Federal Court  Cour fédérale

**Date: 220130529**

**Docket: IMM-9496-12**

**Citation: 2013 FC 567**

**Ottawa, Ontario, May 29, 2013**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**NIKISHA BLACKWOOD**
**JAKKIN JEANELLE ST. HILL**

**Applicants**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision by an inland enforcement officer (the officer) of the Canada Border Services Agency on September 12, 2012, denying the applicants' request for their removal from Canada to be deferred.

[2] The applicants request that the officer's decision be set aside and the application be referred back to the Canada Border Services Agency (CBSA) for redetermination.

**Background**

[3] Nikisha Blackwood, the principal applicant, is a citizen of St. Lucia. She entered Canada on October 14, 2000 as a temporary resident. Her oldest child, also the second applicant, Jakkin Jeanelle St. Hill entered Canada on March 2, 2001 with the same status. The applicant's second child was born in Toronto on May 24, 2001. On February 4, 2002 the applicant and her oldest child claimed refugee protection. Their claim was rejected on July 30, 2003.

[4] The applicant and her child did not appear for a pre-removal interview. The applicant's second child returned to St. Lucia in 2004 and the applicant and her oldest child left Canada in July 2005. She legally changed her name and returned to Canada in September 2005. Her youngest child was born in July 2007. In February 2008, the applicant again departed from Canada and re-entered in December 2008. She was detained and then released on May 18, 2010. The applicants submitted a pre-removal risk assessment (PRRA) application on the same day.

[5] The principal applicant applied for permanent residence as a common law partner on June 28, 2010. The PRRA application was refused on July 21, 2011. The principal applicant was detained for eight days and released on a bond. On September 19, 2011, the principal applicant's spousal application was approved in principle. On January 30, 2012 a warrant was issued for her arrest due to violating the terms of her release of reporting all address changes.

[6] On January 31, 2011, the spousal application was withdrawn due to the sponsor withdrawing the application. The principal applicant was detained on the same day, spending a month in detention before being released on a bond. She made a humanitarian and compassionate (H&C) application for permanent residence on April 10, 2012.

[7] On August 10, 2012, the Ontario Superior Court of Justice granted the principal applicant full custody of all three children.

[8] On August 31, 2012, the principal applicant received a direction to report for removal. She requested deferral of that removal the same day.

**Officer's Decision**

[9] The officer refused the deferral request on September 12, 2012. Madam Justice Elizabeth Heneghan of this Court granted a stay of removal pending the resolution of this application on September 14, 2012.

[10] The officer's reasons began with a recital of the principal applicant's immigration history. The officer noted that CBSA has an obligation under subsection 48(2) of the Act to enforce removal orders as soon as is reasonably practicable. The officer emphasized how little discretion an enforcement officer has to defer removal.

[11] The officer turned to the first ground for removal raised by the principal applicant, her outstanding H&C application. He noted the application had been received by Citizenship and Immigration Canada (CIC) on April 10, 2012 and quoted the H&C application instruction guide which indicated that such an application did not delay removal from Canada. He also cited the IP 5 Manual indicating that an H&C application did not trigger a stay of removal. He found that removal would not render the H&C application moot, citing the same sources, and indicated counsel had not provided evidence that an H&C decision was imminent. The officer indicated that while it was beyond his authority to perform an H&C evaluation, he would consider the other factors brought forward in the deferral request.

[12] The officer then turned to the family's establishment in Canada. He excerpted the principal applicant's submissions describing her employment and the child support orders in force for her family and noted that she had submitted documentary evidence including tax returns, a residential lease and an employment letter.

[13] The officer acknowledged that the removals process is difficult and that the principal applicant had worked to support her family in Canada and establish connections. He noted, though, the principal applicant was no longer eligible for a work permit due to being under an enforceable removal order and that she had not established she would be unable to receive child and spousal support payments after leaving Canada. The officer considered letters of support describing the principal applicant's progress in overcoming the trauma she suffered at the hands of her ex-husband, but concluded that there was insufficient evidence to warrant a deferral.

[14] The officer noted that the principal applicant had spent the majority of her life in St. Lucia and had left Canada to live there from February 2008 to December 2008, where she was employed as a personal support worker and attended school. The officer concluded that establishment was not a reasonable basis for deferral of removal.

[15] The officer then turned to the ground of hardship upon return to St. Lucia. The officer noted the principal applicant's submission that she was in a vulnerable psychological condition as a victim of abuse at the hands of her former spouse and her stepfather and had sought counselling in Canada. The officer canvassed the country conditions documents submitted by the applicants concerning violence against women in St. Lucia but concluded that this material was general in nature and did not speak to the principal applicant in specific terms. The officer also relied on the applicants' PRRA decision which spoke to serious efforts by the St. Lucian government to reduce crime.

[16] The officer acknowledged the medical evidence submitted by the principal applicant concerning her counselling in Canada but concluded there was insufficient evidence demonstrating removal would be detrimental to her health or that she would be unable to access treatment in St. Lucia. He also considered her argument that she would not be able to support herself or her family in St. Lucia but noted that she had secured employment during her stay there in 2008. Therefore, hardship did not justify deferral of removal.

[17] Finally, the officer turned to the ground of best interests of the children. He noted the applicants argued this ground justified deferral due to the children being in school in Canada and the

poor country conditions for children in St. Lucia. He indicated he had considered country conditions evidence on this point.

[18] The principal applicant had argued her children would not be able to attend St. Lucian public schools due to not having citizenship. The officer quoted a St. Lucian statute indicating citizenship was available based on parental citizenship, meaning that the principal applicant's children could be registered as St. Lucian citizens.

[19] The officer acknowledged the principal applicant's evidence her children had used counselling services in Canada but noted there was no evidence they were currently doing so or that they would be unable to access such services in St. Lucia. The officer noted that all three children had lived in St. Lucia in some capacity since the principal applicant's first arrival in Canada.

[20] The officer concluded there was no reasonable basis for deferral and indicated the applicants were expected to report for removal.

**Issues**

[21] The applicants submit the following points at issue:

1. What is the standard of review?

2. Did the officer err in failing to consider the special considerations involved in the applicants' pending H&C application, namely, the issue of family violence and the timeliness of their application in light of their prior application for permanent residence under the family class?

3. Did the officer err in ignoring relevant evidence before him with respect to the best interests of the children?

[22] I would rephrase the issues as follows:

1. What is the standard of review?

2. Did the officer err in refusing the request for deferral?

**Applicants' Written Submissions**

[23] The applicants argue the applicable standard of review is reasonableness. The applicants argue the officer has jurisdiction to defer removal and that the duty to remove as soon as practicable means the timing of removal must be reasonable and sensible.

[24] The applicants rely on *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311, for the proposition that an H&C application can justify deferral where there are special considerations. The applicants argue that such special considerations are present in this case due to the fact they had a previous permanent residence application approved in principle that was withdrawn due to the principal applicant ending the abusive relationship with her sponsor. Had the principal applicant not chosen to escape her abusive situation, she would not likely have faced removal proceedings. The IP 5 Manual specifically advises officers to be sensitive to the situation of a sponsored applicant leaving an abusive relationship. The officer makes no mention of these unique circumstances and does not consider them.

[25] The applicants also argue the officer did not make any findings as to the timeliness of the H&C application, which was called for given that they submitted their application soon after the refusal of their sponsored application for permanent residence. The applicants submit these omissions render the decision unreasonable.

[26] The applicants also request judicial review on the basis that the officer ignored evidence. The applicants argue the officer was not alert, alive and sensitive to the best interests of the children given his failure to consider the psychological hardship they would experience if removed from Canada and given their own evidence and the country conditions evidence concerning the lack of counselling and services available in St. Lucia. Disregarding the psychological effects of removal is contrary to the officer's role.

**Respondent's Written Submissions**

[27] The respondent agrees that reasonableness is the appropriate standard of review and argues the refusal of the request was reasonable.

[28] The respondent agrees that the officer's responsibility was to consider the circumstances related to the H&C application and its potential impact on the removal order. The respondent argues the officer did exactly this by considering the principal applicant's immigration history, the best interests of the child and hardship upon return.

[29] The respondent notes that the IP 5 Manual requires that H&C officers, not removals officers, be sensitive to the withdrawal of a spousal application due to abuse. The removals officer has no delegated authority to make an H&C decision.

[30] The respondent points out that the abuse against the principal applicant occurred in Canada and the abuser is in Canada. The officer was therefore reasonable in refusing the request.

[31] The respondent argues the officer need not have considered whether the H&C application was timely as it was clearly not delayed due to a backlog in processing, as it had only been recently filed.

[32] The respondent submits that the officer's analysis of the best interests of the children was properly focused on short-term interests and that no evidence was ignored.

## Analysis and Decision

[33] **Issue 1**

What is the standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[34] The standard of review applied to removals officers decisions on a deferrals request is reasonableness (see *Ortiz v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 18 at paragraph 39, [2012] FCJ No 11). In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339).

[35] **Issue 2**

Did the officer err in refusing the request for deferral?

In *Baron* above, the Court of Appeal held that generally, H&C applications will not warrant deferral of removal, but left open the possibility of "special considerations" (at paragraph 51):

> Subsequent to my decision in *Simoes*, *supra*, my colleague Pelletier J.A., then a member of the Federal Court Trial Division, had occasion in *Wang v. Canada (M.C.I.)*, [2001] 3 F.C. 682 (F.C.), in the context of a motion to stay the execution of a removal order, to address the issue of an enforcement officer's discretion to defer a removal. After a careful and thorough review of the relevant statutory provisions and jurisprudence pertaining thereto, Mr. Justice Pelletier circumscribed the boundaries of an enforcement officer's discretion to defer. In Reasons which I find myself unable to improve, he made the following points:
>
> - 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 added]

I agree entirely with Mr. Justice Pelletier's statement of the law.

[36] Mr. Justice Russel Zinn wrote in *Williams v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 274, [2011] 3 FCR 311, that when evaluating such special considerations. "… it is the officer's responsibility to consider the circumstances related to the H&C application" (at paragraph 38). While Mr. Justice Zinn went on to discuss an officer's approach in considering backlogged H&C applications, I do not read his reasons as precluding considerations of other circumstances related to the timing of an H&C application.

[37] The respondent does not dispute that such consideration is necessary, but argues that such consideration was performed by the officer in this case. Given that the officer's reasons contain no discussion of the fact that the principal applicant's previous application had been rejected due to the termination of an abusive relationship, I cannot agree. It is hard to imagine circumstances

surrounding an H&C application that could cry out louder for analysis under the "special considerations" mentioned in *Baron* above.

[38] An applicant for permanent residency, such as the present principal applicant, who suffers abuse at the hands of her sponsor faces an awful dilemma: leaving her abuser and foregoing her chance to obtain permanent status in Canada or remaining with her abuser, thereby risking her safety but leaving her application undisturbed. Either choice has serious, even mortal risks.

[39] While the officer is not required to mention every piece of evidence or every argument, this argument was central to the applicants' request for deferral and the officer only addresses it in boiler-plate language. This omission is significant enough to lead to an inference the officer made his finding without regard for that evidence (see *Pinto Ponce v Canada (Minister of Citizenship and Immigration)*, 2012 FC 181 at paragraph 35, [2012] FCJ No 189).

[40] The officer's failure to consider the circumstances of the H&C application renders the decision unreasonable.

[41] As a result, I need not deal with the other issues raised by the applicants.

[42] The application for judicial review is therefore allowed and the matter is referred to a different officer for redetermination.

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

## JUDGMENT

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

## ANNEX

**Relevant Statutory Provisions**

***Immigration and Refugee Protection Act*, SC 2001, c 27**

| | |
|---|---|
| 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. |
| 72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court. | 72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation. |

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-9496-12 |
| **STYLE OF CAUSE:** | NIKISHA BLACKWOOD<br>JAKKIN JEANELLE ST. HILL<br><br>- and -<br><br>THE MINISTER OF PUBLIC SAFETY<br>AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | May 8, 2013 |
| **REASONS FOR JUDGMENT AND JUDGMENT OF:** | O'KEEFE J. |
| **DATED:** | May 29, 2013 |

**APPEARANCES:**

| | |
|---|---|
| Clarisa Waldman | FOR THE APPLICANTS |
| Teresa Ramnarine | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Waldman & Associates<br>Toronto, Ontario | FOR THE APPLICANTS |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |