

Federal Court



Cour fédérale

Date: 20211117

Docket: IMM-7897-19

Citation: 2021 FC 1257

Ottawa, Ontario, November 17, 2021

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

FLAVIO MONTE-TAVARES

Applicant

and

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

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Monte-Tavares, was notified on November 21, 2019, that he was scheduled to be removed from Canada on January 3, 2020. He asked the Canada Border Services Agency (“CBSA”) Inland Enforcement Officer (“Enforcement Officer”) to defer his removal based on the best interests of the children impacted by his removal, a pending spousal sponsorship application, and the possibility of an appeal of his criminal conviction. The

Enforcement Officer refused the deferral request on December 31, 2019. This is a judicial review of the Enforcement Officer's decision to reject Mr. Monte-Tavares' request to defer his removal from Canada.

[2] Mr. Monte-Tavares asked this Court to stay his removal pending the determination of this judicial review of the negative deferral request decision. On January 3, 2020, Justice Ahmed granted the motion, staying the execution of Mr. Monte-Tavares' removal until this application for judicial review was determined.

[3] As I explain in greater detail below, the judicial review is allowed. I find the Enforcement Officer's evaluation of the short-term interests of the children fails to grapple with the dilemmas around the requirements for the children's care facing this family.

II. Background Facts

[4] Mr. Monte-Tavares is a citizen of Portugal. He came to Canada in July 2015 on a visitor visa. He is married to a citizen of Canada, who has three children, who are also Canadian citizens. In 2017, he married his wife. Mr. Monte-Tavares is a step-father to his wife's three children, who were in grade one, three, and four at the time of the deferral request. These children's biological father is not present in their lives. In recent years, including when the deferral request was being considered, Mr. Monte-Tavares was responsible for dealing with the day-to-day care of the children while his wife, the children's mother, worked.

[5] In June 2018, Mr. Monte-Tavares was convicted of assault and uttering threats against his wife. As a result of these convictions, he was found criminally inadmissible under paragraph 36(2)(a) of *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*. Mr. Monte-Tavares asserted in his deferral request that he had not been informed of the immigration consequences by his former counsel when he pled guilty to these offences. His wife in her affidavit also asserted that her husband had not been adequately represented when he pled guilty and that he had not hurt her or her children.

[6] Part of the request for a deferral was based on needing an opportunity to advance his criminal appeal. At the oral hearing, Mr. Monte-Tavares' new counsel advised that the criminal appeal had not been pursued and therefore he would not be relying upon those arguments on judicial review.

[7] Mr. Monte-Tavares and his wife filed a spousal sponsorship in October 2019. It was still pending at the time that the deferral request was being considered.

III. Issues and Standard of Review

[8] The determinative issue is the manner in which the Enforcement Officer dealt with the short-term best interests of the three children directly impacted by the Applicant's removal from Canada. The Applicant framed his arguments challenging the refusal as a problem with the Enforcement Officer fettering their discretion. With respect to the short-term best interests of the children, there was no specific argument advanced about how the Enforcement Officer fettered their discretion in considering this issue. Rather, the arguments relate to the failure to give due

consideration to the children's short-term best interests given the facts in the case. As it has been framed in this way in this application, I do not consider this issue as being about the fettering of discretion.

[9] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from that presumption.

IV. Analysis

[10] Subsection 48(2) of *IRPA* directs that enforceable removal orders against foreign nationals must be "enforced as soon as possible." This has been interpreted to mean that inland enforcement officers at CBSA charged with arranging the removal of those with enforceable removal orders have limited discretion to defer their removal (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 51; *Lewis v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FCA 130 para 54 [*Lewis*]).

[11] The Federal Court of Appeal in *Lewis* confirmed that as part of this limited discretion, removals officers can consider the short-term best interests of children raised in a request to defer removal. This consideration is not required to be a "full-blown assessment" of the best interests of the child (*Lewis* at para 82). Short-term best interests of the child have included considerations, such as, finishing the school year, making arrangements for the adequate care for children if remaining in Canada, and maintaining the well-being of children who need

specialized ongoing medical care in Canada (*Lewis* at para 83; *Toney v Canada (Minister of Public Safety and Emergency Preparedness)*, 2019 FC 1018 at para 50).

[12] In this case, the material before the Enforcement Officer set out that the Applicant, who did not have immigration authorization to work in Canada, was the primary person in the family who dealt with the day-to-day needs of the children. This included taking the children to school, being with the children after school and looking after them when they were ill during the school week.

[13] The Enforcement Officer acknowledged that the removal of Mr. Monte-Tavares would require a “period of adjustment” for the children and that it was “an emotional situation.” They also noted that as Canadian citizens, the Applicant’s wife and children would have access to “Canadian social programs”, including “access to social assistance, healthcare and education.” The Enforcement Officer also stated that it was “important to note that Mrs. Monte Tavares has submitted a Spousal Sponsorship application sponsoring her husband Mr. Monte Tavares” and that “if the application is approved Mr. Monte Tavares would be permitted to return to Canada.”

[14] The Enforcement Officer’s findings on the ability of the family to continue the spousal sponsorship application while abroad may be in conflict with their suggestion of the possibility of the Applicant’s wife managing the care of the children on her own, in the short-term, by receiving social assistance. Paragraph 133(1)(k) of *Immigration and Refugee Protection Regulations*, SOR/2002-227, excludes spousal sponsorship applications from sponsors who receive social assistance for a reason other than a disability.

[15] As noted in *Lewis*, “even on a short-term basis, the Enforcement Officer had to be alert, alive and sensitive to these issues and was required to give them brief reasonable consideration” (at para 88). I am not satisfied that the Enforcement Officer turned their mind to this legal constraint on spousal sponsorship applications and its implications on the family’s arrangements for the short-term needs of the children following the Applicant’s removal. Without addressing this issue, the Enforcement Officer’s decision fails to come to grips with the reality facing the family in the short-term in trying to maintain eligibility for the spousal sponsorship, continue to provide financially for the family and arrange child-care on an immediate basis. Similar to Justice McDonald’s finding in *Ismail v Canada (Minister of Public Safety and Emergency Preparedness)*, 2019 FC 845, I do not find that the Enforcement Officer was alive to the reality that would face this family in the immediate aftermath of the Applicant’s removal (at para 15). The Enforcement Officer’s assessment of the immediate arrangements for the children’s care was not realistic or sensitive to the family’s situation (*Lewis* at para 92).

[16] Accordingly, I find the Enforcement Officer’s decision was unreasonable. The application for judicial review is granted and the request for the deferral of removal is sent back to a different officer for redetermination.

[17] The parties did not raise a question for certification and I agree that none arises.

JUDGMENT IN IMM-7897-19

THIS COURT'S JUDGMENT is that:

1. The application is granted;
2. The matter is referred back to a new officer for redetermination;
3. There is no question for certification.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

STYLE OF CAUSE: FLAVIO MONTE-TAVARES v THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: SEPTEMBER 14, 2021

JUDGMENT AND REASONS: SADREHASHEMI J.

DATED: NOVEMBER 17, 2021

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