Federal Court Cour fédérale

Date: 20131030

Docket: IMM-10568-12

Citation: 2013 FC 1111

Ottawa, Ontario, October 30, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

VALENTINA LAGUTO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

OVERVIEW

[1] This is an application by Valentina Laguto (the Applicant) for judicial review of a decision of Enforcement Officer Brad Hansen (the Officer) of the Ottawa branch of the Canada Border Services Agency (CBSA), refusing to defer the Applicant's removal to Russia pending the outcome of an application for permanent residence on humanitarian and compassionate grounds (the H&C

application). The Applicant's H&C application was officially accepted for processing on August 27, 2012.

[2] On October 18, 2012, Justice Tremblay-Lamer heard a motion by the Applicant for an order granting a stay against her removal to Russia, then scheduled for October 21, 2012. Justice Tremblay-Lamer granted the stay of the removal order. On March 14, 2013, Justice Tremblay-Lamer granted leave to commence this application for judicial review.

[3] While I am sympathetic to the position of the Applicant, I note that the period of time for which she sought a deferral of removal (eight months) has now passed. Having carefully considered the findings of Justice Tremblay-Lamer and her determination that this application for judicial review raises serious issues, I have nevertheless concluded for the reasons set out below that the Officer's decision likely 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 [*Dunsmuir*]).

FACTS

[4] The Applicant was born on June 26, 1943, in the city of Minsk (then part of the former USSR and the capital city of Belarus since 1991). She is now 70 years of age and holds Russian citizenship.

[5] The Applicant's husband of more than 45 years, Juan Gualberto Hernandez Himely, is a Cuban citizen now living in Canada. Despite being refused refugee protection, Mr. Himely has

been permitted to remain in Canada since he is the subject of a deportation order that is unenforceable as a result of Cuba's policies on citizens who overstay their exit visas.

[6] The Applicant and her husband met when Mr. Himely was studying in the USSR and they married on December 24, 1966. In August 1969, the couple left the USSR to live in Cuba and resided there until 2010. In 1993, following the collapse of the USSR, the Applicant applied for and obtained Russian citizenship since she found herself stateless and Belarus did not have an embassy in Cuba at the time.

[7] The Applicant's daughter was accepted as a refugee in Canada in 1992 and is now a Canadian citizen, married with two children. The Applicant has a brother and sister living in Belarus, whom she has visited on occasion, and another daughter living in Italy. The Applicant has never been to Russia, although she lived her first 26 years in the USSR.

[8] On April 27, 2010, the Applicant and her husband arrived in Canada on temporary resident visas valid from February 12, 2010 until February 12, 2011. In June 2010, they filed refugee claims and the Applicant became the subject of a section 44 report for entering Canada with the intention to establish permanent residency status, without first applying for or obtaining the appropriate visa.

[9] The couple's refugee claims were both rejected by the Refugee Protection Division (RPD) on November 14, 2011. The RPD summarily rejected the Applicant's claim given that her fears of persecution related to Cuba and she made no claims against her country of citizenship (Russia). Her

husband's claim was rejected because the RPD found that there was no credible basis to his claim and that, on a balance of probabilities, he had it within his control to acquire Russian citizenship.

[10] The Applicant submitted a pre-removal risk assessment (PRRA) application on January 5, 2012, but it was closed due to the one year PRRA bar. An H&C application filed on May 7, 2012 was rejected for non-payment on August 14, 2012. On August 27, 2012, processing of the Applicant's H&C application was commenced as all fees had been paid.

[11] On August 28, 2012, the Applicant attended a pre-removal interview. She was advised that removal was imminent and that she should inquire with the Cuban and Russian embassies about the possibility of "refoulement". The Applicant has no family in Russia and the Russian embassy informed her that she should not expect it to assist her with questions regarding housing, living expenses or her medical conditions upon her removal to Russia. She was advised at the Cuban consulate that she may be able to return to Cuba, but that she would require a special entry permit, would have no pension, and would have no access to any of the couple's former properties or bank accounts as they have been confiscated by the government.

[12] A second pre-removal interview was conducted on September 21, 2012 and the Applicant signed a Direction to Report for Removal, scheduled for October 21, 2012.

[13] On October 5, 2012, the Applicant's counsel submitted a request for the deferral or indefinite stay of the removal order against the Applicant. Since arriving in Canada, the Applicant has provided child care for her two grandsons, aged 2 and 8. She argues that there are a variety of

H&C grounds justifying her request for a deferral of her removal order until the H&C application of both she and her husband, are decided. Her request, however, was rejected on October 10, 2012, in a decision that is the subject of this application for judicial review.

[14] As discussed above, by Order dated October 18, 2012, Justice Tremblay-Lamer granted a stay of removal until the determination of this application for judicial review.

DECISION UNDER REVIEW

[15] After considering the information presented by counsel and the issues raised, the Officer concluded that a deferral of the execution of the removal order would not be appropriate in the circumstances of this case. In particular, while counsel had requested that the CBSA exercise its discretion to defer the removal order for eight months (i.e. until early June 2013) in order to enable the first stage assessment of the H&C application, he noted that there was "absolutely no reasonable expectation" that the application would have reached stage one processing in that time frame. Noting that an enforcement officer has limited discretion to defer a removal order and that, if such discretion is exercised, he must do so while continuing to enforce the order as soon as reasonably practicable, the Officer concluded that a time frame of 30 to 42 months does not comply with the mandate stipulated in the *Immigration and Refugee Protection Act, SC 2001, c 27* ("*IRPA*" or "*Act*").

[16] In describing the background to the Applicant's claim, the Officer noted that, while Belarus maintains a diplomatic presence in Canada, there is no evidence that the Applicant has approached the Embassy "in order to attempt to obtain status in the country to which the city that she was born,

raised and spent the first 26 years of her life in, now belongs" (Decision, p. 2). In addition, he concluded that, based on prior interviews, the Applicant and her husband made a conscious decision not to return to Cuba within the required time frame, despite being aware of the serious repercussions of that choice, as described by the Cuban Embassy.

[17] The Officer then went on to consider the three fundamental questions justifying the stay of the removal order as proposed by counsel. With respect to the best interests of the Canadian children, the Officer acknowledged that the Applicant provided care and cultural and linguistic instruction for her two young grandchildren, but found that their mother could also provide such instruction and had managed to arrange for alternative care prior to 2010. As such, the Officer was not convinced that a deferral of removal was warranted on these grounds.

[18] Counsel for the Applicant had also raised the misleading and conflicting information provided by CBSA and Citizenship and Immigration Canada (CIC) on the status of the H&C application process. The Officer found that this concern was no longer relevant, given that the Applicant's H&C application had been accepted for processing on August 27, 2012.

[19] Finally, the Officer considered the H&C grounds raised by the Applicant. He addressed the conditions the Applicant would face if removed to Russia and the harm such removal would have on the Applicant and her husband. He found that submissions related to the one-year bar on H&C applications were irrelevant as the Applicant's H&C application had been accepted.

[20] In analyzing the above H&C grounds for deferral, the Officer noted that the Applicant would not be under any obligation to remain in Russia upon arrival, that she would not require a visa to enter Belarus (where she has previously visited family and could seek residency), and that she has a daughter who resides in Italy who may be able to offer accommodations for her.

[21] As for the separation of the Applicant from her husband, the Officer noted the RPD's finding that the husband could not point to any impediments that would prevent him from obtaining Russian citizenship and cited documentary evidence suggesting there may be a simplified citizenship application process for spouses of citizens. In addition, the Officer found that with the help of family in Belarus or Italy, the Applicant could possibly domicile in one of these two countries and obtain permission or invitation for her husband to join her. With respect to the separation of the Applicant and her daughter and grandchildren, the Officer noted simply that other options exist for the Applicant to seek to obtain legal status to enter and remain in Canada at a later date, from outside the country.

ISSUES

[22] Upon a review of the parties' submissions, it appears that the overriding issue is whether the Officer's decision is reasonable. Before looking into this issue, however, the Court must determine if this application is moot, given the requested eight-month deferral period has effectively expired.

ANALYSIS

[23] Although the parties have not dealt with the standard of review, it is clear that the Officer's decision is reviewable on the standard of reasonableness: *Baron v Canada (Minister of Public*

Safety and Emergency Preparedness), 2009 FCA 81, at para 25 [*Baron*]; *Fernandez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1131, at paras 40-42. As a result, this Court will not intervene if the decision is justified, transparent and intelligible, and if it falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at para 47.

[24] On the last page of her request for the deferral of her removal, the Applicant (through her counsel) requested the CBSA to exercise its discretion to defer the removal order for eight months. This deferral, according to counsel, "would enable the first stage assessment of the H&C application". Yet, on the first page of her request, the subject line reads as follows: "Re: Valentina LAGUTO – Request for Deferral of Removal Order and indefinite Stay of Removal order based on Humanitarian & Compassionate grounds (ID: 5672-0508)". Similarly, on the fax cover page included at page 17 of the Motion Record, counsel for the Applicant writes: "We request that the removal order for Ms Valentina LAGUTO be deferred and/or stayed indefinitely".

[25] It is clear that if the request was for a deferral of eight months, as the Officer characterized it in his decision, the application for judicial review should be considered moot. The deferral period requested in the Applicant's letter expired on June 5, 2013, and it is clear from the decision of the Court of Appeal in *Baron*, above, at paras 29-31, that the passing of a scheduled removal date renders an application for judicial review moot once a stay has been granted.

[26] When properly characterized, however, I believe what the Applicant is seeking is a deferral of her removal until the determination of the first stage of her H&C application. At the hearing,

counsel for the Applicant explicitly stated that the eight-month deferral was an alternative argument, probably made on the mistaken belief that a time-limited request would be more easily granted and that it would most likely be sufficient for the H&C application to reach the first stage of the process.

[27] Be that as it may, the Respondent does not query the timeliness of this application and describes the request as seeking deferral "until the determination of the first stage of [the Applicant's] application for permanent residence on humanitarian and compassionate grounds" or "until her H&C application reached the first stage, which she claimed would take 8 months" (Respondent's Memorandum of Argument, paras 1 and 4). Given that description, it is clear that this application is not moot, since what the Applicant is really seeking is a deferral of her removal until the determination of her H&C application. As the Court of Appeal stated in *Baron*:

> [29] I agree entirely with the parties that the determination of the mootness issue depends on the proper characterization of the controversy that exists between them. In this regard, the parties implicitly concede that if the characterization of the dispute as found by the Judge, i.e. "whether an applicant should be removed, and is obliged to leave, on the scheduled removal date" (paragraph 45 of her reasons), is correct, then the judicial review application is moot. However, they submit that the proper characterization is whether the appellants should be removed prior to the determination of their H&C application. At paragraph 33 of his Memorandum of Fact and Law, the respondent formulates his submission as follows:
>
> > 33. The correct characterization of the controversy, however, is whether an applicant should be removed *prior to the happening of a particular event*, such as prior to the determination of a pending H&C application. It is then not the passing of the removal date which renders the judicial review application moot, but the happening of the event. This characterization of whether removal is reasonably practicable prior to the happening of the event is entirely consistent with the enforcement officer's mandate under section 48 of the *IRPA* to execute a removal order as soon as reasonably practicable. It is

> this characterization of the controversy that the Applications Judge should have adopted, and erred in failing to do so.
>
> [30] Since the appellants' H&C application had not been dealt with at the time of the hearing before the learned Applications Judge [and I am not aware of any determination having been made since Dawson J. rendered her decision], the parties take the position that the controversy still exists between them and thus that the matter is not moot.
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> [31] In my view, the parties have properly characterized the nature of the controversy which exists between them. (…)
>
> (…)
>
> [38] Thus, in my view, since the event which the appellants invoke in seeking a deferral has not occurred, I cannot see how it can be said that there is no existing controversy between the parties and that no practical effect can result from a decision on the judicial review. While the specific timing of the removal arrangements which had been made prior to the issuance of the stay by O'Keefe J. is no longer valid, this does not, in my respectful view, render the issues raised in the judicial review application moot. The concrete or real controversy between the parties, i.e. the execution of the removal order prior to the determination of the appellants' H&C application, remains alive.

[28] Having found that the issue is not moot, I will, therefore, examine the reasonableness of the decision made by the Officer.

[29] The Applicant submits that the Officer's most serious error results from his presumption that the 30 to 42 months processing period for H&C applications fettered his discretion to defer removal until the H&C application was processed, as he had an obligation to enforce a removal order "as soon as reasonably practicable". The Applicant cites case law in support of her argument that, where exigent personal circumstances justify it, particularly those involving children, removal can

be deferred. According to the Applicant, although no jurisprudence is provided in support, this extension can be granted for as long as is required.

[30] When the Officer states that "a time frame of 30-42 months does not comply with the mandate stipulated in the Immigration and Refugee Protection Act", there is no doubt that he is referring to his statutory duty to "enforce a removal order as soon as reasonably practicable", as section 48(2) of *IRPA* read at the time of his decision. In *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682, Justice Pelletier interpreted this obligation in the following way:

> [45] The order whose deferral is in issue is a mandatory order which the Minister is bound by law to execute. The exercise of deferral requires justification for failing to obey a positive obligation imposed by statute. That justification must be found in the statute or in some other legal obligation imposed on the Minister which is of sufficient importance to relieve the Minister from compliance with section 48 of the Act. In considering the duty imposed and duty to comply with section 48, the availability of an alternate remedy, such as a right of return, should weigh heavily in the balance against deferral since it points to a means by which the applicant can be made whole [page705] without the necessity of non-compliance with a statutory obligation. For that reason, I would be inclined to the view that, absent special considerations, an H&C application which is not based upon a threat to personal safety would not justify deferral because there is a remedy other than failing to comply with a positive statutory obligation.
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> See also: *Baron*, above, at para 51.

[31] One of the special considerations which may warrant deferral in the face of an H&C application is where the H&C application was brought on a timely basis but has not yet been determined due to a backlog in the system: *Guan v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 992, at para 41. Indeed, this Court has found that a failure to

consider such a factor could justify overturning a decision where it is impossible to say whether the Officer's decision would have been the same had he considered the issue: *Lisitsa v Canada (Minister of Citizenship and Immigration)*, 2009 FC 599 [*Lisitsa*]; *Nucum v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1187 [*Nucum*]. In the case at bar, the Officer did not explicitly consider whether special circumstances for discretionary deferral of removal could exist when an H&C application is in the 30 to 42 months backlog for processing applications. This is obviously what prompted Justice Tremblay-Lamer to find that the Officer's conclusion regarding the timeliness of the application raises a serious issue worthy of consideration.

[32] However, this Court has questioned whether a long-pending H&C application is sufficient on its own to justify a deferral in recent jurisprudence. A strong argument can be made, on the basis of the decision of the Court of Appeal in *Baron*, that deferral based on a long-standing and timely H&C application should only be considered where a threat to an applicant's personal safety has been established: *Ponce Moreno v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 494. I need not decide this issue in the context of the present case, nor was the Officer required to consider if special circumstances for discretionary deferral of removal could exist when an H&C application is in the 30 to 42 months backlog for processing applications, as the H&C application had only just been submitted in the case at bar. In that respect, this case is quite different from the *Nucum* and *Lisitsa* cases, where the H&C applications had been pending for significantly longer than this application.

[33] On the facts that were before the Officer, I am unable to conclude that his decision was unreasonable. This is not a case where it could be said that the Officer may have exercised his

limited discretion to find that the Applicant's personal circumstances justified deferral, but for a conclusion that the 30 to 42 months period prevents him from enforcing the removal order as soon as reasonably practicable.

[34] In the same vein, I am also of the view that the question whether an officer should consider timeliness in terms of when the application was filed instead of when it will be decided is immaterial and irrelevant in the circumstances of the present case. As discussed above, one of the "special considerations" noted on occasion by this Court that may warrant deferral in the face of an H&C application is where the H&C application was brought on a timely basis but has not been determined due to a backlog in the system: *Williams v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 274, at para 36 [*Williams*]; *Simoes v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ no 936, at para 12.

[35] The calculation of timeliness in terms of when an application will be decided rather than when it was filed has been recognized as raising a serious issue both by Justice Tremblay-Lamer in the current matter and by Justice Lemieux in *Bhagat v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 45 at paras 16-18 [*Bhagat*]. In *Bhagat,* merely concluding that an H&C application is subject to a long processing period (30 months in that case) and that a decision is not imminent, was found not to constitute a proper assessment of whether an application had been filed in a timely manner.

[36] Apart from stating that "this application was only received on August 27th, 2012", the Officer has not explicitly considered whether the application was submitted in a timely fashion. It is

not obvious on the facts of this case whether the filing was timely or not. The Respondent argues that the H&C application was submitted two and a half years after the Applicant arrived in Canada, suggesting that this should not be considered timely; however, the timeline in the Officer's decision suggests that the Applicant first submitted an H&C application on May 7, 2012, less than six months after her refugee claim was rejected (November 14, 2011), approximately four months after her PRRA application was filed (January 5, 2012) and prior to the PRRA application being closed (August 20, 2012). While we see that the first H&C application was rejected for non-payment on August 14, 2012, payment was received on August 27, 2012 and the Applicant's counsel states that the application was resubmitted with payment on August 23, 2012.

[37] The Officer provides no analysis as to whether timeliness should be considered in relation to the first date of filing or the date payment was received. In addition, he does not suggest that the application was not made in a timely manner, but merely finds, as was censured in *Bhagat*, that given the date submitted, the request for a deferral was unreasonable.

[38] The effect of this omission would seem immediately problematic if not for the fact that the Applicant's request for deferral was for an eight-month period and that her application had been pending for less than two months at the time of the Officer's decision. Instead of considering whether it was reasonable to defer the removal until a first stage determination had been made, the Officer could reasonably respond to the request merely by suggesting that the eight-month period would not be sufficient to provide the Applicant with the remedy she sought. While the Officer relies solely on his own experience (albeit with dozens of files) in making this determination, his

expectation appears to have proven accurate, as no first stage decision had been rendered and the eight-month deferral requested had essentially elapsed at the time of the hearing.

[39] Was it reasonable for the Officer, though, to limit his analysis to the specific period of time proposed by the Applicant in her request? Despite the fact that the Applicant's counsel tied the request to the first stage assessment of the H&C application, I do not think it can be said that it was unreasonable for the Officer to make his decision in relation to the specific period of time requested by the Applicant. Even if the request had been tied solely to the first stage assessment of the H&C application, it remains unlikely that the Officer's failure to consider the timeliness of the application would constitute a determinative error on the facts of this case. Assuming that the application was made in a timely manner, the Respondent is correct to submit that the Applicant has failed to establish that the H&C application was not determined due to a backlog in the system.

[40] While it may seem unfair that the projected processing time appears to be increasing at an exponential rate (from 18 months in 2009 to 30 to 42 in 2012) and one might argue that the Minister is essentially sidestepping its duty to promptly process applications for landing by advertising increasingly lengthy processing times, the application in the case at hand had been pending for less than two months at the time the Officer's decision was made. Although there may be an overriding backlog in the system as a whole, it was not unreasonable for the Officer to conclude on the facts of this case that a decision was not imminent, regardless of the overall processing time. The Officer was asked in essence to delay removal indeterminately because the date of the decision on the H&C application was unknown and unlikely to be imminent. Considering the limited discretion granted

to an enforcement officer to defer removal, his decision cannot be considered unreasonable given the facts of this case.

[41] It is only where an application is timely and has not yet been determined due to a backlog in the system that an officer is required to turn his mind to whether a deferral is warranted as a result of a pending H&C application: see *Williams*, above, at para 38. While I agree that the government should not be permitted to refuse to defer removal based solely on their own backlog, I am satisfied, for the reasons set out above, that it was not a reason for the decision in this case.

[42] Even if one were to consider the other special circumstances put forward by the Applicant to justify a deferral of her removal, namely the best interests of the Applicant's grandchildren, the separation from her husband, her frail health and the fact that she has no ties to Russia, I agree with the Respondent that the evidentiary record before the Officer was slim. Despite this lack of evidence and considering his limited discretion which is to be distinguished from that of a CIC officer tasked with considering H&C grounds under section 25 of *IRPA*, the Officer nevertheless conducted a reasonable assessment of the Applicant's arguments.

[43] First, the Officer was "alert, alive and sensitive" to the best interests of the Applicant's grandchildren, as required by the jurisprudence of the Supreme Court of Canada and of the Federal Court of Appeal (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, *Hawthorne v Canada (Minister of Citizenship and Immigration),* 2002 FCA 475, [2003] 2 FC 555, and *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125). They would have access to social and public services available to all Canadians, and they would remain in

Canada under the loving care of their parents. They could have access to other care, which was available to the children before their grandmother arrived in Canada. The Applicant's daughter, who was born and raised in Cuba and is fluent in Spanish, will also be able to pass on her cultural background and native language. As a result, I agree with the Respondent that the Officer went further than is required in his consideration of the best interests of the children.

[44] Second, the Officer was sensitive to the potential impact on the Applicant's husband, a Cuban citizen. The Officer properly noted that the husband himself agreed that he could obtain Russian citizenship. The Applicant has not refuted the Officer's finding that her husband could join her in Russia or contested his interpretation of a Russian law regarding citizenship or a document suggesting she would not require a visa to enter Belarus. While I accept both the Applicant's submission and Justice Tremblay-Lamer's finding that the separation of the elderly couple could result in irreparable harm and agree that "a most cautious approach" is merited in considering such an eventuality (*Ramprashad-Joseph v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1715, at para 3), the Officer had evidence that the husband could join the Applicant in Russia and little evidence of the hardships they would face together or the difficulties of resettling in Belarus. The fact that an individual chooses not to leave Canada with his spouse is not a ground to warrant deferral. Moreover, the Applicant's counsel has advanced no concrete evidence in support of her assertion that the husband's H&C application is "most likely" to be accepted and, as such, I cannot conclude that the Officer ought to have found that a deferral should be granted because the Applicant would "inevitably" be entitled to return to Canada as his spouse.

[45] Third, the Applicant did not present evidence of her ailing health or the lack of social services available in Russia. An applicant has the burden to present such evidence (*Jodlowska v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1413, at para 8). A careful review of the letter describing the Applicant's visit to the Russian Embassy does not say that the Applicant would not be entitled to a pension or government help but rather that the Head of the Consular Section stated that "he is no expert in the old age security and [they] should go on the internet and find the information" (Certified Tribunal Record, p. 24). Neither can the Applicant fault the Officer for inferring that she could seek assistance from family members in Belarus or Italy. A deferral request is not to be considered a substitute for the other avenues of relief.

CONCLUSION

[46] For all of the above reasons, I find that the application for judicial review should be dismissed. The Officer did not fetter his discretion and did not bind himself by any guidelines. Rather, it is clear from the decision that the Officer considered the relevant issues raised by the Applicant. This Court may have reached another conclusion, but this is not the test to determine whether the impugned decision is unreasonable. Of course, the Applicant is not prevented from bringing a second request for deferral if she is again required to report for removal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-10568-12
STYLE OF CAUSE:	VALENTINA LAGUTO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 3, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	DE MONTIGNY J.
DATED:	OCTOBER 30, 2013

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