Federal Court  Cour fédérale

Date: 20130507

Docket: IMM-9467-12

Citation: 2013 FC 478

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, May 7, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

NELLY JANET ARRECHAVALA DE ROMAN

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The applicant is seeking judicial review of a decision dated September 4, 2012, by a Canada Border Services Agency [CBSA] enforcement officer, in which the officer denied the application to stay the execution of the applicant's removal order and decided that her deportation order was enforceable as of September 16, 2012.

[2] On September 14, 2012, fearing that the applicant's medical condition would be irreparably harmed by removing her immediately, Justice Simon Noël ordered an interim stay of enforcement of the impugned removal order pending a final decision on the officer's application for judicial review.

II. Facts

[3] The applicant, Nelly Janet Arrechavala de Roman, left her country, Guatemala, on April 25, 2007, to come to take care of her mother who lives in Canada and who was suffering from health problems at that time. Since then, the applicant has been without status in Canada. Her refugee claim, her application for permanent residence on humanitarian and compassionate considerations [H&C] and her pre-removal risk assessment [PRRA] were all denied, respectively on November 23, 2009, October 27, 2011, and December 5, 2011.

[4] In the month of April 2010, while she was in the process of regularizing her status in Canada, the applicant was diagnosed with a high grade neuroendocrine cancer with regional lymph node metastases, a rare colon cancer. According to the medical evidence in the record, she was hospitalized for a splenic flexure obstruction on April 3, 2010, then underwent emergency surgery on April 22, 2010. She was subsequently treated with a course of chemotherapy that lasted until the end of January 2011, and serial examinations were planned for the coming years (letter from Dr. Valérie Leblanc).

[5] Although the applicant's medical condition has progressed favourably since her treatments began, the medical evidence in the record indicates that the applicant's condition requires close monitoring. She wears a subcutaneous catheter to keep her [TRANSLATION] "substantial risk of recurrence" under observation (letter from Dr. Émilie Comeau, CHUS-Hôpital Hôtel-Dieu [hospital]). Both physicians recommend that the applicant remain in Canada for appropriate follow-up.

[6] On May 24, 2012, the officer dealing with the applicant's application for a stay of the removal order sent her counsel an e-mail from Dr. Patrick Thériault of the Health Management Branch, Citizenship and Immigration Canada [CIC], in which he stated:

> We have reviewed the medical material submitted on this client.
> It appears this client was diagnosed with a very aggressive colon tumour for which she received chemotherapy treatment in April 2010.
> She requires follow-up care.
> She is considered fit to fly according to IATA.
> There are medical services in Guatemala including oncology services that can provide her with follow up for her condition.

[7] On June 21, 2012, the applicant sent the officer a letter from Dr. Luis Rosada Moran, deputy medical director of the Institut de cancérologie Dr Bernardo del Valles, stating that the tests requested by her treating physician were not available in their institution. In her view, it is preferable that the tests be conducted in Canada where the applicant's treatment began.

[8] In response to that letter, on July 20, 2012, the officer sent counsel for the applicant an e-mail from Dr. Thériault. This second e-mail reads as follows:

> [Ms. Arrechavala de Roman] was diagnosed with a rare colon cancer in 2010 for which she received surgery and chemotherapy in Canada.

> She now requires specialized follow-up investigation (blood test and PET scan).
> She does not require escort for her transfer to Guatemala.
> PET scan is available in Guatemala as well as specialized oncologist follow-up.
> There are also tertiary care services in neighboring countries such as Mexico and Panama.

[9] The applicant's application for a stay of the removal order was denied on September 4, 2012; that decision is the subject of this judicial review.

[10] On September 12, 2012, the applicant filed a new H&C application from within Canada. The application is currently outstanding.

III. Issues

[11] The applicant essentially disputes the assessment of her medical evidence, which indicates that she presents a substantial risk of recurrence of the cancer that she suffered, that she needs appropriate medical follow-up to monitor and manage this risk and that in Guatemala she will not be able to access the care and medical tests required by her treating physicians in Canada. Moreover, the applicant submits that the officer did not consider the harm that her immediate removal to Guatemala would cause given her medical condition.

[12] Thus, the two issues raised in this application for judicial review are the following:

a. Did the enforcement officer err by not considering the special circumstances surrounding the application, i.e. the applicant's medical condition?

b. Was the officer's refusal to grant a stay of the applicant's removal order justified having regard to all the evidence on record?

IV. Relevant statutory provisions

[13] The authority granted to enforcement officers is set out in section 48 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Section 20 of the *Protecting Canada's Immigration System Act*, SC 2012, c 17 [amending act], which came into force on December 14, 2012, amended subsection 48(2) of the *IRPA*. That provision now reads as follows:

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.

[Emphasis added]

[14] In its previous version, subsection 48(2) of the *IRPA* read as follows:

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.

[Emphasis added]

[15] The issue of whether and to what extent the amendment to section 48 of the *IRPA* changed the mandate of enforcement officers, who must now consider whether it is "possible" to enforce the removal order instead of deciding whether the removal is "reasonably practicable" given the special circumstances of the application (*Baron v Canada (Minister of Public Safety and Emergency*

Preparedness), 2009 FCA 81, [2010] 2 FCR 311), does not arise in this case. The impugned decision was made under the previous version of the provision. The parties did not address the legislative change in their written representations, and the Court will not consider it for the purposes of this application for judicial review.

V. Applicable standard of review

[16] In *Baron*, above, at paragraph 25, Marc Nadon J.A. of the Federal Court of Appeal determined that the applicable standard of review for an enforcement officer's decision refusing to stay a removal is reasonableness (*Hussain v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1544 at para 17-18 and *Canada (Minister of Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286).

[17] In applying the reasonableness standard to the officer's decision, the Court is concerned with "justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59). As Justice James O'Reilly stated in *Ramada v Canada (Solicitor General)*, 2005 FC 1112, "it is only where [enforcement officers] have overlooked an important factor, or seriously misapprehended the circumstances of a person to be removed, that their discretion should be second-guessed on judicial review" (at para 7).

[18] Thus, in *Turay v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1090, Justice Yvon Pinard summarized some factors that may be decisive when the Court assesses the reasonableness of an enforcement officer's decision made in the exercise of the officer's discretion:

> [15] The applicable standard of review of an enforcement officer's decision refusing to defer an applicant's removal from Canada is that of reasonableness (*Baron v. Minister of Public Safety and Emergency Preparedness*, 2009 FCA 81). The court should intervene if the decision of the removals officer was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 47). If the court concludes there has been a faulty analysis of the best interests of the children, the enforcement officer's decision will be rendered unreasonable (*Kolosovs v. Minister of Citizenship and Immigration*, 2008 FC 165).
>
> [16] The removals officer's source of power is subsection 48(2) of the Act which imposes a positive obligation on the Minister to execute a valid removal order. However, even on the narrowest reading of subsection 48(2) there are a number of variables that can influence the timing of a removal on a practicable basis as affirmed by Justice Denis Pelletier in *Wang v. Canada (M.C.I.)*, [2001] 3 F.C. 682 (T.D.). There are only two categories of factors that can affect the officer's decision: factual (practicable) and legal (reasonable). This was expressed in *Cortes v. Minister of Citizenship and Immigration*, (2007), 308 F.T.R. 69, at paragraph 10:
>
> > . . . removal must occur as soon as practicable, but only as soon as the practicability of the removal is reasonable. . . .
>
> It is well-established that the "enforcement officer's discretion to defer removal is limited" (*Baron, supra*, at paragraph 49).
>
> [17] Practicable considerations include "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" (*Simoes v. Canada (M.C.I.)*, [2000] F.C.J. No. 936 (T.D.) (QL) quoted in *Baron, supra*, at paragraph 49; see also *Hasan v. Minister of Public Safety and Emergency Preparedness*, 2008 FC 1100, at paragraph 8). In *Baron*, at paragraph 51, the Federal Court of Appeal affirmed the comments in *Wang, supra*, defining family hardship as a variable of low importance for a removals officer. Indeed, Justice Pelletier stated as follows:
>
> > [48] . . . 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. . . .

> [18] In *Mauricette v. Minister of Public Safety and Emergency Preparedness*, , 2008 FC 420, at paragraph 23, the Court explained reasonability to be:
>
> > . . . where there are compelling circumstances that make it necessary for the Officer to defer removal, then, justice would require that the Officer exercise that discretion.
>
> [Emphasis added]

VI. Analysis

Preliminary issue

[19] On September 19, 2012, the applicant wrote to the national league against cancer in Guatemala to find out whether it would be possible to continue the medical follow-up prescribed by her treating physician in Canada in her country. The applicant's record contains a letter dated September 24, 2012, in which Dr. Rosada Moran, deputy medical director of the Liga national contra el cancer [national league against cancer], confirms that, as the only specialized cancer treatment in Guatemala, their institute does not have available certain examinations that the applicant needs and that other examinations such as indoleactic acid, blood chromogranin and the PET scan have just been put in place.

[20] The Court concurs with the respondent that a review of the lawfulness of an administrative decision must be conducted on the basis of the evidence that was before the decision-maker. The applicant cannot supplement her evidence to complete her record at the judicial review stage. As a result, the letters submitted as Exhibits 13 and 14 in support of paragraphs 28-30 of the applicant's affidavit are inadmissible and excluded from the Court record.

[21] That said, this evidence only confirms the evidence that was already before the decision-maker when he issued his decision, in particular the letter from Dr. Rosada Moran.

(1) Did the enforcement officer err by not considering the special circumstances surrounding the application, i.e. the applicant's medical condition?

[22] In *Baron*, above, at paragraph 51, the Federal Court of Appeal repeated Justice Denis Pelletier's reasons in *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682, concerning an enforcement officer's discretion to defer a removal:

> - There are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths.
>
> - The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act. In considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission..
>
> - In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.
>
> - Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application. [Emphasis in the original].

[23] The respondent submits that, despite the peremptory wording of section 48 of the *IRPA*, officers who are enforcing removal orders on behalf of the Minister have "relatively narrow" or "very limited" discretion, that, in short, gives them "limited" flexibility to defer a removal (*Shpati*,

above, at para 45 and *Baron*, above, at para 49). The respondent contends that, in cases where there is no remedy that would allow the foreign national to come back to Canada, such as an application for permanent residence or an application for exemption based on humanitarian and compassionate considerations, the removals officer must determine whether the foreign national would be exposed to a risk of death, extreme sanction or inhumane treatment if returned to his or her country (*Shpati*, at para 51). Last, the respondent adds that where an application for exemption based on humanitarian and compassionate considerations is pending at the time of the application to defer the removal, the officer can exercise his or her discretion favourably only if the application for exemption is based on a threat to personal safety (*Shpati*, at para 43-44 and *Baron*, at para 50).

[24] *Shpati* and *Baron* did not change, but clarified, the law on stay applications. In *Ramada*, above, Justice O'Reilly noted:

> [3] . . . officers can consider whether there are good reasons to delay removal. Valid reasons may be related to the person's ability to travel (*e.g.* illness or a lack of proper travel documents), the need to accommodate other commitments (*e.g.* school or family obligations), or compelling personal circumstances (*e.g.* humanitarian and compassionate considerations). (See: *Simoes* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 936 (T.D.) (QL), *Wang* v. *Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 682 (T.D.) (QL), *Prasad* v. *Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 805 (T.D.) (QL); *Padda* v. *Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1353 (F.C.) (QL)). It is clear, however, that the mere fact that a person has an outstanding application for humanitarian and compassionate relief is not a sufficient ground to defer removal. On the other hand, an officer must consider whether exigent personal circumstances, particularly those involving children, justify delay.
> [Emphasis added].

[25] It is true that the mere existence of an application based on humanitarian and compassionate considerations cannot prevent the enforcement of a valid removal order unless there is a "threat to personal safety". The issue is whether the applicant's medical condition and the fact that she would

be deprived of the medical treatment she needs could have amounted to a threat to personal safety that the officer had to take into account.

[26] However, the applicant's argument that she has a new outstanding H&C application is irrelevant here because that application was submitted a week after the date of the officer's decision, i.e. on September 12, 2012. It has been clearly established that, on an application for judicial review, an applicant may not challenge a decision by relying on a question or fact that was not before the initial decision-maker unless the question goes to jurisdiction (*Toussaint v Canada (Labour Relations Board)*, [1993] FCJ No. 616 (QL/Lexis) (FCA), at para 5; *Chen v Canada (Minister of Citizenship and Immigration)* (2000), 157 FTR 307, [2000] FCJ No. 1954 (QL/Lexis), at para 9-12).

[27] That being said, the officer's discretion to defer the enforcement of a removal, as limited as it is, required him to be satisfied that the applicant's medical condition would not be jeopardized if she returned to Guatemala. The Court is not convinced that the officer considered and reasonably assessed all the medical evidence to ensure that an immediate removal would not expose the applicant to the significant and imminent risks that her treating physicians attested to.

(2) Was the officer's refusal to grant a stay of the applicant's removal order justified having regard to all the evidence on record?

[28] With respect, the officer's decision is untenable when one considers the medical evidence adduced by the applicant, both with respect to the risks and the course of her disease, and the availability of the medical services required for her treatment in her country. Because the applicant was not given any specific reason in support of the decision under review, the Court can only

presume that the decision was made on the basis of the opinion of the CIC consultant, Dr. Thériault. There are two short e-mails in which Dr. Pelletier noted that the applicant had a "rare" and "aggressive" colon cancer and stated, without any basis, that the medical services required for the applicant's condition exist in Guatemala and in neighbouring countries. The Court notes that the applicant did not meet with Dr. Thériault (applicant's affidavit, at para 26), and his opinion is based essentially on the applicant's medical file.

[29] Even more important, that evidence is contradicted on a balance of probabilities by the applicant's evidence showing that not only is this an unusual case, which the CIC medical consultant confirmed, but also that the care and examinations required for the necessary follow-up treatments are not available in Guatemala. Following *Shpati*, above, at paragraph 41, the enforcement officer could not simply refuse to defer the removal on the basis of the risks alleged by the applicant because new evidence concerning those risks had been submitted.

[30] The officer completely underestimated this risk, which goes to the applicant's health and life, by relying only on Dr. Thériault's e-mails. Assuming he knew about the health services available in Guatemala and in the neighbouring countries, it is totally unreasonable to require the applicant to travel to those countries to undergo the tests and treatments that are necessary for her condition. Although there are no grounds that permit the Court to ensure that the officer seriously examined the applicant's allegations and evidence, it is obvious that the officer was not sensitive to the seriousness of the applicant's unique and personal circumstances and, in that sense, did not reasonably exercise the discretion he has under subsection 48(2) of the *IRPA*.

VII. Conclusion

[31] For all the above reasons, the Court allows the applicant's application for judicial review. The officer's decision is set aside, and the matter is returned for reconsideration by another enforcement officer.

[32] Counsel for the respondent requested that the Minister of Public Safety and Emergency Preparedness, who is responsible for making and enforcing removal orders, be substituted for the Minister of Citizenship and Immigration for the purposes of this judicial review application in accordance with the *Department of Public Safety and Emergency Preparedness Act*, SC 2005, c 10, and the decision dated April 4, 2005, PC 2005-0482, and the Court concludes that the application for judicial review be allowed and that the case be returned for redetermination by another enforcement officer.

JUDGMENT

THE COURT ORDERS as follows:

1. The applicant's application for judicial review is allowed, and the case is returned for redetermination by another enforcement officer;

2. No question of general importance to be certified;

3. The style of cause is amended so that the Minister of Public Safety and Emergency Preparedness replaces the Minister of Citizenship and Immigration as respondent in this proceeding, as appears in the above style of cause.

"Michel M.J. Shore"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9467-12
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DATED:	May 7, 2013

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