Date: 20070706

Docket: IMM-7789-05

Citation: 2007 FC 718

Ottawa, Ontario, July 6, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MARAT MOUMAEV

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision of an enforcement officer, dated December 21, 2005, which refused the applicant's request for a deferral of his removal from Canada.

[2] The applicant seeks an order quashing the decision not to defer removal.

Background

[3] The applicant, Marat Moumaev, and his son, Rouslan Moumaev, are citizens of Russia and claim to be of Chechen ethnicity. The applicant described his ethnic background and explained the basis for his fear of returning to Russia in his affidavit. The applicant's family was deported from Chechnya in 1944 and as a result, he was born in Kazakhstan. His family returned to Chechnya in 1957, where the applicant lived until he moved to Moscow in 1974. During the Chechen war of 1994 to 1995, Russian citizens of Chechen origin were being arrested and persecuted. The applicant began receiving threatening phone calls and was informed that many of his Chechen friends in Moscow had been beaten by the police, tortured and arrested.

[4] In June 1995, the applicant was stopped by the police for a routine document check. He provided them with his passport, which indicated his Chechen ethnicity, and was immediately taken into custody. He was asked to sign documents accusing other imprisoned Chechens of keeping illegal firearms. He refused to sign the documents, and was beaten by the police. He was warned not to complain about the incident. The applicant and his family later moved to Cyprus with temporary visas, where they remained for four years. The applicant returned to Russia a number of times during this period. He returned in 1998 in order to renew his international passport, and again in 1999, in order to apply for a Canadian visa.

[5] After obtaining a visa, he fled to Canada with his son. They arrived in Canada as visitors on October 13, 1999. Their claim for refugee protection was denied on August 7, 2003, because they

had failed to establish their Chechen ethnicity. The applicant submitted his internal passport and military book in support of his ethnic identity; however, the original documents were lost by the Immigration and Refugee Board (the Board) when they were taken for forensic testing. Leave for judicial review of the Board's decision was denied on December 17, 2003. The applicant submitted his first PRRA application in March 2004. The PRRA application was rejected on November 3, 2004, due to a lack of evidence establishing the applicant's ethnicity. Leave for judicial review of the first PRRA decision was denied on April 13, 2005.

[6] The applicant was originally scheduled for removal from Canada to Russia on January 5, 2005. He did not appear for removal on January 5, 2005, and a warrant for his arrest was issued on January 6, 2005. The applicant was arrested on November 29, 2005, on an immigration warrant for removal and was scheduled for removal on January 4, 2006.

[7] The applicant submitted an application for permanent residence on humanitarian and compassionate grounds (H&C) in May 2005 and a second PRRA application in December 2005. The applicant also requested a deferral of his removal to Russia pending the outcome of these applications. The deferral request was refused by an enforcement officer on December 21, 2005. The applicant then filed a motion with this Court for a stay of removal which was granted on January 10, 2006, pending a decision regarding the second PRRA application. The second PRRA application was refused on January 18, 2006, and the stay of removal was terminated.

[8] The applicant was scheduled for removal on May 24, 2006, however, he sought a second stay of removal pending the outcome of leave applications for the judicial review of: (1) the second PRRA decision, dated January 18, 2006; and (2) the refusal of the enforcement officer to defer removal, dated December 21, 2005. On May 19, 2006, this Court granted stays of removal pending the determination of both applications, in addition to leave for judicial review in both cases. This is the judicial review of the enforcement officer's decision to refuse the applicant's request for a deferral of removal.

Officer's Reasons

[9] There were no formal reasons given for the officer's decision. However, a fax sent by the officer to the applicant's counsel stated the following:

> As for your request, unfortunately I am unable to defer removal for your client. As you know, I am required to remove people who are under removal order as soon as reasonably practical. Also, as you note, you client was served with a negative PRRA decision and instructions to report for his removal on – January 5, 2005. He decided not to comply with CBSA's instruction.

Issues

[10] The applicant submitted the following issues for consideration:

1. Did the officer err in refusing to defer the applicant's removal?
2. Did the officer err in failing to provide adequate reasons for the decision?

[11] The respondent submitted the following additional issues for consideration:

1. Is this matter moot?

2. Is any discretionary remedy available where the applicant does not come to the Court with clean hands?

3. Should the officer have undertaken a substantive review of the applicant's evidence concerning risk in making his decision?

Applicant's Submissions

[12] The applicant noted that he had requested a deferral of his removal from Canada on the basis of a pending PRRA application, in support of which he had submitted significant new evidence regarding his fear of persecution upon return to Russia due to his Chechen ethnicity.

[13] The applicant submitted that the decision to defer removal under subsection 48(2) of IRPA was discretionary and required that the officer consider relevant factors in each case (see *Poyanipur* v. *Canada (Minister of Citizenship and Immigration)* (1995), 116 F.T.R. 4 (F.C.T.D.)). It was submitted that the officer fettered his discretion and ignored evidence of risk when refusing to defer the applicant's removal. The applicant submitted that enforcement officers may consider whether it is reasonable to defer removal pending a risk assessment and whether failure to defer will expose the applicant to a risk of serious harm (see *Saini* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 4 F.C. 325, (1998), 150 F.T.R. 148)).

[14] The applicant submitted that he had initiated his second PRRA on December 9, 2005, prior to removal arrangements being made. It was submitted that the applicant's assertion regarding the risk to his life was a *bona fide* application and should have been considered by the officer. The applicant submitted that the officer erred in failing to properly assess the risk he faced (see *Sklarzyk* v. *Canada (Minister of Citizenship and Immigration)*, 2001 FCT 336 (F.C.T.D.)). The applicant submitted that the officer did not consider the issue of the risk involved in his removal to Russia, as this issue was not addressed in the decision, which did not include reasons. This Court has held that boilerplate type decisions may generate allegations that the decision-maker did not turn its attention to the facts of the claim (see *Mohacsi* v. *Canada (Minister of Citizenship and Immigration)*, [2003] 4 F.C. 771, 2003 FCT 429).

[15] It was submitted that the officer fettered his discretion by emphasizing the fact that the applicant had not complied with previous CBSA instructions for removal, without referring to other facts which supported his deferral request. The applicant acknowledged that enforcement officers are not required to produce formal reasons; however, it was noted that there were no notes to file in this case. It was submitted that the decision demonstrated that the officer misunderstood the facts and failed to disclose the basis upon which it was reached (see *Shawesh* v. *Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1757 (F.C.T.D.)).

Respondent's Submissions

[16] The respondent noted that the applicant had requested a stay of removal pending a decision regarding his second PRRA application. Since a negative PRRA decision was rendered on January 18, 2006, it was submitted that this application for judicial review was moot (see *Doucet-Boudreau* v. *Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, (2003) 232 D.L.R. (4th) 577). It was submitted that the facts of this case were unique and not of a recurring nature that should compel the Court to hear the issue in spite of the lack of a live issue between the parties.

[17] The respondent submitted that remedies on judicial review were discretionary, and that the Court may deny such remedies due to the applicant's conduct. It was submitted that in the immigration context, individuals such as the applicant, who choose to evade immigration officials, do not come to Court with clean hands and ought not be rewarded by the exercise of the Court's equitable jurisdiction (see *Chen* v. *Canada (Minister of Citizenship and Immigration)*, 2003 FC 1464).

[18] The respondent submitted that standard of review applicable to deferral decisions is that of patent unreasonableness (see *Zenunaj* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 1715). It was submitted that there was no duty upon a removal officer to conduct risk assessments or consider H&C factors in reaching a decision. The respondent submitted that the task of the officer was to make removal arrangements as soon as reasonably practicable, and that

discretion to defer was generally limited to physical impediments to travel (see *Adviento* v. *Canada (Minister of Citizenship and Immigration)* (2003), 242 F.T.R. 295, 2003 FC 1430).

[19] The respondent submitted that officers do not err in giving little weight to new risks raised at the eleventh hour. An officer may only consider such applications where the risk is obvious, very serious or could not have been raised earlier (see *Jamal* v. *Canada (Minister of Citizenship and Immigration)*, 2001 FCT 494). It was submitted that the applicant was attempting to reargue the case he did not make before the Board, and that it was not patently unreasonable for the officer to give less weight to his last minute PRRA application, which was not supported by new evidence of exceptional risk. The respondent noted that under section 165 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations), subsequent PRRA applications do not result in a stay of a removal order. Therefore, there were arguably fewer circumstances in which officers would be justified in ignoring the positive obligation to remove a person as soon as reasonably practicable. It was submitted that absent allegations of risk stemming from changed country conditions, the officer ought not to defer on the basis of risk.

[20] The respondent submitted that the officer's reasons were adequate. It was submitted that enforcement officers were not required to provide formal reasons, and there was no duty upon them to address every aspect of a deferral request (see *Hailu* v. *Canada (Solicitor General)*(2005), 27 Admin.L.R. (4th) 222, 2005 FC 229). Unlike the case in *Shawesh* above, the officer indicated that given that the applicant had already had a PRRA and had failed to appear for removal in the past, deferral was not warranted. It was submitted that the applicant failed to point to any new evidence

submitted in his second PRRA which established that he faced a new or exceptional risk if he returned to Russia (see subsection 113(a) of IRPA). The respondent submitted that it was therefore not patently unreasonable for the officer to refuse to undertake a substantive review of the applicant's last-minute PRRA application.

Applicant's Reply

[21] The applicant submitted that the application for judicial review was not moot. It was submitted that the fact that a stay of removal on an interim injunction granted the underlying judicial review was precisely the reason why the Court should not simply apply the serious issue test, but should go further and examine the merits of the application (see *Wang* v. *Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 682, 2001 FCT 148).

[22] The applicant submitted that his second PRRA application should not be characterized as a "last-minute" application, as it was filed prior to any removal arrangements being made. The applicant submitted that the doctrine of "clean hands" did not apply, since he was seeking a statutory remedy. In the alternative, it was submitted that discretionary relief should be granted. The applicant submitted that as articulated in *Thanabalasingham* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FCA 14, the Court should attempt to strike a balance between maintaining the integrity of the judicial process and the protection of human rights.

[23] The applicant submitted that while the standard of review applicable to a decision to defer removal was reasonableness (see *Adviento* above), the officer's decision was also reviewable on the more deferential standard of patent unreasonableness. It was submitted that the applicant's proof that he was Chechen was new and qualified as new evidence under subsection 113(a) of IRPA.

Analysis and Decision

Standard of Review

[24] This Court has held that the decision of removal officers to defer removal is subject to a high level of deference, given the nature of the statutory scheme and the limited, fact driven discretion they exercise under subsection 48(2) of IRPA. The decision is thus reviewable on the standard of patent unreasonableness (see *Hailu* above).

[25] **Mootness**

The respondent submitted that this matter was moot. I have reviewed the order dated May 19, 2006, staying the removal of the applicant made by Justice Beaudry. Justice Beaudry stayed the applicant's removal "until the application for judicial review is determined by the Federal Court". Accordingly, I must deal with the application for judicial review otherwise, the order of Justice Beaudry would continue to be in force. The matter therefore is not moot.

[26] **Issue 1**

Did the officer err in refusing to defer the applicant's removal?

Immigration officers have very limited discretion to defer removal orders. Federal Court jurisprudence has established that officers may consider factors such as: (1) the existence of a pending H&C application that was filed in a timely manner; (2) medical problems; (3) the arrangement of travel documents; and (4) threats to personal safety (see *Boniowski* v. *Canada (Minister of Citizenship and Immigration)* (2004), 44 Imm.L.R. (3d) 31, 2004 FC 1161), when deciding whether to defer removal. Justice Pelletier stated the following regarding the duties of removal officers at paragraphs 47 to 50 of *Wang* above:

> […] The Minister is under a positive obligation to execute removal orders, which are lawful orders, generally made by persons other than the Minister who hold designated offices with a specific grant of authority to make such an order. These orders are not mere administrative arrangements which the Minister can alter at her convenience. In fact, the Minister is precluded from issuing a Ministerial permit to a person who is subject to a removal order which is compelling evidence that the Minister is intended to execute removal orders as opposed to rendering them ineffective.
>
> It has been recognized that there is a discretion to defer removal though the boundaries of that discretion have not been defined. The grant of discretion is found in the same section which imposes the obligation to execute removal orders, a juxtaposition which is not insignificant. 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. The consequences of removal in those circumstances cannot be made

> good by readmitting the person to the country following the successful conclusion of their pending application. […]
>
> **(**Emphasis Added)

[27] The following are relevant dates in this case:

- November 3, 2004: First PRRA refused.
- January 5, 2005: Original removal date, applicant does not appear.
- January 6, 2005: Warrant for applicant's arrest issued.
- May 2005: H&C application filed.
- November 29, 2005: Applicant arrested (subsequent date of removal set for January 4, 2006).
- December 9, 2005: Second PRRA application submitted.
- December 21, 2005: Deferral of removal requested and subsequently refused.

[28] The applicant submitted that the officer's decision not to defer removal should be quashed because it did not demonstrate any consideration of the risks he would face if returned to Russia. It is well established that the applicant bears the onus of presenting compelling evidence in support of his request for deferral (see *John* v. *Canada (Minister of Citizenship and Immigration)*, 2003 FCT 420). In support of his request for deferral, the applicant submitted all of the documents filed with his second PRRA application, including:

- three affidavits attesting to his Chechen identity;
- a photocopy of his restored birth certificate;
- a photocopy of his Soviet workbook;
- documentation regarding country conditions facing Chechens; and

- a letter from Amnesty International.

[29] The officer was aware that the applicant's initial PRRA had been rejected because he had not established his Chechen ethnicity, as this fact was outlined in the applicant's submissions. The documents submitted to the officer included a birth certificate which was re-issued on November 26, 2004, and indicated that the applicant was Chechen. The applicant stated that his original birth certificate had been destroyed when his family home was bombed. His sister mailed the re-issued certificate to him in late 2004, after both his refugee claim and first PRRA had been decided. The applicant explained that he had not attempted to obtain his birth certificate beforehand, because he believed that his military book and internal passport, which were submitted with his refugee claim, would have proved his ethnic identity. However, the Board questioned the authenticity of these documents and determined that the applicant had not established his ethnic identity. The applicant alleged that the Board lost his military book and internal passport when they were taken for forensic testing.

[30] Although the timing of the request and second PRRA application appear suspect, in my view, there was evidence of a serious threat to the applicant which warranted a deferral of removal. In particular, I would note that the applicant's re-issued birth certificate supported his contention that he was Chechen. Documentary evidence was also provided regarding the seriousness of the risks faced by Chechens returning to Russia. Section 15.13 of the immigration policy manual (ENF 10 Removals) states:

> **Subsequent PRRA applications**
>
> A person who receives a negative PRRA decision and who remains in Canada following notification under R160 may make another application…Pursuant to R165, a subsequent application does not result in a stay of removal and removal arrangements can proceed. In limited cases, exceptional circumstances may warrant the deferral of removal pending a subsequent PRRA decision…

[31] In my view, the officer's decision not to defer the applicant's removal until the completion of the second PRRA was patently unreasonable. There were exceptional circumstances in this case which warranted a deferral of removal, including the Board's mismanagement of the applicant's identity documents, and the fact that the applicant had submitted a newly available birth certificate which had not previously been considered. The applicant provided the officer with both personal and documentary evidence regarding the seriousness of the risk he faced should he be removed from Canada.

[32] The application for judicial review is therefore allowed, and the decision not to defer removal is set aside.

[33] Because of my finding on the issue of mootness and the first issue, I need not deal with the other issues.

[34] Neither party wished to submit a serious question of general importance for my consideration for certification.

JUDGMENT

[35] **IT IS ORDERED that** the application for judicial review is allowed and the decision not to defer removal is set aside.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.:

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 it must be enforced as soon as is reasonably practicable.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.
113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit:
(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

The *Immigration and Refugee Protection Regulations*, S.O.R./2002-227:

165. A person whose application for protection was rejected and who has remained in Canada since being given	165. La personne dont la demande de protection a été rejetée et qui est demeurée au Canada après la délivrance de

notification under section 160 may make another application. Written submissions, if any, must accompany the application. For greater certainty, the application does not result in a stay of the removal order.

l’avis visé à l’article 160 peut présenter une autre demande de protection. Les observations écrites, le cas échéant, doivent accompagner la demande. Il est entendu que la demande n’opère pas sursis de la mesure de renvoi.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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