaogu requested a three-month deferral of her removal to allow time for a "bedding-in" period for her son, and also so that she may seek urgent medical attention, the state of her mental health having acutely deteriorated since receiving the confirmation of her removal date. Documents, including a psychologist's report dated June 19,

2017, a letter from a medical practitioner in Nigeria and copies of prescriptions were attached in support of this request. The letter also urged the Officer to consider the compelling H&C grounds for deferring Ms. Mbaogu's removal and provided the Officer with the guidelines used by H&C officers.

[13] The Officer considered that the letter was requesting reconsideration based on the short-term best interests of the child, the pending H&C application, the long-term best interests of the child, Ms. Mbaogu's medical needs and the lack of medical care in Nigeria.

[14] The Officer reviewed each aspect of the request in detail. In her response, the Officer began by noting that CBSA has an obligation under s. 48(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 to enforce removal orders as soon as possible, provided there are no impediments to so doing. Moreover, enforcement officers have little discretion to defer removals; should an officer choose to exercise this discretion, "they must do so while continuing to enforce a removal order as soon as possible".

[15] With respect to the requested three-month deferral to allow time for Ms. Mbaogu's son to settle in with his guardian, the Officer determined that sufficient time had been given to make arrangements, and that the child would be well taken care of by his mother's aunt, who had long been actively involved in his life.

[16] Regarding the outstanding H&C application, the Officer noted that it was beyond her authority to make or re-make H&C decisions and that an H&C application does not affect the validity of a removal order. As processing times for H&C applications are approximately twenty-five months, the Officer determined this did not constitute a request for a short-term deferral.

[17] Finally, with respect to Ms. Mbaogu's mental health issues, including whether adequate medical care would be available to her in Nigeria, the Officer reviewed the psychologist's report as well as the letter from a medical practitioner based in Nigeria. The Officer concluded there was insufficient evidence to show that Ms. Mbaogu was not fit to travel by air, nor did it serve to indicate that she is in need of longer-term follow up treatment, the nature of which could not be obtained in Nigeria.

[18] Overall, the Officer found there was insufficient evidence to conclude that Ms. Mbaogu or her child would be exposed to a risk of death, extreme sanction or inhumane treatment if she were returned. As such, she refused to reconsider her previous decision not to defer the removal order.

III. **Issue and Standard of Review**

[19] The applicable standard of review for a decision of an enforcement officer on an application to defer a removal is that of reasonableness: *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*], at para 25; *Mota Furtado v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 963, at para 19. The decision to refuse to reconsider such a decision must be subject to the same standard of review.

[20] As Ms. Mbaogu has already been removed from Canada, the determinative issue in this matter is whether it is moot, and, if it is moot, whether the Court ought to exercise its discretion to hear the application in any event.

IV. **Analysis**

[21] Citing *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*], Mr. Justice Diner recently reviewed the test for mootness in *Harvan v Canada (Citizenship and Immigration)*, 2015 FC 1026, at para 7:

> [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;
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> 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.

[22] In the analysis of whether the present matter is moot, the first step is to ask whether the determination of this judicial review would have any practical effect in solving the controversy between the parties.

[23] Ms. Mbaogu is seeking judicial review of the failure of the Officer to reconsider her request for a three-month deferral of the removal order. But, it is no longer possible to defer removal for that time since Ms. Mbaogu has already been returned to Nigeria and the three months have passed. The relief that Ms. Mbaogu sought cannot be granted. There is therefore no live controversy between the parties.

[24] Counsel for Ms. Mbaogu says that it is not that simple; if the refusal to defer is not reviewable when an applicant is removed, "executive lawlessness" will ensue, with the result that "the rights of Applicants will be truncated and trampled upon by simply deporting them".

[25] The problem with that argument is that Ms. Mbaogu *did* have her removal reviewed, several times. In addition to at least two verbal deferral requests which were granted, the Officer thoroughly considered Ms. Mbaogu's original deferral request, and then again in the impugned Decision. There were also two Orders of this Court in which her removal was considered. On the same day that she applied for this judicial review, counsel for Ms. Mbaogu filed a motion for a stay of the removal. That motion was heard and denied, at which point counsel submitted additional correspondence for consideration by this Court. Again, the motion for stay was reviewed by the Court and denied.

[26] More importantly, I also note that the original request by Ms. Mbaogu was for a three-month deferral to allow for a bedding-in period for her son. That period has already lapsed. Even if Ms. Mbaogu had been granted a stay of removal by this Court, the refusal to defer controversy between the parties would now be moot due to the passage of time for which such deferral was required. See *Baron*, above, at para 37.

[27] Finally, I have considered that the H&C application filed by Ms. Mbaogu will proceed despite her removal, and that there will be no collateral consequences that would justify hearing this judicial review (*Borowski*, above, at 363). Consideration of the various arguments raised on the merits of the refusal by Ms. Mbaogu in this application will not in any way overcome the fact that the three months have lapsed.

[28] Under all of these circumstances, the Court can see no reason why discretion should be exercised to hear this matter.

[29] Accordingly, for the reasons given, this application is denied.

[30] Neither party believes there is a question for certification. Nor do I.

JUDGMENT IN IMM-2940-17

THIS COURT'S JUDGMENT is that this application is denied. No serious question of general importance arises for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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