

Federal Court



Cour fédérale

Date: 20250422

Docket: IMM-3809-24

Citation: 2025 FC 720

Toronto, Ontario, April 22, 2025

PRESENT: The Honourable Madam Justice Blackhawk

BETWEEN:

MYUNGHAK NAM

Applicant

and

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

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision dated March 4, 2024, of an Inland Enforcement Officer (“Officer”) with Canada Border Services Agency (“CBSA”) that denied the Applicant’s request to defer his removal (“Decision”).

[2] The Applicant asks this Court to set the Decision aside and send the matter back for redetermination by a different officer.

[3] For the reasons that follow, this application is granted.

II. Background

[4] The Applicant is a citizen of South Korea. He was born in North Korea but moved to South Korea when he was young. The Applicant has a lengthy immigration history in Canada.

[5] On March 1, 2011, the Applicant arrived in Canada. He initiated a refugee protection claim on March 10, 2011.

[6] The Applicant's claim for refugee protection was granted by the Refugee Protection Division on September 5, 2012. However, vacation proceedings were initiated on June 11, 2013, due to the Applicant's misrepresentation, including failure to disclose his South Korean citizenship. The vacation application was granted on January 10, 2019.

[7] On April 20, 2019, the Applicant made an application for permanent residence ("PR").

[8] On May 4, 2019, a section 44 report was prepared, related to the Applicant's misrepresentation, pursuant to paragraph 40(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[9] On May 14, 2019, the Applicant married a permanent resident of Canada.

[10] On July 18, 2019, a deportation order was issued.

[11] On August 7, 2019, the Applicant was provided a Pre-Removal Risk Assessment ("PRRA") notification, that was submitted on December 20, 2019.

[12] The Applicant was charged with assault in January 2021 and August 2022. In January 2023, the Applicant received a suspended sentence of 12 months probation for one assault charge and the other charges were withdrawn.

[13] In December 2022, the he Applicant's wife applied to renew her PR card and indicated her marital status as "separated" on her application.

[14] In August 2023, the Applicant's spousal application was refused, as the Applicant was no longer married. His application for PR was also refused in August 2023.

[15] On November 21, 2023, the Applicant's PRRA was refused. The Applicant was interviewed for removal in February 2024. A direction to report for removal was delivered to the Applicant on February 26, 2024, and removal was scheduled for March 12, 2024.

[16] On February 22, 2024, the Applicant submitted a humanitarian and compassionate grounds ("H&C") application.

[17] On February 28, 2024, the Applicant requested deferral of his removal. Additional submissions were provided on March 3, 2024. The request for deferral was refused on March 4, 2024. This Court granted the Applicant's motion for a stay of his removal on March 8, 2024. This Court granted leave to commence a judicial review on January 7, 2025.

III. Standard of Review

[18] The parties submit, and I agree, that the applicable standard of review in this case is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at paras 25, 86).

[19] Reasonableness review is a deferential standard and requires an evaluation of the administrative decision to determine if the decision is transparent, intelligible, and justified (Vavilov at paras 12–15, 95). The starting point for a reasonableness review is the reasons for decision. Pursuant to the Vavilov framework, a reasonable decision is "one that is based on an

internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85).

[20] To intervene on an application for judicial review, the Court must find an error in the decision that is central or significant to render the decision unreasonable (*Vavilov* at para 100). The onus is on the Applicant to demonstrate that the Decision is not reasonable.

IV. Analysis

[21] The Applicant argued that the Decision is unreasonable because the Officer: unreasonably assessed his mental health and the impacts of removal; unreasonably assessed the best interests of the child (“BIOC”), his 12-year-old son; failed to address the arguments raised concerning the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] and the length of time he has been in Canada; fettered their discretion; and failed to consider evidence of processing times and prejudice related to his pending H&C application.

A. *Limited discretion of officers*

[22] The Applicant argued that the Officer improperly fettered their discretion by failing to consider that they had discretion and could defer removal with compelling circumstances.

[23] The Respondent argued that the Decision is reasonable. They argue that section 48 of the *IRPA* underscores the importance of enforcement of removal orders as soon as possible. They argued that deferral of removal is exceptional, and that officers have limited discretion. They argued that the Officer considered the Applicant’s request for deferral and found that a deferral was not warranted.

[24] In addition, they argued that the Officer did not fetter their discretion. A review of the Decision illustrates that the Officer was aware that they could defer removal, if the Applicant demonstrated deferral was warranted.

[25] This Court's jurisprudence is clear; an enforcement officer has limited discretion to defer removal. Officers may consider several factors, including illness or other impediments to travel, and pending applications. Deferral is restricted for exceptional short-terms and limited to only those situations "where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment" (*Forde v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1029 [*Forde*] at para 36).

[26] While pending applications are a factor that should be considered, "the mere existence of an H&C application [does] not constitute a bar to the execution of a valid removal order," nor is an officer required to engage in a full-blown analysis of H&C grounds (*Baron v Canada (Minister of Public Service and Emergency Preparedness)*, 2009 FCA 81 at paras 50–51; see also *Kanagashapesan v Canada (Public Service and Emergency Preparedness)*, 2019 FC 1504 at paras 27–29; *Newman v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 888 at paras 18–19; *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at paras 41–45; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paras 54–61). Ultimately, removal is the rule and deferral of removal is the exception.

[27] Canada has an interest in the prompt removal of persons whose refugee claims have not been upheld (*IRPA*, s 48(2)). This is not merely an administrative convenience, as it goes to the wider public interest in ensuring confidence in the integrity of the immigration program as a

whole (*Vieira v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 626;
Ghanaseharan v Canada (Minister of Citizenship and Immigration), 2004 FCA 261 at para 22).

[28] A review of the Decision confirms that the Officer did not fetter their discretion in respect of the deferral request. The reasons for Decision state:

It is important to note that an enforcement officer has little discretion to defer removal. However, if an enforcement officer does choose to exercise this discretion, they must do so while continuing to enforce removal as soon as possible... In the context of a request to defer removal my limited discretion is limited to compelling evidence of serious detriment resulting from the enforcement of the removal order as scheduled.

[29] The Officer did not fetter their discretion by failing to consider the deferral application. The Officer was live to the relevant considerations for deferral and considered those factors in view of the Applicant's evidence. The Officer noted that the Applicant had raised mental health concerns, the best interests of his minor child, his application for PR based on H&C grounds, economic hardships for his employees, his son and ex-wife, and new risks to his safety related to a recent broadcast in December 2023 in North Korea that featured the Applicant's story. The fact that the Officer was not satisfied that the Applicant had satisfied the criteria that would justify exercising their discretion does not mean that the Officer fettered their discretion.

B. *Mental health issues*

[30] The Applicant argued that the Officer unreasonably concluded that there are options available to him for virtual psychological care, either through his current health care practitioners who prepared the reports submitted in support of the deferral request, or by other providers in South Korea.

[31] The Respondent argued that the Decision is reasonable, and that the Applicant's reliance on a report which recommends that he remain in Canada is improper and effectively usurps the Officer's role in assessing the issues. Further, the Respondent argued that the Decision was reasonable, as the report was based on limited meetings with the health practitioners on the eve of the immigration proceedings.

[32] A review of the Decision indicates that the Officer accepted and considered the evidence from Dr. Kim, that the Applicant suffers with post-traumatic stress disorder ("PTSD"), Persistent Depressive Mood disorder, alcohol use disorder, and insomnia disorder. In addition, Dr. Kim expressed concerns related to possible suicide. Further, the Officer appears to have also accepted the evidence of Dr. Day, with respect to the nature of the Applicant's mental health conditions.

However, the Officer also stated:

I have considered that since the onset of the pandemic that many mental health professionals have expanded their practice to include virtual care via telephone or virtual calls... Nonetheless, should he wish to engage in virtual care or in-person care in South Korea with another mental health care provider, he has a consult report to share to provide continuity of care. Either way, I am satisfied that Mr. NAM has options for psychological care, as he may consider all international mental health care providers whom offer virtual care.

[33] I have reviewed both Dr. Kim's and Dr. Day's reports ("Reports"). I note that Dr. Day's report does not highlight a treatment plan. However, the report from Dr. Kim states that the Applicant requires "psychopharmacological treatment for more than 2 years and regular individual psychotherapy for more than 2 years." Dr. Kim also advised that the Applicant may require "6 to 8 week inpatient drug and alcohol rehab program if he is not able to quite drinking alcohol completely in 6 month [sic] time." Further, Dr. Kim noted that "[a] de-stabilizing move to South Korea at this point would be extremely detrimental to Mr. Nam's mental health

concerns,” and “it will be very difficult for Mr. Nam to receive the necessary medical treatments and well-structured psychiatric managements in South Korea with his current financial and psychological conditions.”

[34] I agree that many health care practitioners now have virtual options. However, it is not clear that virtual care is a viable option for the Applicant. The Reports do not indicate that either doctor offers virtual care options, if that is a suitable care option for the Applicant, or if the Applicant will have access to the necessary tools to access virtual care options. Accordingly, the Officer’s conclusion is not reasonable as it is not supported by the evidence.

[35] The Officer correctly noted that reports prepared for the purpose of assisting an applicant in their effort to remain in Canada must be considered with caution, as these reports are “to an extent self-serving.” The reality is that the stress, anxiety, and depression caused by the prospect of removal is an inherent consequence of removal. Accordingly, this evidence must be approached and considered with caution.

[36] In the present context, the report from Dr. Kim is clearly prepared in response to a request from the Applicant’s counsel to conduct a mental health assessment. Dr. Kim conducted an initial assessment, had three follow-up interviews, and conducted comprehensive testing with the Applicant, which the Officer noted in the Decision. I agree that the timing of the Reports was a factor that the Officer could consider in terms of the weight accorded to them. However, it is not clear how this factor was weighted by the Officer in the Decision.

[37] Finally, the Applicant argued that the Officer did not engage with the findings in the Reports concerning the impacts of removal on the Applicant.

[38] The Decision highlights that this Court's jurisprudence has found that irreparable harm is not established through mental health evidence where the symptoms are clearly linked to a pending removal.

[39] A review of the Reports supports a conclusion that some of the Applicant's mental health issues are tied to his pending removal, including his alcohol use disorder and suicidal thoughts. That said, the Reports also underscore some longstanding mental health issues, notably PTSD, and a concern that the cumulative effect of the Applicant's mental health issues amplifies his risk for self-harm if he is removed from Canada.

[40] The Officer's reasons do not engage with his amplified risk of self-harm and are not reasonable. The Decision only address the availability of mental health support, concluding that there is no evidence that "there are no options for care."

[41] This Court has found decisions unreasonable where the reasons do not engage with how removal will impact the applicant's mental health (*Jeong v Canada (Citizenship and Immigration)*, 2019 FC 582 at para 57; *Esahak-Shammas v Canada (Citizenship and Immigration)*, 2018 FC 461 at para 26). In my view, the Decision was not reasonable, because it failed to engage with the evidence set out in the Reports concerning how removal may impact the Applicant's mental health.

C. *H&C application and section 12 of the Charter*

[42] The Applicant argued that the Decision to deport him from Canada before his personal circumstances may be properly addressed in his H&C application amounts to cruel and unusual treatment and is an infringement of his section 12 rights under the *Charter*. In addition, the

Applicant argued that the Decision failed to consider his evidence concerning processing times and the impact of removal on his pending H&C application.

[43] The Respondent argued that decision makers are not obliged to consider and respond to every argument made before them. In addition, the Respondent argued that the section 12 *Charter* issue was not relevant to the issue before the Officer.

[44] The Applicant appeared to concede in supplemental written and oral argument that since this Court granted a stay of the removal order, pending the outcome of this application, some of the concerns raised are no longer at issue.

[45] The Applicant acknowledged that the Supreme Court of Canada (“Supreme Court”) has held that the deportation of a long-term permanent resident who had deliberately violated an essential condition for residency in Canada was not cruel and unusual treatment (*Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711). On the contrary, the Supreme Court found it was likely that it would “outrage” Canadian standards if persons who had been granted conditional entry into Canada were permitted to stay without consequence when the conditions have been deliberately violated (at 736).

[46] However, the Applicant argued that recent jurisprudence from the Federal Court of Appeal must be considered. The Federal Court of Appeal has found that there is no breach of section 12 of the *Charter* where the many “safety valves” in place in the context of a removals process provides the individual a genuine opportunity to consider their circumstances to avoid a disproportionate result (*Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 at para 51; *Moretto v Canada (Citizenship and Immigration)*, 2019 FCA 261 at paras 59, 65).

[47] The Applicant argued that it would be grossly disproportionate to remove him in advance of a decision on his H&C application, as he has not had the benefit of the processes or “safety valves” noted by the Federal Court of Appeal.

[48] I do not agree. The Applicant indicated in his affidavit that his former counsel did not properly advise him of all options. He stated that he was not advised to appeal the negative PRRA decision, that he was not aware of the option to file an H&C application until July 2023, and that he thought an H&C application had been filed in November 2023. I accept the Applicant’s evidence; however, there is no affidavit from his former counsel, nor has the Applicant raised the competency of former counsel as an issue in this application. That is a serious allegation and there are specific processes to be followed where such allegations are advanced (*Yang v Canada (Citizenship and Immigration)*, 2015 FC 1189 at para 16).

[49] A review of the Decision supports that the Officer considered factors such as the Applicant’s long stay in Canada, the BIOC, and his work/business history. In addition, the Applicant benefited from some of the processes or “safety valves” noted above, including a PRRA and a request for a deferral of his removal. As noted by this Court in *Singh Warring v Canada (Citizenship and Immigration)*, 2022 FC 1332 (CanLII) at paragraph 29, “the cumulative effect of these various processes is that the removal process complies with the *Charter*.”

[50] In addition, I note that the Supreme Court has found that the foreseeable treatment or punishment of an individual by a foreign state post-extraction is too causally remote from actions by Canadian officials to be considered in a section 12 analysis; rather, this is a section 7 consideration (*United States v Burns*, 2001 SCC 7 at paras 50–57; *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779; *Reference Re Ng Extradition (Can)*, [1991] 2 SCR 858).

[51] Section 12 of the *Charter* prohibits treatment which effects are “grossly disproportionate.” This is an extremely high threshold to meet. The Supreme Court has clarified this is more than mere excessive impacts, rather it must outrage society’s sense of decency, such that Canadians would find it to be “abhorrent or intolerable” (*R v Bissonnette*, 2022 SCC 23 at paras 16, 86).

[52] Finally, the Respondent persuasively argued that an H&C assessment is not an assessment of the risks faced by an individual upon removal. Accordingly, the Applicant’s argument that the Decision violates his section 12 *Charter* rights based on the pending H&C application is not supported.

[53] The Applicant has not demonstrated that there has been a breach of section 12 of the *Charter*. I am not persuaded that his removal pending the H&C application meets the high threshold to establish “cruel and unusual” treatment within the meaning of section 12 of the *Charter*.

[54] The Applicant also argued that the Officer’s Decision was not reasonable because it was narrowly focused on Immigration, Refugees and Citizenship Canada (“IRCC”) statistics and ignored his evidence concerning processing times for H&C applications.

[55] The Respondent maintained that the Decision was reasonable, and that it was reasonable to find that deferral was not warranted where the processing time for H&C applications is 19 months or more.

[56] This Court has clearly stated that individuals cannot avoid removal by filing an H&C application shortly before being notified that they are the subject of a removal and the decision on the outstanding application is unlikely to be imminent (*Forde* at para 40).

[57] The Applicant has not provided any authority to support his argument that anecdotal evidence ought to be accepted or preferred over posting times that are posted by the IRCC, nor am I persuaded that the Officer was required to engage with the anecdotal evidence provided by the Applicant (*Dosa v Canada (Citizenship and Immigration)*, 2019 CanLII 391 (FC) at para 3; *Sallai v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 809 at para 33).

[58] Accordingly, it was reasonable for the Officer to determine that the lengthy processing time for the Applicant's recent H&C application was not a factor in favour of deferral.

D. *Best interests of the child*

[59] The Applicant argued that the Officer unreasonably assessed the best interests of the Applicant's child. The Applicant argued that the Decision does not set out a robust BIOC analysis, which has not been considered to date. In addition, the Applicant argued that the Officer unreasonably concluded he will be able to maintain his relationship with his son from abroad using virtual tools.

[60] In support of his position, the Applicant relied on *Huang v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 446, where this Court set aside a decision to refuse to defer removal where the officer failed to consider the BIOC when there had been no previous assessment of these factors (at para 9). In addition, the Applicant relied on *Galusic v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 223, where the Court noted that officers

need to be sensitive to deferral requests based on the BIOC and the analysis needs to be responsive to the evidence (at para 32).

[61] The Respondent argued that the Decision is reasonable and consistent with the jurisprudence that stresses that a deferral officer's review is narrower and only concerned with short term BIOC. In support of this position, the Respondent relied on *Toney v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1018.

[62] I am not persuaded by the Applicant's argument on this issue. I have carefully reviewed the Decision, and I am of the view that the Officer did properly grapple with this important factor. The Officer noted the close bond between the Applicant and his son, the Applicant's co-parenting responsibilities, and the Applicant's financial support. The Officer referenced this Court's jurisprudence that underscores that the removal process is very difficult for families and forced separation from family members and the consequences of that separation are not sufficient to establish irreparable harm (*Fecarotta v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 317 at para 6).

[63] The Applicant's evidence illustrated the close parental relationship he has with his son. They talk to each other daily and spend every weekend together. He is clearly a devoted parent. In my opinion, the evidence focused on the long-term consequences of removal. The Applicant underscored the critical financial support he provides for his son.

[64] The hardships that the Applicant has pointed to are, with respect, the consequences of removal; he did not point to specific short-term consequences that the Officer ignored or failed to grapple with. The Officer's Decision on this issue is reasonable and supported by the evidentiary record. To be clear, I am not suggesting that removal of a parent does not have significant and

serious implications on their children, nor that deferral officers do not have a responsibility to consider these impacts. The evidentiary record does not support a finding that the Officer failed to consider how the Decision would impact the Applicant's son.

V. Conclusion

[65] The Officer's Decision is not reasonable with respect to the findings concerning the Applicant's mental health issues. Specifically, the reasons for Decision indicating that the Applicant would have access to mental health support virtually are not supported by the evidence. In addition, the reasons for Decision do not clearly engage with the impacts of removal on his mental health and his enhanced risk of self-harm.

JUDGMENT in IMM-3809-24

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is granted.
2. The Applicant’s request for deferral of removal will be returned to the CBSA for reconsideration by a different officer.
3. No question is certified.

“Julie Blackhawk”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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