Federal Court  Cour fédérale

Date: 20130702

Docket: IMM-10645-12

Citation: 2013 FC 730

Montréal, Quebec, July 2, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

IKROM AHMEDOV

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant seeks judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*), of a decision of a Canada Border Services Agency (CBSA) Officer, dated October 11, 2012. The Applicant alleges that the Officer refused to exercise his discretion to defer the Applicant's scheduled removal from Canada on October 23, 2012, under section 48 of the *IRPA*. The Applicant contends that the Officer did not exercise his discretion reasonably and that he was biased.

I. Background

[2] The Applicant is a citizen of Uzbekistan, born in 1974, who entered Canada on a visitor visa on April 5, 1999. This was the beginning of what would become a long immigration history. Throughout the years, the Applicant applied for refugee protection, a pre-removal risk assessment (PRRA), and permanent residence on humanitarian and compassionate (H&C) grounds. These were rejected on October 17, 2000, September 24, 2003, and September 25, 2008, respectively.

[3] On both December 13, 1999 and January 16, 2002, the Applicant was issued one-year work permits. On August 17, 2003, he sought a third work permit, but was ineligible as a removal order against him had been issued by CBSA.

[4] Since 2007, the Applicant has owned a registered tiling business and, since his last work permit expired in 2003, he has worked continuously in Canada without authorization. He never reported his income to the Canadian tax authorities or paid income tax, even though he knew of his duty to do so.

[5] On September 1, 2006, the Applicant married a Canadian citizen. Their first-born son was born in Ottawa on October 27, 2007 and they divorced on November 15, 2008. The Applicant's ex-spouse moved to Turkey with their son and re-married. In February 2012, she and his first-born son returned to Canada and in September 2012, the Applicant allowed his first-born son to return to Turkey temporarily with his mother.

[6] The Applicant married another Canadian citizen – who had a 14-year-old son from a previous marriage – in a religious ceremony held on October 1, 2011. Their marriage was legalized on March 2, 2012.

[7] By letter dated February 29, 2012, the Applicant was directed to report to the Officer for a pre-removal interview.

[8] On March 5, 2012, the Officer directed the Applicant to apply for a passport from the Consulate General of the Republic of Uzbekistan in New York in view of his imminent removal from Canada. Since the Uzbek Consulate does not issue passports from abroad, the Applicant applied for a temporary travel document. He contacted the Consulate General and was told that the information on file was that he was in jail in Canada, awaiting his removal.

[9] On April 5, 2012, the Applicant applied for permanent residence, sponsored by his spouse (Spousal Sponsorship Application).

[10] During a second pre-removal interview held on September 25, 2012, the Applicant signed a direction to report for removal on October 23, 2012.

[11] On October 4, 2012, the Applicant and a paralegal employed by his counsel met the Officer, who acknowledged that travel documents can be issued more quickly if the subject of a removal order is in custody, but denied having informed the Uzbek Consulate that the Applicant was in

custody. The Applicant claims that the Officer then told him that it was impossible to remain in Canada since his Spousal Sponsorship Application was doomed to fail.

[12] In the Officer's affidavit, he denies this allegation and denies misinforming the Uzbek Consulate.

[13] On October 5, 2012, the Applicant made a request for deferral of removal.

[14] On October 9, 2012, the Uzbek Consulate issued a temporary travel document to the Applicant, valid only until December 8, 2012.

[15] On October 11, 2012, the Applicant and his spouse met the Officer without counsel, as they were told that it would only be a routine check-in. The Applicant alleges that the Officer then advised him not to contact the Uzbek Consulate since it would not disclose the source of the error on the Applicant's status and reiterated that the Spousal Sponsorship Application would be rejected, possibly as early as the following week; again, the Officer denies these allegations.

[16] The Officer allegedly accused the spouse of "liv[ing] off the Canadian system" and told her to get a job, though she was seven months pregnant (Applicant's Record (AR) at 86).

[17] During that meeting, the Applicant signed a declaration of his income from unauthorized work (the Declaration). He alleges that he previously notified the Officer of his employment

situation but had never been advised to cease working. He claims that he signed the Declaration in the absence of his counsel and in a state of extreme anxiety.

[18] The Officer denies any intimidation, duress, or evidence of fear on the Applicant's part and states that the Applicant did not request to speak with counsel.

[19] On October 11, 2012, a report was sent to Citizenship and Immigration Canada (CIC) advising that the Applicant was inadmissible under subsection 30(1) and paragraph 41*(a)* of the *IRPA* for working without authorization (AR, above at 77-78).

[20] The Officer denies any interference in the processing of the Spousal Support Application.

[21] On October 17, 2012, the Uzbek Consulate advised the Officer that it never had information on file indicating that the Applicant was in custody, that they never stated to anyone that he was in custody, and that in any event, whether or not he was in custody was immaterial.

[22] On October 19, 2012, Justice Mosley granted the Applicant's motion for a stay of his removal scheduled for October 23, 2012.

[23] At the time of the decision at issue in the present case, the Applicant's spouse was pregnant with their child (the Applicant's second son) and expected to deliver on December 10, 2012. The Applicant's second son was born on December 13, 2012.

II. Decision under review

[24] The Officer declined to exercise his limited discretion under section 48 of the *IRPA* (as it read at the time) to defer the Applicant's removal. He stressed that, even if he chose to exercise his discretion, he was required to enforce the removal order as soon as reasonably practicable.

[25] The reasons devote some attention to the Applicant's history of working without authorization in Canada and the failure to report his income to Canadian tax authorities. The Officer noted that, with minor exceptions, the Applicant worked in Canada without authorization since his arrival. The Officer reasoned that previous applications for work permits show that the Applicant knew that the *IRPA* required him to seek authorization before working in Canada. The Officer found the Applicant's failure to report his income to Canadian tax authorities and to pay income tax was inconsistent with his claim that he had been a law-abiding, independent, and productive member of Canadian society.

[26] The Officer did not find that the Applicant's removal would cause irreparable financial harm to his family. First, the Applicant was ineligible to work in Canada under paragraph 183(1)*(b)* of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] and could not provide financial assistance to his family members. Second, section 209 of the *Regulations* invalidated any work permit issued under the *Regulations* when a removal order made against the permit holder became enforceable; any financial assistance provided by the Applicant to his family could not be considered in disposing of his deferral request. Third, even if the Applicant could legally work in Canada, he could not be considered a source of financial support for his family since

his gross income from his tiling business was approximately $1,250/month. The Officer drew a negative inference from the Applicant's failure to substantiate his alleged income with supporting documentation.

[27] The Officer did not find that the Applicant's first-born son would suffer irreparable harm as a result of his removal because he played a minimal role in his son's life. Given that the Applicant's first-born son had been living in Turkey since 2010, the Officer did not accept that the Applicant had direct contact or had a strong emotional relationship with him. The Officer emphasized the Applicant's admission that his estranged spouse prevented him from contacting or being involved with his first-born son and that he did not learn of their temporary return to Canada in February 2012 until April 2012. His estranged spouse's departure from Canada for Turkey without his consent and his own failure to seek a court order to obtain joint custody of his first-born son also attested to his limited role.

[28] Nor did the Officer accept that the best interests of the Applicant's first-born son necessitated a deferral to allow him to fulfill his intention of applying for joint custody. Citing *Khamis v Canada*, 2010 FC 437, the Officer concluded that the best interests of the child test required him to look to the best interests of the Applicant's first-born son in the short term. The Officer found that those interests would actually be enhanced by removing the Applicant to Uzbekistan, where he could obtain a passport and travel by train to Turkey, as he had before coming to Canada. Moreover, it was uncertain whether his first-born son would ever return to Canada or whether the Applicant would fulfill his intention of applying for joint custody.

[29] Furthermore, the Officer did not accept that the Applicant's stepson would suffer irreparable harm. The Officer reasoned that any relationship of emotional well-being between the Applicant and his stepson was relatively recent because they only began to share the same household in September 2011. Nor would his stepson's best interests be compromised by any notable degree, as his stepson's biological father was still present in Canada.

[30] In the Officer's view, neither the Applicant's spouse nor his family unit as a whole would suffer irreparable harm because the Applicant had no legal means of providing financial support to her or to the family. The Officer found that because the Applicant's spouse had found it necessary to avail herself of social assistance in the past, it was reasonable to assume that she would have to do so again once their baby was born. Even though there was a relationship of emotional support between the Applicant and his spouse (who has no family in Canada), her strong community ties in Canada were sufficient to provide her with emotional support.

[31] The Officer did not accept that the unborn child would suffer irreparable harm. The Officer found that the Applicant had no legal means of supporting himself or the child, that the child's needs could be met by the spouse, and that social programs would be required to meet his or her needs even if the Applicant were not removed.

[32] The Officer found that the Spousal Sponsorship Application did not engage his discretion to defer removal because such applications were not grounds to stay a removal under section 50 of the *IRPA*. Deferring the removal on this basis, moreover, was inconsistent with the requirement to enforce the removal order as soon as reasonably practicable. A decision on the Spousal

Sponsorship Application was not imminent, given the lengthy processing times. The Officer also noted that the Applicant submitted the Spousal Sponsorship Application after learning that his removal from Canada was imminent and appears to have projected that it would be refused. It was reasonable to expect that the Applicant's sponsor would be ineligible to sponsor him, as she was a likely recipient of social assistance. The Uzbek Consulate's refusal to issue passports from abroad also suggested he would be unable to provide the required valid travel documents in order for the Spousal Sponsorship Application to be approved.

[33] Finally, the Officer decided that to defer the removal would be inconsistent with his duty to enforce the removal order as soon as reasonably practicable, as the Applicant's temporary travel documents expired on December 8, 2012 and were only issued after a long delay. There was no guarantee that a subsequent document would be re-issued. It was not reasonably practicable to defer removal until the second son was born since the last "reasonably possible" date for removal was December 8, 2012.

III. Issues

1) Did the Officer reasonably decline to exercise his discretion to defer the Applicant's removal until his second son was born or until his Spousal Sponsorship Application was processed?

2) Does a reasonable apprehension of bias arise?

3) Did the Applicant have a right to counsel at the October 11, 2012 pre-removal interview?

IV. Relevant legislative provisions

[34] The following legislative provisions of the *IRPA*, as they then read, are relevant:

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.

V. Position of the parties

[35] The Applicant argues that the Officer unreasonably exercised his limited discretion to defer removal until it was reasonably practicable to enforce the removal order.

[36] In particular, the Applicant submits that the Officer was not alert, alive and sensitive to the best short-term interests of his second son. He infers this from the comment that "the newborn infant child will not be aware of who is providing his/her care, […] which [his spouse] is more than capable of providing" and that the child "is entitled to benefit from all the social programs and healthcare available…" (AR, above at 14).

[37] The Applicant argues that the Officer exercised his discretion based on the following false or unsupported assumptions: (i) he was not a law-abiding or productive citizen because of his failure to report his income to tax authorities; (ii) community support would be forthcoming to his spouse;

(iii) his spouse will be ineligible to sponsor him because she is likely to avail herself of social assistance; (iv) he must hold and submit valid travel documents for the Spousal Sponsorship Application to be approved; and (v) a determination of the Spousal Sponsorship Application was not imminent.

[38] Finally, the Applicant argues that a reasonable apprehension of bias arises because the Officer pre-judged his case and would not be responsive to the totality of the evidence. He argues that bias arises from the Officer's: (i) demand that he sign the Declaration without legal counsel; (ii) stereotyping and insensitive comments to his spouse; (iii) alleged insistence that the Spousal Sponsorship Application could be rejected as early as the following week; and (iv) transmission of the Declaration to CIC even though it was signed in a state of extreme anxiety and in the absence of counsel.

[39] The Respondent argues that the Court's intervention is not warranted because the issue of the pending birth is moot. The pending birth was the strongest reason to support a short-term deferral; this factor became moot when the Applicant's second son was born.

[40] The Respondent adds that the Officer could reasonably decline to exercise his discretion because the short-term interests of the Applicant's family and the Spousal Sponsorship Application were insufficient to warrant a deferral.

[41] On the first issue, the Respondent posits that: (i) the Officer had no discretion to consider H&C factors; (ii) family separation and financial hardship do not justify a deferral of removal; (iii)

the Officer only had discretion to consider the best interests of the second son in the short term; (iv) it was reasonable to conclude that the Applicant cannot be considered a source of financial support; (v) any impact on his first-born son was speculative; (vi) any impact on his stepson would be minimal; and (vii) it was reasonable to conclude that the spouse would have emotional support from the community since she has been residing in Canada for 10 years.

[42] The Respondent further argues that it was reasonable for the Officer to decline to exercise his discretion on the basis of the Spousal Support Application because; (i) deferrals due to a process pending under the *IRPA* are only justifiable if denying the deferral results in a risk of death, extreme sanction, or inhumane treatment; (ii) the Spousal Support Application cannot be granted unless the Applicant returns to Uzbekistan for a passport or travel document; (iii) the Applicant is not entitled to an exception from the requirement to have valid passport or travel documents and his assertion that one might be granted on H&C grounds is speculative; (iv) the Officer could reasonably conclude that a decision on the Spousal Support Application was not imminent or likely to be determined by the expiry of the Applicant's temporary travel document; and (v) the requirement that the Applicant re-submit a spousal sponsorship application from abroad does not justify a deferral of removal.

[43] Finally, the Respondent argues that no reasonable apprehension of bias arises since the Applicant's allegations are not supported by material evidence.

VI. Analysis

Standard of review

[44] The parties agree that the standard of review for assessing a decision-maker's discretion to defer removal is reasonableness. They also agree that a reasonable apprehension of bias is determined on the correctness standard.

1) Did the Officer reasonably decline to exercise his discretion to defer the Applicant's removal until his second son was born or until his Spousal Sponsorship Application was processed?

[45] Section 48 of the *IRPA* required the Officer to enforce the removal order against the Applicant as soon as reasonably practicable.

[46] The scope of an enforcement officer's discretion to defer removal under section 48 is narrow *(Canada (Minister of Public Safety and Emergency Preparedness v Shpati)*, 2011 FCA 286). In *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, Justice Nadon defined the scope of this discretion by reference to the Minister's legal obligation to enforce the removal order:

> 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.

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

[47] First, it might be the case that the refusal to defer the removal pending the birth of the Applicant's second son was unreasonable. That might very well be why Justice Mosley granted the Applicant's motion for a stay of his removal until the present Application for judicial review is disposed of. However, this issue is moot as the Applicant's second son was born on December 13, 2012. In *Ramirez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 500,

Justice Near (as he then was) held that an argument to defer removal based on the birth of a child became moot once the child was delivered. Citing *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, Justice Near declined to exercise his discretion to decide the matter on its merits.

[48] Second, the decision is reasonable in the sense that the Officer was alert, alive, and sensitive to the best interests of the Applicant's children, just as he considered the financial and emotional support he provided to his spouse and the family unit.

[49] As Justice Russell held in *Ren v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1345, an enforcement officer lacks jurisdiction to conduct a full H&C analysis of the best interests of any child affected by the removal and is only required to consider those interests in the short term (at para 41). Justice O'Keefe also stated that "enforcement officers are not positioned to evaluate all the evidence that might be relevant in an H&C application". While they must treat the "immediate interests [of affected children] fairly and with sensitivity", they need not substantially review those interests before enforcing a removal order (*Fernandez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1131 at para 46).

[50] Because the Officer was not required to substantially assess the best interests of the children, whether he drew incorrect inferences concerning the Applicant's tax situation or the level of community support available to his spouse is immaterial. The jurisprudence is clear that the subject of a removal order cannot avoid its enforcement "simply because [he is one of the] parents of Canadian born children" (*Ramirez*, above at para 20). Given the limited jurisdiction of the Officer to conduct an H&C analysis, these errors do not affect the reasonableness of the decision.

[51] Even if the Officer were required to conduct an in-depth H&C analysis, the Officer's analysis would be reasonable in the context of a removal decision. Justice Near's decision in *Ramirez*, above, provides a helpful analogy to this Application:

> In this case, the Officer did consider the fact that the children would remain in the care of their mother. The Officer also noted that the family knew that the Applicant was under a removal order and that the wife and children had access to all the social programs and resources available to all Canadians to assist them. The Officer acted reasonably within the ambit of discretion afforded them.

[52] Third, the Spousal Support Application was insufficient to engage the Officer's discretion. *Baron*, above, states that deferrals should be reserved for pending applications if "failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment" (at para 51). The Federal Court of Appeal affirmed this in *Shpati*, above: 'The present case is analogous to *Baron* in that there is no statutory stay of removal pending the determination of either an H&C application or a judicial review application with respect to a negative PRRA" (at para 42).

[53] The relevance of the alleged false or unsupported assumptions that the Officer made about the Spousal Support Application is contingent on whether such an application was sufficient to engage the Officer's discretion. Since the application itself was insufficient to defer the removal, it is immaterial whether the Officer's assumptions about its imminence or the Applicant's ability to meet its conditions were false or unsupported.

[54] The alleged false or unsupported assumptions are not dispositive. *Ogiriki v Canada (Minister of Citizenship and Immigration)*, 2006 FC 342, holds that a decision that is "reasonable

taken as a whole and should stand, even if a few ‘weaknesses’ were identified by the [a]pplicant” (at para 13).

[55] Fourth, the decision is not unreasonable because the Applicant will be required to re-submit an application for permanent residence sponsored by his spouse from Uzbekistan. Justice Shore held in *Artiga v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 1294 that this would not affect the reasonableness of a removal decision because the Applicant knew he was subject to an enforceable removal order and "could have chosen to submit an overseas sponsorship application or an inland application on Humanitarian and Compassionate (H&C) grounds, either of which would continue to be processed after his removal from Canada" (at para 53). *Artiga*, above, is analogous to this Application because the Spousal Sponsorship Application was made after the Officer directed the Applicant to apply for a new passport in view of his imminent removal from Canada.

2) Does a reasonable apprehension of bias arise?

[56] In *Committee for Justice & Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369, Justice de Grandpré outlined the following general test for determining if a reasonable apprehension of bias arises:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically--and having thought the matter through--conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly." (at p 394).

[57] In *Arthur v Canada (Attorney General)*, 2001 FCA 223, the Federal Court of Appeal elaborated on what is required to establish bias:

> An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. (at para 8)

[58] I do not think that an informed person, viewing the Officer's decision realistically and practically (and having thought the matter through) would conclude that it was more likely than not that the Officer would, consciously or unconsciously, not decide fairly.

[59] As for the Applicant's allegations that the Officer had demonstrated, in his handling of the Applicant's file and during the meetings held on October 4 and October 11, 2012, that he had pre-judged this case, suffice it to say that the evidence on the subject is highly contradictory. Since neither party was cross-examined on their affidavit, I am unable to find that the Applicant has proven his allegations on the balance of probabilities.

[60] Even if I were to favour the Applicant's account of the events, it would not be sufficient to invalidate the decision in the present circumstances.

[61] First, the allegations that the Officer insisted at the October 4, 2012 meeting that the Spousal Support Application would fail and that he insisted at the October 11, 2012 meeting that it could be rejected as early as the following week do not establish bias. The second allegation lacks a ring of

truth, given that the Officer's reasons relied heavily on his finding that a decision on the Spousal Support Application was not imminent. The grounds for a reasonable apprehension of bias must be "substantial" (*Committee for Justice & Liberty*, above at 395). These allegations do not support the inference that the Officer had so made up his mind that any representations were likely to be ineffective.

[62] Second, there was no material evidence that the Uzbek Consulate had information that the Applicant was in custody or that the Officer so misinformed the Consulate. An email from the Vice Consul of the Republic of Uzbekistan confirms this: "The Consulate General of Uzbekistan in New York had no information whether Mr. Ikrom Ahmedov was detained or not. Moreover, according to the Consulate procedure a secretary who answers to phone calls is not [a] consular officer and could not give any information about Uzbekistan citizens' travel documents in process as she does not have access to these files" (Respondent's Record at 40).

[63] Third, the Officer's request that the Applicant sign the Declaration in the absence of counsel and in a state of extreme anxiety is insufficient to establish a bias finding. These allegations rest on pure conjecture and do not establish that the Officer had a closed mind. Moreover, Justice Snider held in *Ghirmatsion v Canada (Minister of Citizenship and Immigration)*, 2011 FC 519 that questioning in a harsh manner does not in itself raise a reasonable apprehension of bias (at para 114). The same could be said about the Applicant's allegation regarding the officer's collection of information necessary to assess irreparable harm.

[64] Finally, the October 11, 2012 report to CIC was not improper. Since the Officer was of the opinion that the Applicant was inadmissible, subsection 44(1) gave him discretion to prepare a report setting out the relevant facts to be transmitted to the Minister. The Applicant was without a work permit since 2003 and waited until he received a removal order to apply for a new one (at the hearing, he filed a work permit issued on April 9, 2013 and valid until March 25, 2014). The Applicant does not provide any other material evidence to support his claim that the Officer interfered in the Spousal Support Application. If the outcome of that application shows undue interference, the Applicant will have the right to seek judicial review of that decision before the Court.

3) Did the Applicant have a right to counsel at the October 11, 2012 pre-removal interview?

[65] The Applicant has asked the Court to certify the following question:

> Is an Applicant's right to counsel triggered when the enforcement officer interviews him or her for the purpose of collecting information that may have an impact on his or her request for deferral of removal, and where the Applicant has made it known to the officer beforehand that he or she has retained counsel?

[66] The test for certification is set out in paragraph 74*(d)* of the *IRPA* and subsection 18(1) of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22. The threshold required for certifying a question is whether "there is a serious question of general importance which would be dispositive of an appeal" (*Zazai v Canada (Minister of Citizenship and immigration)*, 2004 FCA 89 at para 11, citing *Bath v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ 1207).

[67] The scope of the right to counsel in pre-removal interviews that lead to the preparation of a subsection 44(2) inadmissibility report has been considered by the Federal Court of Appeal in *Cha v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FCA 126.

[68] It was held in that case, at para 54, that (in the absence of a *Charter* right to be notified of a right to counsel on arrest or detention) an interviewee is not "entitled as of right to be notified before a hearing that he or she has either a statutory right or a duty-of-fairness right to counsel". If the interviewee "is sufficiently informed of the object and possible effects of a forthcoming hearing" (at para 54), there is no procedural fairness duty to inform an interviewee in the context of a pre-removal interview of the right to counsel.

[69] First, since the question has already been decided by the Federal Court of Appeal, it will not be certified under the present judgment.

[70] Second, in the case at bar, the Applicant argues that he did not receive proper notice of the object of the interview but that he was rather advised that it would only be a routine check-in. It could be that this did not meet the duty of the Officer to inform him of the object of the interview and, as said *in obiter* in *Cha*, the decision should be set aside for that single reason. However, as also stated *in obiter* in *Cha*, the decision of the Supreme Court of Canada in *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 suggests that it would be inappropriate to grant the present Application. In its discussion of the circumstances in *Cha*, above at para 67, and the doctrine in *Mobil Oil*, above, the Federal Court of Appeal stated that because "a new hearing before a different Minister's delegate could only result, again, in the issuance of a

deportation order, to order a new hearing would be an exercise in futility". This comment fully applies to the present Application, as the Applicant was already under a removal order and the only issue raised which could have justified a deferral of the Applicant's removal in the circumstances was the pending birth of his second child, which is an issue that is now moot.

VII. Conclusion

[71] For the foregoing reasons, the Application for judicial review is dismissed. No question of general importance is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed.
2. No question of general importance is certified.
3. No costs are granted.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ms. Arghavan Gerami	FOR THE APPLICANT
Mr. Peter Nostbakken	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gerami Law Professional Corporation Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT