Federal Court  Cour fédérale

Date: 20190410

Docket: IMM-3206-18

Citation: 2019 FC 437

Ottawa, Ontario, April 10, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

MARCEL HENRIQUEZ

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application by Marcel Sayah Henriquez [the "Applicant"] of a decision ["Decision"] of the Inland Enforcement Officer ["Officer"] that refused a deferral dated July 11, 2018, of the execution of the removal order after a failed Pre-Removal Risk Assessment ["PRRA"] on December 11, 2017.

II. Background

[2] The Applicant came to Canada from Haiti. He is currently serving a federal sentence at the Joyceville Institution in Kingston, Ontario.

[3] The Canadian Border Services Agency [“CBSA”] had previously issued him a Section 44(1) Report on May 22, 2015, for inadmissibility under section 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [“IRPA”] due to his criminal convictions, and thereafter referred him to an admissibility hearing. On April 27, 2017, he was issued a Deportation Order with no right to appeal.

[4] In December 2018, the Applicant filed another PRRA with new evidence that was not filed when he previously did his own PRRA application. Some of the new evidence is in regards to the Applicant’s mental health. That PRRA was negative. After his negative deferral decision he was granted a stay of removal.

III. Issues

[5] The issues are:

A. Did the decision maker apply the wrong legal test when making the decision?

B. Was the Decision reasonable?

IV. Standard of Review

[6] In *Newman v Canada (Public Safety and Emergency Preparedness),* 2016 FC 888, Justice Gascon was presiding over a judicial review application relating to an inland enforcement officer refusing to defer the execution of the removal order against the applicant. Justice Gascon determined that the standard of review is reasonableness.

[7] On the question of whether the wrong legal test was used it is established that the standard of review in assessing questions pertaining to the interpretation of a decision maker's enabling statute that is closely connected to its function are on the reasonableness standard *(Smith v Alliance Pipeline Ltd,* 2011 SCC 7 at para 26; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd,* 2016 SCC 47 at para 62).

[8] As Justice O'Keefe held in *Anabtawi v Canada (Minister of Citizenship and Immigration),* 2012 FC 856 at paragraph 29, "Therefore, the question of whether the officer applied the correct legal test…is also reviewable on a standard of reasonableness".

[9] For the reasons that follow, I will grant the application.

V. Analysis

[10] The Applicant made several arguments which are related to whether the Decision was reasonable, but I will not opine on those arguments, as I find that the Officer did not apply the

correct test when exercising his discretion and that in itself is determinative of this matter. Therefore, it is unnecessary to address the other issues raised

[11] I find it a reviewable error that the Officer stated at page 4 of the Decision, "I note however that the articles and reports do not mention Mr. Marcel Sayah HENRIQUEZ personally".

[12] That is not the legal test that is to be applied. The Officer unreasonably applied a standard that is far higher than what is required.

[13] This Court and the Federal Court of Appeal have held that deferral is for applications where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment (*Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 ["*Wang*"] at para 32; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 51; *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at paras 41-43).

[14] I find it was an error for the Officer to read into the test that country condition reports must cite an applicant by name. It is not often, unless the person is a politician, military officer, or another high profile individual in a leadership position, that the independent country condition reports would ever mention an applicant by name. The Officer was looking for proof of a serious risk that was akin to a wanted poster. Of course, this is not the test.

[15] In *Savunthararasa et al v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 51 ["*Savunthararasa*"], the Federal Court of Appeal confirmed that the applicant must establish a risk of death, extreme sanction, or inhumane treatment since the risk was last reviewed. There is no suggestion in the caselaw that an applicant's name must appear in the independent documentary evidence that is before a decision maker. The fact that the Officer drew a negative inference from the fact that the documentary evidence did not mention the Applicant by name is therefore a reviewable error.

[16] The Respondent relied on paragraph 18 of Justice Grammond's decision in *Sheron v Canada (Citizenship and Immigration),* 2018 FC 1221 ["*Sheron*"] to argue that, "general risk, like armed conflict, does not necessarily entail a risk to the applicant that is sufficiently individualized to halt a lawful removal".

[17] The relevant cited paragraph in *Sheron,* above, in context, however, is very different from what is happening here:

> [18] The situation in the two English-speaking provinces of Cameroon is obviously very serious. Nevertheless, to be able to demonstrate that her removal to Cameroon would expose her to irreparable harm, Ms. Gariba Sheron must also show that she would be personally affected by the armed conflict (see, for example, Bouaza v Canada (Sécurité publique et Protection civile), 2018 CF 1028 (CanLII), 2018 FC 1028 at para 22).
>
> [19] The evidence in this regard is quite slim. There is a statement in Ms. Gariba Sheron's affidavit to the effect that she has lost contact with her family members and that their houses have been sacked. No further details are provided, in particular as to how she learned of those events. There is no evidence whatsoever that Ms. Gariba Sheron would be perceived as a supporter of the separatist movement or that she would be targeted by anyone.

[18] This case does not stand for the proposition that it is reasonable for the Officer to require that country condition information must mention an applicant by name to establish personalized risk. Nor do I find that the Officer's notation can be read in any other way than to require the Applicant to establish a mention of his name in the country condition information.

[19] This error cannot be rescued as immaterial, as the error goes to the heart of the decision, as per *Mendoza v Canada (Minister of Citizenship and Immigration),* 2010 FC 648.

[20] I am sending this matter back to be re-determined by a different officer.

[21] No certified question arose from the application.

JUDGMENT in IMM-3206-18

THIS COURT'S JUDGMENT is that:

1. The application is granted and the matter is sent back to be determined by a different decision maker;

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3206-18
STYLE OF CAUSE:	MARCEL HENRIQUEZ v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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APPEARANCES:

Mr. Simon Wallace	FOR THE APPLICANT
Mr. Christopher Crighton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McCARTEN WALLACE LAW Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT