Federal Court  Cour fédérale

Date: 20180709

Docket: IMM-491-18

Citation: 2018 FC 713

Vancouver, British Columbia, July 9, 2018

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

NOE GAMA SANCHEZ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS
(Delivered from the Bench at Vancouver, British Columbia, on July 9, 2018)

I. Nature of the Matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision by an Immigration Enforcement Officer of the Canada Border Services Agency [Officer] dated January 30, 2018, denying the Applicant's request for a deferral of his removal from Canada.

[2] The Applicant and the Respondent both submit that the present application for judicial review should be allowed by this Court as the Officer's decision is unreasonable.

II. Background

[3] The Applicant and his wife are citizens of Mexico and have three children (one of them is Canadian/Mexican and the other two are American/Mexican).

[4] In 1990, the Applicant and his parents entered the United States as visitors.

[5] On November 13, 1996, the Applicant was charged with (i) conspiracy to possess with intent to distribute and to distribute a substance containing methamphetamine, and (ii) possession with intent to distribute a substance containing methamphetamine.

[6] On July 2, 1997, the Applicant entered into a plea bargain and pled guilty on the first count. He was sentenced to 60 months imprisonment and agreed to deportation from the United States. On June 25, 1998, the Applicant was transferred to a prison in Mexico. After the completion of his sentence, the Applicant was released in 2001.

[7] On June 1, 2008, the Applicant arrived in Canada with a visitor visa and claimed refugee protection in December 2008.

[8] On June 26, 2012, the Applicant filed a humanitarian and compassionate [H&C] grounds application which was denied.

[9] In October 2012, the Refugee Protection Division [RPD] refused the Applicant's refugee claim under Article 1 F(b) of the Refugee Convention due to a serious non-political crime. The Applicant then sought judicial review of the RPD's decision. On August 29, 2013, the Federal Court dismissed the application, however certified a question in regard to the Canadian equivalent of a foreign offence when assessing the seriousness of the crime.

[10] On September 25, 2013, the Applicant sought relief at the Federal Court of Appeal concerning the certified question. On January 28, 2014, the Federal Court of Appeal dismissed the application. The Applicant sought leave to the Supreme Court of Canada; however, that request was denied.

[11] On February 25, 2014, following a report under subsection 44(1) of the IRPA, a deportation order, based on serious criminality pursuant to paragraph 36(1)(b) of the IRPA, was issued against the Applicant.

[12] The Applicant then filed a Pre-Removal Risk Assessment [PRRA] application, followed by a second H&C application. On July 29, 2016, both applications were denied.

[13] On October 28, 2016, the Applicant filed an application for leave and judicial review of the PRRA and H&C decision. On February 16, 2017, the Federal Court dismissed the application.

[14] On October 6, 2017, the Applicant made a third H&C application. The decision has yet to be rendered.

[15] On January 24, 2018, the Applicant was informed of his removal order. He was scheduled to return to Mexico on February 12, 2018.

[16] On January 28, 2018, the Applicant requested his removal to be deferred.

III. Decision

[17] On January 30, 2018, the Officer refused the deferral request, based on the four grounds upon which the Applicant requested a deferral of removal: psychological hardship that the family will face, the outstanding H&C application, the mental health of the Applicant's wife and the Applicant's economic support for his family.

[18] In his reasons, the Officer repeated that he has an obligation to execute a valid removal order as soon as possible under subsection 48(2) of the IRPA.

[19] The Officer began his assessment by outlining the Applicant's immigration history. The Officer then addressed the psychological hardship that the Applicant's family would face. Considering the post-traumatic stress disorder [PTSD] diagnosis of the Applicant's 12-year-old son, the Officer found that this issue was of "long term concern" and the granting of a "short term deferral" would only delay the Applicant's removal from Canada and would still have a negative impact on his family, particularly his 12-year-old son, sooner or later. The Officer

concluded that the Applicant's children would remain with their mother and, while in Mexico, the Applicant can communicate daily with his family via Skype.

[20] The Officer noted that the Applicant's wife suffers from psychological health problems which would likely regress if her husband was deported to Mexico. The Officer found that the Applicant's wife was also issued a removal order from Canada and could therefore accompany her husband to Mexico. Mental health services are also available for the Applicant's wife and children if needed. The Officer came to the conclusion that the removal order must nevertheless be enforced. His "ability to defer is extremely limited, and is limited to circumstance wherein failure to defer would expose the applicant to the risk of death, extreme sanction or inhumane treatment".

[21] The Applicant stated his concern about his family's financial situation, considering the fact that he provides economic support for the family. The Officer noted that the Applicant can no longer work lawfully in Canada, because his work permit becomes invalid when a removal order is made against him.

[22] As for the outstanding H&C application, the Officer was not convinced how the Applicant's third application would differ from his previous applications which were denied. "Jurisprudence supports that general H&C factors are not relevant to the officer's discretion under Section 48 of IRPA". After reviewing the Applicant's reasons for a deferral of his removal order, the Officer concluded that "a pending H&C does not give rise to an obligation to defer removal".

IV. Relevant Provisions

[23] The following is relevant to the present case:

48 (2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.	**48** (2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

V. Analysis

A. *Did the Officer render an unreasonable decision?*

[24] The applicable standard of review of a removals officer's discretion on a deferral request is that of reasonableness (*Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25; *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at para 27).

[25] Both parties submit that the present application for judicial review should be granted by this Court. The Court agrees. The Officer is silent on the 12-year-old's suicidal ideation. Based on the psychological report dated August 16, 2017, and sent to the Applicant's counsel on January 25, 2018, it was clear from the evidence before the Officer that the youngster "did report that he experiences recurrent thoughts related to a suicidal act" if he were to be removed from Canada or if the family returned to Mexico (Certified Tribunal Record [CTR], Psychological Report of Dr. Darla Shewchuck, p 144). According to the psychologist, the child "requires continued psychological treatment and support. [A] major disruption, such as a move back to a

country he regards with terror, would most certainly not be in the best interests of the child" (CTR, Psychological Report of Dr. Darla Shewchuck, p 147). This omission alone in the decision constitutes a reviewable error (*Tiliouine v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1146 at para 12).

[26] The Officer is also silent on the impact removal would cause on the other children, one of them also suffering from PTSD. This Court has previously concluded that the best interests of all children must be considered (*Pegito London v Canada (Citizenship and Immigration)*, 2015 FC 942 at paras 20 and 23). There was psychological evidence stating that "none of the family members have fully recovered from the past trauma they survived. They are still fragile. […] The mental well-being of all members of this family are at high risk if this family loses Noe Gama Sanchez to deportation" [Emphasis added.] (CTR, Psychological Report of Dr. Darla Shewchuck, p 139).

[27] The Court finds the decision to be unreasonable as the Officer committed a reviewable error by failing to address primordial and significant aspects of the evidence. The decision does not fall within the range of possible and acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VI. Conclusion

[28] The application for judicial review is therefore granted.

JUDGMENT in IMM-491-18

THIS COURT'S JUDGMENT is that the application for judicial review be granted and the decision of the Officer be remitted to a different officer for determination anew. There is no serious question of general importance to be certified.

Obiter

Please, see also *Faisal v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 685, rendered by the undersigned judge. Serious risk to life and psychological health are to be taken seriously.

Unlike elsewhere, every attempt is made in Canada to ensure families are kept together, recognizing that family unification and reunification are goals that are acknowledged and understood by the three branches of government, except in extraordinary circumstances where one of the family members could be a risk to Canada.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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