Date: 20090304

Docket: IMM-908-08

Citation: 2009 FC 231

Toronto, Ontario, March 4, 2009

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

BERNICE MAY WATSON

Applicant

and

**THE MINISTER OF PUBLIC SAFETY
(CANADA BORDER SERVICE AGENCY) and
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Bernice May Watson (the "Applicant") seeks judicial review of the decision of an Enforcement Officer, Canada Border Services Agency (the "Officer") dated February 25, 2008. In that decision, the Officer refused the Applicant's request to have her removal from Canada deferred, which removal had been scheduled for February 29, 2008.

[2] By Order dated February 25, 2008, Justice Kelen stayed the execution of the removal order. He found that the refusal to defer was based on a patently unreasonable finding made by the Officer, that is the finding that there was no evidence presented to show that the Applicant's husband was incapable of or unwilling to care for or arrange care of his sons and further, that there was an outstanding application based on humanitarian and compassionate circumstances concerning the Applicant's rehabilitation after her conviction for possession of narcotics and fraud over $5,000.00, as well as the care of her Canadian born children.

[3] The Applicant, a citizen of Jamaica, entered Canada in September 1986. In August 1991, a deportation order was issued against her.

[4] In March 1998, the Applicant was convicted of possession of narcotics. In April 2001, she was convicted of fraud over $5,000.00. In May 2002, her first H. & C. application was rejected on grounds of criminality.

[5] In June 2006, the Applicant filed a Pre-Removal Risk Assessment ("PRRA") application. In February, she was directed to report for removal on March 1, 2007. She failed to appear and went into hiding. She was arrested on January 18, 2008 and placed in immigration detention.

[6] On March 16, 2007 the Applicant began a second H. & C. application.

[7] In April 2007, the Applicant's PRRA application was refused.

[8] The Applicant was again directed to appear for removal on February 29, 2008. Her request to defer removal had been denied by the Officer on February 25, 2008. In her decision, the Officer noted that there was no evidence about the ability or willingness of the Applicant's husband to care for their Canadian-born children.

[9] The Applicant sought leave to file a further affidavit in response to the further Memorandum filed by the Minister of Citizenship and Immigration (the "Respondent"). In this affidavit, which was filed by leave of the Court, the Applicant deposed that she now holds a work permit issued on April 4, 2008 and authorizing her to work until April 3, 2009.

[10] Two issues arise from this application. First, is the application moot and if so, should the Court exercise its jurisdiction to hear it on the merits? Second, if the matter is heard on the merits, did the Officer commit a reviewable error?

[11] Both parties addressed the issue of mootness. I note in particular, the submissions of the Respondent that the Court should exercise its discretion to hear the matter, having regard to the test in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

[12] The Respondent argued that the parties remain in an adversarial relationship, that the resources of the Court have already been expended, that a hearing date had been set and submissions filed. A decision on the merits would avoid a continuing pattern of removal dates, stay

motions and judicial reviews. Third, a decision on this matter would raise no concern about this Court's proper adjudication role as the arguments are limited and could provide guidance to removals officers in the future in exercising their limited discretion to defer removal.

[13] The Respondent argues that the decision of the removals officer is reasonable.

[14] For her part, the Applicant submits that in asking the Court to hear this matter, the Respondent is demonstrating his continuing intention to remove her, notwithstanding the fact that she now holds a valid temporary work permit. She says that this means that she now has status in Canada.

[15] In any event, the Applicant also argues that the Officer's decision is not reasonable. She says that the officer's finding that there was no evidence about the father's ability or willingness to look after her children is contrary to the evidence that was submitted with the deferral request.

[16] Further, the Applicant submits that the Officer breached the requirements of procedural fairness by failing to provide adequate reasons for her decision.

Discussion and Disposition

[17] The matter is moot because the date of removal has passed. In this regard, see *Baron v. Canada (Minister of Public Safety and Emergency Preparedness* (2008), 69 Imm. L.R. (3d) 293

(F.C.). The removal order remains effective, only its execution has been delayed as the result of the stay Order made on February 28, 2008.

[18] In *Weekes (Litigation Guardian of) v. Canada (Minister of Public Safety and Emergency Preparedness)*, 73 Imm. L.R. (3d) 294 (F.C.), at paragraphs 33 to 35 I discussed the basis for the exercise of discretion when a matter is moot, in light of the principles discussed in *Borowski*.

[19] I accept the submissions of the Respondent regarding the exercise of my discretion. The principal factor in that regard is that removals officers may benefit from judicial review regarding their limited discretion to defer execution of a removals order, pursuant to subsection 48(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 which provides as follows:

Effect	Conséquence
48.(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.	48.(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.

[20] I am satisfied that I should hear this case and deal with the decision of the Officer on its merits. In light of prior jurisprudence as to the appropriate standard of review to be applied to a decision to refuse deferral, I refer to the instructions given by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. In my opinion, the applicable standard of review is that of reasonableness.

[21] The Officer's decision contains the following statement:

> No evidence presented that Mr. Hanslip in [*sic*] incapable or unwilling to care for or to arrange for care for his sons.

[22] This statement is unreasonable. It is not supported by the evidence. The evidence is open to interpretation and the Officer failed to do that. The task of the Officer is to engage in a limited weighing of the evidence. A broad statement that there is "no evidence" when the record shows otherwise is unreasonable and will serve only to invite avoidable proceedings before this Court.

[23] Although my finding as to the reasonableness of the Officer's decision is sufficient to allow this application, I choose to comment upon the Applicant's submissions concerning her status in Canada.

[24] The Applicant holds no status in Canada as a result of having been issued a temporary worker's permit. That is clear from the *Immigration and Refugee Protection Regulations*, SOR/2002-227, section 202, as follows:

Temporary resident status	Statut de résident temporaire
202. A foreign national who is issued a work permit under section 206 or paragraph 207(*c*) or (*d*) does not, by reason only of being issued a work permit, become a temporary resident	202. L'étranger qui se voit délivrer un permis de travail au titre de l'article 206 ou des alinéas 207*c*) ou *d*) ne devient pas, de ce seul fait, résident temporaire.

[25] In the result, this application for judicial review is allowed and the decision of the Officer is quashed. There is no question for certification arising.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is allowed and the decision of the Officer dated February 25, 2008 is quashed, no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-908-08
STYLE OF CAUSE:	BERNICE MAY WATSON v. THE MINISTER OF PUBLIC SAFETY (CANADA BORDER SERVICE AGENCY) and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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