Federal Court Cour fédérale

Date: 20230524

Docket: IMM-6687-21

Citation: 2023 FC 721

Ottawa, Ontario, May 24, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

LANCE EDWARD FOSTER

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Lance Foster asked that his removal from Canada to Saint Lucia be deferred owing to the health of his three Canadian children and the mental health of their mother, his common law spouse. His deferral request was denied by an Inland Enforcement Officer with the Canada Border Services Agency [CBSA]. However, Mr. Foster's removal was stayed by order of this Court pending this application for judicial review of the deferral decision.

[2] For the reasons given below, I conclude the deferral decision was unreasonable. Although an officer considering a deferral request is not required or entitled to undertake a "full-blown" analysis of the long-term best interests of the children, they are required to consider the short-term best interests of children who might be affected by their parents' removal. I conclude that while the Enforcement Officer facially addressed the children's best interests, they did not undertake any substantive consideration of the primary basis for the deferral request, namely their mother's mental health and associated difficulties in caring for children with special needs.

[3] The application for judicial review will therefore be allowed. The deferral decision is set aside and Mr. Foster's request for a deferral of his removal is remitted for reconsideration. However, his additional request for an order directing the Minister to allow him to file an application for a Pre-Removal Risk Assessment [PRRA], and for a stay pending that application, is not warranted in the circumstances, even if it were within the jurisdiction of the Court.

II. Issues and Standard of Review

[4] The Enforcement Officer's decision to refuse to defer Mr. Foster's removal is subject to review on the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 42.

[5] While Mr. Foster raises a number of issues in his application for judicial review, in my view the single determinative issue is whether the Enforcement Officer's decision was reasonable in its consideration of the best interests of the children.

III. Analysis

A. *The Removal Order*

[6] Mr. Foster arrived in Canada in 2008. He was approved for permanent residence in 2014 following a spousal sponsorship by his first wife, from whom he is now separated but to whom he remained legally married at the time of the decision. Mr. Foster lives with his common law wife and their three Canadian children, who at the time of the deferral request were 7 years old, 2 years old, and 2 months old.

[7] Following convictions in late 2018, Mr. Foster was found inadmissible for criminality in 2019 pursuant to paragraph 36(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. In August 2019, while Mr. Foster was in immigration detention, he submitted a PRRA application, alleging he would be at risk from gang members in Saint Lucia. This application was refused in October 2019. The PRRA officer found Mr. Foster's submissions and evidence regarding the allegations of risk to be vague and lacking in details. They also noted that although the asserted incidents involving the gang were apparently reported to police, supporting details and copies of police reports were not submitted. Mr. Foster contends that these shortcomings arose from preparing the PRRA application from immigration detention and his belief that his immigration consultant would be providing more details and documents.

[8] Shortly after this refusal, Mr. Foster was released from immigration detention. Further criminal convictions followed in October 2020 and April 2021. He was arrested and detained in July 2021, and a direction to report for removal was issued in September 2021.

B. *The Deferral Request*

[9] On September 29, 2021, Mr. Foster's counsel filed a deferral request on his behalf. Apparently prepared on short notice and while Mr. Foster remained in detention, the deferral request consisted of counsel's submission letter and a number of supporting documents, notably: (i) a Communication Assessment Report with respect to the 2-year-old, which indicates delays in language development and weak social communication skills, and also refers to the 7-year-old's diagnosis of autism spectrum disorder and the involvement of the Children's Aid Society; (ii) an email confirming an appointment at a Congenital Cardiology Clinic for the 2-month-old; and (iii) four support letters from Mr. Foster's family in Saint Lucia.

[10] The submission letter stated that the 7-year-old and the 2-year-old are autistic, and that the 2-month-old "has a hole in his heart." It further stated that the children's mother has serious mental health troubles, including an overdose attempt and a recent diagnosis of bipolar disorder, and was awaiting an appointment with a psychiatrist. The submission letter emphasized the mother's serious mental health issues, her difficulties in caring for the children with special needs, and Mr. Foster's role as the children's primary caregiver and financial provider. Given the family situation and Mr. Foster's role, the submission letter noted that the whole family would have to move to Saint Lucia if he were removed there. It further emphasized the importance of the mother and children remaining under medical care in Canada, given the lack of specialized care in Saint Lucia for those with autism spectrum disorder.

[11] The submission letter recognized that since Mr. Foster's earlier PRRA refusal was more than a year prior, he was entitled to file a further PRRA application. It asked that he be "served with another PRRA" and that his removal be deferred pending the outcome of that application.

C. *The Deferral Decision*

[12] An Inland Enforcement Officer with the CBSA issued a decision refusing to defer Mr. Foster's removal on October 1, 2021. The decision noted that the request for deferral raised the best interests of the children, the risk Mr. Foster faced in Saint Lucia, and the lack of medical care in Saint Lucia. It set out a thorough case chronology, including reference to Mr. Foster's convictions and sentences. It then noted the obligation under subsection 48(2) of the *IRPA* to enforce removal orders as soon as possible, and the limited discretion on enforcement officers to defer removal, before turning to the grounds raised.

[13] In considering the best interests of the children, the officer stated that they had considered those best interests, that they had considered all of the statements and submissions provided, that they had "considered the short term best interests of the children in a fair and sensitive manner," and that they were "alert, alive and sensitive" to the three children's best interests. The decision then goes on to refer to the medical conditions of the children, notes the involvement of the Children's Aid Society, and acknowledges the Communication Assessment Report and the email regarding the Congenital Cardiology Clinic appointment for the 2-month old. It then set out the following analysis of the children's best interests:

> I acknowledge that [the children] should have a mother or father or both by their sides. I further acknowledge that the relocation of the

> children, and/or separation from either parent, may cause some emotional difficulties for the family.
>
> I note, should the children stay in Canada with their biological mother […], they would continue to enjoy the benefits of the standard of living available to them as Canadian resident's [*sic*] and the benefits associated to them by Canadian birth right. Given that they are already established in Canada, it is reasonable to assume that any family or friends in Canada would extend any available assistance to them.
>
> In addition, if the children and [their mother] were to permanently reside in St. Lucia, Mr. Foster is already familiar with the language, customs, traditions, health care and education systems in his country of citizenship. It is reasonable to assume that any family and friends in St. Lucia would extend any available assistance to the family upon arrival.
>
> I note, Mr. Foster has a significant amount of family in St. Lucia. [The mother] and the children could rely on Mr. Foster's family to assimilate if the decision is made to relocate to St. Lucia.
>
> I note that there may be a period of adjustment with the children and [the mother] if they choose to relocate to St. Lucia or remain in Canada. I believe that with the love and support of either parent, regardless of the geographical location, the children will be strongly supported during their period of adjustment, if any.
>
> In consideration of the above, I do not find this to be sufficient to warrant the deferral of removal from Canada.

[14] The decision went on to consider Mr. Foster's allegations of risk in Saint Lucia and medical care in Saint Lucia. Under the latter heading, the Enforcement Officer repeated their notes regarding the medical condition of the children and the involvement of the Children's Aid Society, and also noted the mother's diagnosis of bipolar disorder. However, the Enforcement Officer noted that Mr. Foster had not identified any medical conditions of his own that would preclude him from boarding an airplane to Saint Lucia. The Officer went on to refer to

Mr. Foster's relationship with the children's mother, his non-compliance with the *IRPA*, and his criminality in Canada before concluding that deferral of removal was not appropriate.

D. *The Application is not Moot*

[15] At the hearing of this application, I raised with the parties a concern that the application had become moot given the passage of seventeen months between the original deferral decision and the hearing of this application. Having heard the parties' submissions and considered the applicable law, I have concluded the application is not moot, since the original request was that removal be deferred until the determination of a further PRRA application. Since no further PRRA application has been determined, there remains an "existing controversy between the parties": *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paras 37–43; *Sosic v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 13 at paras 21–24.

E. *Mr. Foster's Additional Evidence Should not be Admitted*

[16] In support of this application, Mr. Foster swore an affidavit dated November 1, 2021. That affidavit referred to certain facts and documents that were before the Enforcement Officer, but added further facts and documents that were not. The latter do not fall within an exception to the general rule that new evidence going to the merits is not admissible on an application for judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19–20. Those aspects of the affidavit will therefore not be considered.

[17] Mr. Foster also apparently sought to file a further affidavit, sworn December 14, 2022, pursuant to the order granting leave in this matter. That affidavit was filed late, so Associate Judge Duchesne ordered that it not be accepted for filing, while noting that Mr. Foster was at liberty to seek an extension of time for filing. Such an extension was not requested either before or at the hearing, such that the affidavit was not before the Court. In any event, to the extent that the affidavit added further information going to the merits that was not before the Enforcement Officer, it would again have been inadmissible.

F. *The Deferral Decision is Unreasonable*

[18] In my view, the Enforcement Officer's reasons with respect to the best interests of the children, reproduced above, do not meet the standards of a reasonable decision.

[19] My assessment of the reasonableness of the Enforcement Officer's best interests analysis is undertaken in the context of three important constraints. First, an officer reviewing a deferral request is not required or entitled to undertake a "full-blown" analysis of the long-term best interests of the child: *Lewis* at paras 46, 57, 61, 74, 81–82. Rather, the officer is only required to consider the "short-term" best interests of the child, which may include matters such as the need to finish a school year, or maintaining the well-being of children who require specialized care in Canada: *Lewis* at paras 58, 61, 82–83, 88.

[20] Second, an assessment of the reasonableness of reasons for decision must take into account the administrative setting in which they were given: *Vavilov* at paras 91–94. In the present case, the Enforcement Officer was called upon to make a decision under very tight time

constraints given the last-minute nature of Mr. Foster's request for deferral. This may explain the summary nature of some of the statements in the reasons. Nonetheless, the exercise of public power must be justified, intelligible, and transparent to the person subject to that power. If reasons contain a fundamental gap even when read with sensitivity to the institutional setting, it is not for the Court to fill in that gap with reference to the record so as to rewrite the decision maker's reasons: *Vavilov* at paras 95–96. Even with the limited consideration of the best interests of the child that is required on a deferral decision, engaging in speculation, failing to address relevant central issues, or failing to realistically and sensitively assess a child's short-term best interests will render the decision unreasonable: *Lewis* at paras 83, 88–94, citing *Danyi v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 112 at paras 36–40.

[21] Third, the Enforcement Officer's decision must be reviewed in light of the shortcomings in Mr. Foster's request for a deferral. As the Enforcement Officer was required to decide the deferral request in a short period, so too was counsel required to assemble the request in a short period. This appears to have been due to Mr. Foster's late retainer of counsel, combined with difficulties in obtaining medical records, which may have been associated with the mother's mental health. That said, the main thrust of the submissions as regards the children's best interests, was clear.

[22] Considered through this lens, the Enforcement Officer's reasons for decision regarding the best interests of the children do not meet the requirements of justification, intelligibility, and transparency. The Enforcement Officer's reasons repeated a number of appropriate general phrases regarding the best interests analysis, asserting that they had "considered the short term

best interests of the children in a fair and sensitive manner" and that they were "alert, alive and sensitive" to their best interests. However, the analysis they conducted after these phrases was cursory, consisting of generalities such as that relocation "may cause some emotional difficulties"; that children who remain in Canada continue to enjoy the benefits of doing so; that Mr. Foster is familiar with and has family in Saint Lucia; and that while there may be a "period of adjustment," they will be strongly supported during this period "with the love and support of either parent."

[23] None of this grapples with the primary thrust of Mr. Foster's submissions: that the mother's mental health, including her recently diagnosed bipolar disorder, meant that she was not capable of caring for the three children, the two oldest having special needs while the infant was being treated for congenital heart abnormalities. The children's particular needs, as well as the relationship between those needs and the mother's mental health were front and centre in the deferral request, but were not considered by the Officer.

[24] Rather, the Enforcement Officer simply stated that if Mr. Foster were removed and the children remained in Canada with their mother, they would enjoy the benefits of remaining in Canada, and that "it is reasonable to assume that any family or friends in Canada would extend any available assistance to them." In my view, ignoring the submissions about the mother's ability to adequately care for the children, while relying on the existence and ability of family or friends in Canada available to assist the children amounts to the sort of speculation criticized in *Lewis*, and does not satisfy the Officer's obligation to "satisfy [them]self that provisions have been made for leaving a child in the care of others in Canada when parents are to be removed":

Munar v Canada (Minister of Citizenship and Immigration), 2006 FC 761 at para 18, citing *Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180 at paras 37–40; *Lewis* at paras 59–60, 90.

[25] The failure to meaningfully grapple with a central argument raised by Mr. Foster calls into question whether the decision maker was actually alert and sensitive to the matter before them: *Vavilov* at para 128. Particularly on the issue of the best interests of the children, which remains an important one in the context of a deferral decision even though the analysis is necessarily limited, the unreasonableness of the Enforcement Officer's analysis is sufficient to render the decision as a whole unreasonable. As a result, I conclude I do not need to consider Mr. Foster's arguments with respect to other aspects of the decision.

G. *Remedy*

[26] In accordance with the usual remedy on judicial review, the Enforcement Officer's decision is quashed, and Mr. Foster's request is remitted for reconsideration by a different officer: *Vavilov* at para 141.

[27] Mr. Foster's application for judicial review also asks the Court to issue an order in the nature of *mandamus*, directing the CBSA to allow him to make a new PRRA application and submissions in support of that application, with a "statutory stay." While few submissions were directed to this request, Mr. Foster's argument appears to be that since he was in detention when he submitted his first PRRA application, this negatively affected his ability to properly present the PRRA application and contributed to its rejection. He therefore argues that he should be

permitted to apply for a further PRRA and that there should be an automatic stay of removal, equivalent to that imposed by section 232 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

[28] I cannot agree that the requested order is appropriate, even if it were within the jurisdiction of the Court. The availability of a PRRA is governed by sections 112 to 116 of the *IRPA* and sections 160 to 174 of the *IRPR*. While this Court has jurisdiction to judicially review a decision rendered on a PRRA, this is not an application for judicial review of the 2019 refusal of Mr. Foster's PRRA application. This Court has no freestanding jurisdiction to override the provisions of the *IRPA*. In any event, Mr. Foster does not require an order of this Court to be entitled to file a further PRRA application. The entitlement to do so flows from subsection 112(1) and subparagraph 112(2)(*c*)(i) of the *IRPA*, which combine to permit a person in Canada to apply for protection if more than 12 months has elapsed since an earlier application was rejected, where no leave application was filed with this Court. Contrary to the submissions made in Mr. Foster's deferral request, there is no requirement that he be "served with another PRRA," as there is no requirement for the triggering notification for second and subsequent PRRA applications: *IRPR*, ss 160(2), 165.

[29] With respect to Mr. Foster's request for a "statutory stay," section 165 of the *IRPR* is clear that a subsequent PRRA application "does not result in a stay of the removal order." Again, this Court does not have a freestanding jurisdiction to simply override the provisions of the *IRPR* on the basis of arguments about the nature of a first PRRA application, particularly where no application for judicial review has been taken of the refusal of the first PRRA application. As the

name suggests, a "statutory stay" arises by operation of statute or regulation, and not by order of the Court. While the Court has a statutory jurisdiction to grant certain stays in the interests of justice, such orders must pertain to matters properly before the Court: *Federal Courts Act*, RSC 1985, c F-7, ss 18.2, 50. Even if the Court had the power to grant the stay requested, I am not satisfied that Mr. Foster has established, on the evidence presented on this application, that a stay should be granted staying his removal in respect of a further PRRA application.

IV. Conclusion

[30] The application for judicial review will therefore be allowed. Neither party raised a question for certification and I agree that no question meeting the requirements for certification is raised in the matter.

[31] As a final procedural matter, at the request of the Minister and with the consent of the applicant, the title of proceedings in this matter is amended forthwith to name the respondent as the Minister of Public Safety and Emergency Preparedness.

JUDGMENT IN IMM-6687-21

THIS COURT'S JUDGMENT is that

1. The title of proceedings is amended to name the respondent as the Minister of Public Safety and Emergency Preparedness.
2. The application for judicial review is allowed and the applicant's request to defer his removal is returned to another officer for redetermination.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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