Federal Court  Cour fédérale

Date: 20120416

Docket: IMM-5980-11

Citation: 2012 FC 435

Ottawa, Ontario, April 16, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

CECIL ROY DOMAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review from the Decision of the Inland Enforcement Officer of the Canadian Border Services Agency [CBSA], dated August 26, 2011, in which the Officer rejected Mr. Doman's request for a deferral of his removal from Canada to the United Kingdom [the Decision]. Mr. Doman was seeking a deferral until a decision is rendered in his pending application for humanitarian and compassionate [H&C] consideration, made under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant argues that the Decision should be set aside because the Officer failed to properly consider the best interests of the Applicant's son and ignored the cumulative impact of the various negative consequences of the removal, which are asserted to include separation of a very interdependent family unit, unusual hardship for the Applicant and a negative effect on Mr. Doman's pending H&C application. In support of these arguments, the Applicant asserts that I should give considerable weight to the Order issued by Justice Near in granting an interim stay of the removal order in this matter (IMM-5980-11, dated 2011-09-07). The Applicant argues that in granting the stay, Justice Near was required to give close scrutiny to the merits of this application, and could only grant the stay if he were satisfied that there was a good likelihood of success in the instant application.

[3] The Respondent, for its part, submits that the Decision must be maintained because it is reasonable. More specifically, the Respondent asserts that the Officer was required to only provide a cursory review of the issues raised by the Applicant, did consider these issues, and that the determination reached was reasonable in light of the record before the Officer. As for Justice Near's stay Order, the Respondent argues that it provides little or no authority as the issues before him were different from those which arise in this application for judicial review.

[4] The issue of the effect of Justice Near's stay Order can be disposed of quickly as it is firmly settled that the reasons offered on a motion for an interim stay are not binding on the judge hearing the merits of the application because the issues before the stay judge and the judge hearing the merits of the case are different. That is so even where, as here, the motions judge is required to apply a more stringent test in evaluating whether the application raises a serious issue (*Wang v*

Canada (Minister of Citizenship and Immigration), 2001 FCT 148, [2001] 3 FC 682 at para 9; *Haghighi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 372 at paras 15-18 and 35-36; and *Williams v Canada*, 2010 FC 274 at para 29, [2011] 3 FCR 198). Moreover, as is common, Justice Near gave brief treatment to the merits of this application, stating only that he was "… of the view that the Applicant had raised a serious issue with respect to the analysis of his son's dependency and the short term interests of his son" (at para 2 of the Order). Given the non-binding nature of Justice Near's Order and its brevity, the Order provides very little authority in support of the Applicant's position in this matter.

[5] To understand the Applicant's other arguments, it is necessary to review the relevant factual background and the Officer's reasoning in the Decision.

I. BACKGROUND

[6] Mr. Doman was born in Jamaica in 1947. He relocated to England with his mother in 1962 and obtained U.K. citizenship in approximately 1965. Sometime between 1965 and 1987, Mr. Doman's mother came to Canada and obtained Canadian citizenship. In 1987, Mr. Doman came to Canada on a visitor's visa, following his mother's death due to a medication error at a hospital. Mr. Doman was required to spend some time in Canada to attend to the court proceedings that followed his mother's death and to deal with her estate. He renewed his visitor's visa for a period, but it expired in 1989. After the expiry of his visitor's visas, Mr. Doman elected to remain in Canada and took no steps to regularise his status until very recently, when his illegal presence in the country came to the attention of immigration authorities. Mr. Doman has worked at a variety of largely unskilled jobs in Canada and has paid taxes on his employment earnings.

[7] Mr. Doman had a son, named Steven Miles, in 1990. When Steven was three years old, his mother abandoned him. Ever since, he has resided with Mr. Doman, who has been his sole source of financial and emotional support. While in school, Steven was determined to suffer from a learning disability, and in accordance with the provisions of the Ontario *Education Act*, RSO 1990, c E.2, Individual Education Plans [IEPs] were developed for him. The only evidence of Steven's learning disability that was before the Officer was contained in the 2009 IEP, which noted that Steven suffered from a "mild intellectual disability". The accommodations he was afforded included behaviour management coaching, alternative work spaces and extended deadlines. Steven is currently enrolled in a college program to train as an electrician, from which he is scheduled to graduate in 2012. Thereafter, he will need to work as an apprentice to achieve certification.

[8] After Mr. Doman came to the attention of the immigration authorities in 2010, he submitted a pre-removal risk assessment [PRRA] application, which was rejected on September 30, 2010. Mr. Doman was advised of the rejection of his PRRA application on November 8, 2010. On the same date, he made a deferral request, requesting the deferral of his removal until after the Christmas holidays. The CBSA officer, then charged with handling Mr. Doman's file, told him that his deferral request would not be granted but, as a removal date had not then been set, the deferral was not in process. Mr. Doman elected to purchase his own return ticket to the U.K., and was to attend for an interview with CBSA on November 12, 2010, with the ticket in hand. Mr. Doman failed to purchase the ticket, and during his interview on November 12, was ordered to re-attend, three days later, with the ticket. On November 15, Mr. Doman failed to appear for his scheduled interview. He came in to meet with CBSA a few days later, claiming that he had mixed up the date of his interview due to a

miscommunication, but still did not have a ticket, and stated that he would not be able to purchase one. Accordingly, CBSA made arrangements to purchase his ticket for him.

[9] Mr. Doman received a direction to report for removal on November 26, 2010. The removal was scheduled for January 6, 2011, thereby allowing Mr. Doman is to spend Christmas in Canada, as he had wished. However, the removal was cancelled on December 22, due to travel documentation impediments. A travel document was not issued until June 17, 2011. On August 9, 2011, Mr. Doman filed his H&C application. The next day, a new direction to report for removal was served upon Mr. Doman. The removal was originally scheduled for September 9, 2011. On August 10, 2011, Mr. Doman made to a request for deferral of his removal, which culminated in the Decision that is the subject of the instant application for judicial review.

II. THE DECSION

[10] In the Decision, the Officer considered the best interests of Steven, and, indeed, quoted verbatim from the submissions made by counsel for the Applicant regarding the difficulties Mr. Doman alleged Steven would face if the Applicant were returned to the U.K. After considering the submissions, the Officer noted that he was "sensitive to the fact that the removals process can be difficult" and acknowledged that the execution of the removal order "may require a period of adjustment for Steven". He went on to note that Steven, as a Canadian citizen, would be entitled to benefit from Canadian social programs. The Officer concluded on this point that insufficient evidence had been provided in the deferral request to demonstrate that Steven would be unable to find employment in Canada or that he would "… suffer negative consequences to his education if his father … were removed from Canada".

[11] The Officer then considered the degree of Mr. Doman's establishment in Canada and the hardship he would face if he were returned to the United Kingdom. Factors he considered included: the length of time Mr. Doman had been in Canada, his age, the fact he had always worked full-time in Canada, his lack of criminal record, the fact that he did not own property or a business in Canada and his claim that he would be homeless if returned to the U.K., which was based solely on Mr. Doman's statement as to what he was allegedly told by an employee of the British Consulate. In this regard, Mr. Doman claimed that he had contacted the Consulate to inquire about what shelter might be available to him in the U.K. and was informed that there was “nothing available" due to the slow economy. Based on these considerations, the Officer concluded that the degree of Mr. Doman's establishment in Canada did not necessitate a deferral of the removal order.

[12] The Officer next considered the Applicant's outstanding H&C application, noting that it would not be decided for approximately 20 months and that it had been filed only days earlier and 13 months after Mr. Doman was deemed “ removal ready”, when he was informed of the negative decision on his PRRA application. The Officer also noted that IRPA does not contain a provision to stay the enforcement of a removal order due to pending H&C applications and that CBSA has an obligation under section 48 of IRPA to carry out removal orders as soon as reasonably practicable. The Officer concluded that a deferral of Mr. Doman’s removal from Canada was not warranted and directed him to report for removal on September 9, 2011, as had been scheduled.

III. ANALYSIS

[13] The standard of review applicable to the Decision is that of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25, [2010] 2 FCR 311 [*Baron*]; *Canada (Minister of Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at para 27, [2011] FCJ 1454 (FCA), [*Shpati*]). The reasonableness standard is a deferential one and requires the Court to review both a tribunal's reasons and the record before the tribunal. The Court may intervene only if it is satisfied that the reasons of the tribunal are not "justified, transparent or intelligible" and that the result does not fall "within the range of possible, acceptable outcomes which are defensible in respect of facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

[14] In assessing the reasonableness of the Decision, it is important to recall the function of the Officer under section 48 of IRPA. This Court and the Federal Court of Appeal have often noted that removals officers are afforded only limited discretion under the legislation (see, e.g., *Baron* at para 49; *Shpati* at para 45; and *Williams* at para 31). Indeed, this is apparent from the wording of the Act itself. Section 48 provides:

Enforceable Removal Order	Mesure de renvoi
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.
Effect	Conséquence
(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	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que

reasonably practicable.

les circonstances le permettent.

[15] Under the clear wording in section 48, those subject to an enforceable removal order *must* leave Canada as soon as "reasonably practicable". CBSA officers' discretion, therefore, is limited to determining when the earliest point is at which departure will be "reasonably practicable". As Justice Zinn noted in *Williams* at paras 32-35, the case law essentially recognizes three types of situations where a deferral may be granted by a removals officer. These are:

1. Where the originally selected date is not viable, due to difficulties with travel arrangements, such as the unavailability of travel documents or transportation;
2. Where there are other factors that render the originally-selected date impracticable, such as the need for children to finish the school year or imminent birth or death of one of the individuals to be removed from Canada; and
3. Where a pending process under IRPA, which might result in landing, would be rendered nugatory by the removal.

[16] The final type of situation has given rise to most of the litigation before this Court. In *Baron* and *Shpati*, above, the Federal Court of Appeal clearly indicated that the mere fact that there is a pending application for a pre-removal risk assessment or for H&C consideration does not warrant a deferral of removal being granted. Rather, "special circumstances" must exist with respect to the pending process. Those special circumstances will include situations where the failure to defer will expose the person to the risk of death, extreme sanction or inhumane treatment (*Baron*, above, at para 51, *Wang*, above at para 41). Beyond that, such circumstances have sometimes been found to include situations where an H&C application was filed in a timely way, but has been backlogged for

a lengthy period (*Simoes v Canada (Minister of Citizenship and Immigration*), [2000] FCJ No 936, 7 Imm LR (3d) 141 (Fed TD), at para 12; *Villanueva v Canada (MPSEP)*, 2010 FC 543 at para 35). If these circumstances exist, then, as Justice Zinn noted in *Williams* at para 38, the officer will turn his mind to whether a deferral is warranted. This requires consideration of a number of factors, including:

> [t]he conduct of the applicant such as whether he or she has observed the Act's requirements or acted in a manner that subverts the provisions of the Act, whether there are other reasons advanced for the deferral which warrant consideration, and the period of deferral that is being sought or is likely to result. … The officer is merely required to consider the relevant factors present in the circumstances before him.

[17] The reasons advanced for the deferral in such circumstances may include the best interests of any impacted children, which the officer will be required to consider if the other factors pertain. However, as Justice Pinard noted in *Turay v Canada (Minister of Public Safety and Emergency Preparedness)* 2009 FC 1090 at para 21, [2009] FCJ 1369 [*Turay*]), "… removals officers need only consider the short term interests of the children and not in any great detail." It has often been said in this regard that a CBSA removals officer need not and should not engage in a "mini-H&C analysis" (*Chetaru v Canada (Minister of Public Safety and Emergency Preparedness*), 2009 FC 436, at para 18; *Munar v Canada(Minister of Public Safety and Emergency Preparedness*), 2005 FC 1180 at para 36, [2005] FCJ 1488).

[18] There is certain support in the case law for the proposition that an individual, over the age of majority, may be considered a "child" for the purposes of analysis required under section 48 of IRPA (*Naredo v Canada (Minister of Citizenship and Immigration)* (2000), 192 D.L.R. (4th) 373,

[2000] FCJ No 1250 at para 20; *Yoo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 343 at para 32, 343 FTR 253). However, there is also authority to the opposite effect (*Saporsantos Leobrera v Canada (Minister of Citizenship and Immigration)*, 2010 FC 587 at para 63, [2010] FCJ 692).

[19] Applying these principles to the present application, it is clear that Officer's Decision is reasonable.

[20] Assuming, without deciding, that Steven, who is now 22 years old, is a “child” whose interests needed to be considered by the Officer, the Officer did consider all the points that were relevant to Steven’s situation. The Applicant argues that the Officer should have provided more detailed reasoning in his consideration of Steven’s best interests. In my view, there is no merit in this submission for several reasons.

[21] First, and most importantly, this submission invites the Court to engage in a minute parsing of the way in which the Officer wrote his reasons. This is precisely the sort of review that the reasonableness standard mandates is not warranted. Rather, the authorities direct that a deferential approach is required and that a decision may be set aside only if the reasons are not justified, transparent or intelligible *and* if the result is not within the range of possible, acceptable outcomes which are defensible in respect of facts and law. Neither may be said of the Decision.

[22] In terms of the reasons, they are understandable and thus are “transparent and intelligible”. They are also “justified”. Lengthy reasons were not required. As noted in *Turay*, the Officer was not

required to give a fulsome and extensive consideration to the arguments made regarding Steven's interests. Rather, he was with required to simply consider the points made. He did this.

[23] In terms of result, the Officer premised his Decision on the lack evidence regarding the alleged inability of Steven to obtain employment or complete his education without the presence of his father in Canada. As already noted, the only evidence before the Officer regarding Steven's disability was the IEP. In my view, in light of the paucity of evidence, the Officer's conclusion regarding Steven's best interests is certainly reasonable. There is nothing to set Steven apart from any other child with a learning disability, who might be required to work or obtain a student loan to finance his or her education.

[24] As concerns the Officer's alleged failure to consider the cumulative nature of the other factors raised in the deferral request, this submission must likewise fail. The Officer, once again, did consider each and every one of the points raised by the Applicant. Moreover, in my view, the Officer's ultimate determination was more than reasonable on the facts of this case. In this regard, the Applicant had remained illegally in Canada for approximately 22 years. He did not file his H&C application until the 11th hour, and that application has not been mired in a ministerial backlog. Moreover, there was no reliable evidence before the Officer regarding what is likely to transpire to Mr. Doman upon his return to the Great Britain. It is pure speculation for the Applicant to assert that he will be unable to find employment in U.K., when he has been able to do so for the past 22 years in Canada.

IV. CONCLUSION

[25] In light of the foregoing, there is no basis for the Court to interfere with the Decision as the Officer did not commit any reviewable error. Accordingly, this application for judicial review must be dismissed.

[26] No question for certification under section 74 of IRPA was presented and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review of the Decision is dismissed;

2. No question of general importance is certified; and

3. There is no order as to costs.

"Mary J.L. Gleason"
Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5980-11
STYLE OF CAUSE:	*Cecil Roy Doman v The Minister of Public Safety*
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 21, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	GLEASON J.
DATED:	April 16, 2012

APPEARANCES:

Ms. Naseem Mothoowani	FOR THE APPLICANT
Mr. Manuel Mendelzon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lorne Waldman, Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan, Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT