Federal Court  Cour fédérale

Date: 20200403

Docket: IMM-3139-19

Citation: 2020 FC 483

Ottawa, Ontario, April 3, 2020

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

EJIKE KELLY PETER
(A.K.A. EJIKE NELLY PETER)

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant, Ejike Kelly Peter, seeks judicial review of a decision, pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], in which a Canadian Border Services Agency [CBSA] Deferral Officer [Officer] refused to defer the execution of his removal order. The decision was made on May 17, 2019 [Decision].

[2] The Applicant requests that the Decision be set aside and remitted to a different decision-maker for redetermination.

[3] For the reasons that follow, the application for judicial review is dismissed.

II. Decision under Review

A. *Context*

[4] The Applicant is a Nigerian citizen. The following is a timeline of his experiences:

Oct. 18, 2017	Refugee Protection Division [RPD] rejects Applicant's refugee claim. He appeals to Refugee Appeal Division.
Jul. 3, 2018	Applicant applies for permanent residence via spousal sponsorship.
Oct. 2, 2018	RAD dismisses the appeal and upholds the RPD decision that rejected the Applicant's refugee claim.
Jan. 23, 2019	Applicant applies for judicial review of RAD decision (IMM-648-19).
Feb 20, 2019	Applicant was notified that his permanent residence application was sent to a processing office for "further assessment"
April, 2019	CBSA notifies Applicant on April 8, 2019 that he will be removed from Canada on April 18, 2019. Applicant requests deferral because of his pending permanent residence application and his application for leave and for judicial review (IMM-648-19), but it is denied.
May, 2019	Applicant's removal is postponed to May 18, 2019. Applicant requests deferral because of his pending permanent residence application and application for leave and for judicial review.
May 17, 2019	The Applicant's request for deferral is denied, which is the Decision under review. Justice Grammond orders a stay of removal pending the result of the

	Applicant's application for permanent residence and judicial review of the RAD decision.
May 28, 2019	Application for leave and judicial review in IMM-648-19 refused by Justice Pentney.

[5] The Officer assessed two grounds that the Applicant presented in favor of a deferral: his outstanding judicial review of the RAD decision (IMM-648-19) and his outstanding application for permanent residence.

[6] In considering the above grounds, he cited *IRPA* s 48. It reads:

48 (1) A removal order is enforceable if it has come into force and is not stayed.	**48 (1)** La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
(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	(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

[7] The Officer placed particular emphasis on the words "as soon as possible," indicating that the Applicant's grounds for deferral were weighed against that requirement.

[8] In considering the Applicant's pending judicial review of the RAD decision, the Officer noted that he had limited discretion to offer a deferral for that reason. He noted that the Applicant had had his risks assessed by the RPD and RAD, and he did not have the authority to perform new risk assessments. He noted that the Applicant presented no new allegations of risk if

returned to Nigeria, nor was Nigeria on the list of countries with a Temporary Suspension of Removals. From the above, he stated that the Applicant presented insufficient evidence to warrant a deferral on this ground.

[9] In considering the pending spousal sponsorship application, the Officer noted that it did exist, but that such an application was not a bar to removal. He found that there was no reason that the application could not be completed outside of Canada. He also found that there was insufficient evidence that the decision was "imminent".

III. Issues and Standard of Review

[10] The Applicant's written submissions state that the issues are:

(1) The officer erred by basing his decision on an erroneous finding of fact that he made in a perverse or capricious manner or without regard to the material or evidence before him

(2) The officer erred and acted unreasonably by failing to exercise his discretion to defer the execution of the removal order against the Applicant

[11] The Respondent submits that the issue is whether it was reasonable not to defer the removal.

[12] From my review of the matter, the only issue is whether the Officer's decision was reasonable—the Applicant's concerns can be addressed in the overall reasonableness of the decision. In oral submissions, the Applicant focused his arguments that it was an error for the

Officer to fail to consider the "imminence" of the decisions respecting the application for leave and judicial review of the RAD decision and the outstanding application for permanent residence.

[13] The parties' submissions indicate that they agree that the standard of review is reasonableness.

[14] I agree that reasonableness is the standard of review. The parties filed their arguments before the Supreme Court's revision of the standard of review framework in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Reasonableness is now the presumptive standard of review, and I see no exception here that would rebut it.

IV. Parties' Positions

A. *Was the decision reasonable?*

(1) Applicant's Position

[15] The Applicant presents a significant number of alleged errors that the Officer committed in the Decision, several of which are set out below:

1. He referred to the Applicant's application for leave and judicial review as a reconsideration of the Applicant's application and a reassessment of the Applicant's risk;
2. He ignored the fact that the Federal Court's decision was imminent;

3. He concluded that a pending application for leave and judicial review of a negative RAD decision does not give rise to a stay of removal;
4. He concluded that the Applicant has had full due process without including the Federal Court's judicial review process;
5. He ignored the jurisdiction of the Federal Court and concluded that no new risk was present that had not already been considered by the RAD and RPD;
6. He concluded that there was no new risk presented because the Applicant did not present evidence of new risk;
7. He concluded that there was insufficient evidence to warrant a deferral;
8. He concluded that he did not have the authority to assess the merit of RPD or RAD decisions;
9. He concluded that the Applicant requested that he assess the RPD and RAD decisions;
10. He refused to defer the order in spite of the fact that the Applicant's risk assessment was the subject of judicial review;
11. He concluded that the deferral was not warranted in spite of the evidence that the Applicant submitted;
12. He concluded that there was insufficient evidence that the spousal sponsorship application was imminent;
13. He failed to comment on the fact that the Applicant's evidence supported that the judicial review decision at the Federal Court was imminent;

14. He failed to comment on the Applicant's letters with information about his spousal sponsorship application; and

15. He ignored the evidence before him and failed to exercise his discretion.

[16] Throughout these claims, the Applicant does not cite a single legal authority.

(2) Respondent's Position

[17] The Respondent argues that the decision was reasonable. It cites *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*], for the proposition that an Officer's discretion to defer a removal order is limited.

[18] The Respondent notes that IMM-648-19 has concluded (leave denied), making that aspect of the review moot.

[19] With respect to the balance of the Applicant's alleged errors, the Respondent notes that there is no statutory stay when an application for permanent residence is filed. In any case, it notes that application processing times vary, and the Applicant's evidence did not show that a decision was imminent. It notes that this Court has found that processing time statements are estimates, not guarantees (*Voropaev v Canada (Citizenship and Immigration)*, 2008 FC 994 at para 11 [*Voropaev*]).

[20] The Respondent also cites some decisions that have held that these types of decisions do not normally warrant a deferral, such as *Baron* at paras 49-51 and *Uberoi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1232 at para 14.

[21] Finally, the Respondent notes that, as of the filing of its argument, the spousal sponsorship application has still not been decided, bolstering the reasonableness of the decision. It cites *Forde v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1029.

(3) Applicant's Reply

[22] The Applicant notes in reply that Justice Grammond found that the decisions *were* imminent in the order granting him a stay of removal. The Applicant also presents some evidence that, for him, shows that the sponsorship application was imminent.

[23] The Applicant argues that the Respondent's citations of *Baron* and *Voropaev* are distinguishable from the case at bar. *Baron*, because it involved a Humanitarian and Compassionate Application; and *Voropaev* because it involved a different website than that which is currently in use.

V. Analysis

A. *Was the decision reasonable?*

[24] I accept the Respondent's argument that the Officer has limited discretion in whether to grant a deferral. It appears to be more procedural in nature, assessing whether there is some

reason that the order cannot be practically executed, such as illness or impediments to travel.

Below is a passage from Justice Nadon, in *Baron* at para 49:

> It is trite law that an enforcement officer's discretion to defer removal is limited. I expressed that opinion in *Simoes v. Canada (M.C.I.)*, [2000] F.C.J. No. 936 (T.D.) (QL), 7 Imm.L.R. (3d) 141, at paragraph 12:
>
> > [12] In my opinion, the discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, a removal officer may consider various factors such as illness, other impediments to travelling, and pending H & C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system. […]

[25] In *Perez v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 627 [*Perez*], Justice Shore said the following:

> [1] A removals officer cannot defer removal for just any proceeding […] for which he/she is not the mandated decision-maker. The removals officer does not have the jurisdiction to make a renewed refugee assessment, nor a Pre-Removal Risk Assessment (PRRA), nor a decision on humanitarian and compassionate (H&C) grounds, nor, is he mandated to determine judicial reviews or appeals of any of the preceding or other procedures. **A removals officer is solely mandated with the discretion to defer removal for reasons associated with the challenges of arranging international travel.** The Court in *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] F.C.J. No. 295 (QL), explained how very limited the discretion is:
>
> > [45] The order whose deferral is in issue is a mandatory order which the Minister is bound by law to execute. The exercise of deferral requires justification for failing to obey a positive obligation imposed by statute. That justification must be found in the statute or in some other legal obligation imposed on the Minister which is of sufficient importance to relieve the Minister from compliance with section 48 of the Act…

> [48] …At its widest, the discretion to defer should logically be exercised only in circumstances where the process to which deferral is accorded could result in the removal order becoming unenforceable or ineffective. Deferral for the mere sake of delay is not in accordance with the imperatives of the Act. One instance of a policy which respects the discretion to defer while limiting its application to cases which are consistent with the policy of the Act, is that deferral should be reserved for those applications or processes where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment in circumstances and where deferral might result in the order becoming inoperative.
>
> [Emphasis added.]

[26] Under the standard of reasonableness, the Court examines a decision for logical errors and determines if a decision, as a whole, adds up (*Vavilov* at paras 103-104).

[27] To begin, I find that the portion of the arguments relating to the Officer's consideration of the IMM-648-19 decision are moot. Justice Pentney dismissed the application for leave on May 28, 2019.

[28] Even if this part of the decision were to form a basis for making the decision unreasonable, remitting it would have no effect. In any case, I find that this part of the Decision was reasonable—the Officer was unable to find evidence that the failure to defer would expose the applicant to the risk of death, extreme sanction or inhumane treatment in circumstances and where deferral might result in the order becoming inoperative (*Perez* at para 1).

[29] This also applies to the permanent residence application. What I see in the Officer's decision is that he found that (a) no deferral was required for pending permanent residence

applications, and (b) that there was insufficient evidence that the decision was “imminent”. On the first point, the Officer was correct—I have not been pointed to any authority, statutory or otherwise, that states that a deferral is required if an applicant has a pending permanent residence application. On the second point, the Certified Tribunal Record indicates that the most relevant pieces of evidence appear to be a single letter from the applicant’s lawyer and a letter from Immigration, Refugees, and Citizenship Canada. Given that, I do not find that the Officer erred by failing to mention this evidence specifically, or that the Officer erred by concluding that the decision was not “imminent”.

[30] The Applicant’s argument about Justice Grammond’s Order that stated that both of the assessed decisions were “imminent” is not useful. Justice Grammond’s Order was not before the Officer when he made his decision. It cannot affect this analysis.

[31] Finally, again, given the high threshold required in order to grant a deferral, I find even if the decision *was* imminent, the Officer still would have acted reasonably by refusing the deferral (*Perez* at para 1).

VI. Conclusion

[32] The application for judicial review is dismissed.

[33] Neither party raised a question for certification and, in my view, none arises.

[34] There is no order for costs.

JUDGMENT in IMM-3139-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

3. There is no order for costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3139-19
STYLE OF CAUSE:	EJIKE KELLY PETER (A.K.A. EJIKE NELLY PETER) v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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APPEARANCES:

Stella Iriah Anaele	FOR THE APPLICANT
Kareena Wilding	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stella Iriah Anaele Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT