Federal Court  Cour fédérale

Date: 20110729

Docket: IMM-85-11

Citation: 2011 FC 963

Ottawa, Ontario, July 29, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

PAULO JORGE MOTA FURTADO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] The Applicant, Paulo Jorge Mota Furtado, applies for judicial review of the decision of the Inland Enforcement Officer (the Officer) not to defer the execution of the Applicant's removal from Canada scheduled for January 8, 2011.

[2] The Applicant submits that the Officer failed to exercise his discretion in a reasonable and equitable manner and that the Officer made an erroneous finding of fact. The Applicant submits the

Officer did not properly consider the Applicant's request for an extension of time to care for his gravely ill father, to provide for the best interests of his children and also to allow consideration of his application for permanent residence based on humanitarian and compassionate (H&C) grounds. The Applicant further submits the Officer erred in concluding the Applicant was on welfare, when the evidence did not support that conclusion.

[3] I am dismissing this application for judicial review as I do not see any reviewable error made by the Officer in coming to his conclusion.

Background

[4] The Applicant came to Canada on February 3, 1991 at the age of 12 and is a permanent resident. Between the years 1999 to 2007, he was convicted of a number of criminal charges ranging from driving while impaired, assault, trafficking, mischief, obstructing a peace officer, and failure to comply with probation order. On November 1, 2007, a report was written finding him inadmissible on the grounds of serious criminality. A removal order was issued on July 9, 2008. This was appealed to the Immigration Appeal Division, which granted a stay of the removal order. On January 14, 2010, the Applicant was convicted of assault causing bodily harm. After a hearing, the stay order was cancelled on October 28, 2010.

[5] The Applicant made an application for permanent residence on humanitarian and compassionate grounds in October 2010. The Applicant also submitted a Pre-Removal Risk Assessment (PRRA) application, which received a negative decision on December 1, 2010.

[6] Around the same time, the Applicant requested deferral of the removal order on the humanitarian basis that the Applicant had to care for his father who was seriously ill, as well as for the best interest of his children who resided with their mother. He also advanced his request on the basis of his outstanding H&C application and the hardship he would face in Portugal because of problems finding housing and employment.

[7] The Applicant's removal was scheduled for January 8, 2011. The Officer refused the request for deferral. Subsequently a stay of removal was granted pending judicial review of the Officer's decision.

Decision Under Review

[8] The Officer refused the Applicant's request concerning a deferral of his removal from Canada on December 30, 2010. The Officer wrote: "The Canada Border Services Agency (CBSA) has an obligation under section 48 of the Immigration and Refugee Protection Act to enforce removal orders as soon as reasonably practicable. Having considered your request, I do not feel that a deferral of the execution of the removal order is appropriate in the circumstances of this case."

[9] In the accompanying Notes To File, the Officer wrote that inland enforcement officers had little discretion to defer removal but if one did choose to exercise this discretion, he must do so while continuing to enforce a removal order as soon as reasonably practicable.

[10] Regarding the Applicant's father's illness, the Officer found there was another family member in Canada, the Applicant's sister, and there was insufficient evidence to demonstrate that

she would not be able to help assist her parents in the Applicant's absence. The Officer recorded that during the interview the Applicant had stated that he was unemployed, receiving social assistance and was being supported by his mother. The Officer concluded that he would not be able to financially support his parents.

[11] The Officer noted the Applicant's submissions regarding the best interests of his two children. The Officer observed, however, that the Applicant's children live with their mother, and they would continue to have her support after the Applicant's removal. Since the Applicant's children would remain in Canada, the Officer concluded that they would have access to all the services available to all Canadians and they therefore would have "every opportunity to be capable individuals."

[12] The Officer found that there was insufficient evidence to demonstrate that a decision on his H&C application was imminent. The Officer noted the CBSA agrees to grant temporary deferrals of removals to applicants applying for H&C applications, but that the policy will not be granted to applicants who have been found to be inadmissible for criminality or serious criminality. The Officer observed that an outstanding H&C application does not warrant deferral of removal, nor does it constitute a stay. The Officer also noted that according to section 233 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, there is no stay of removal where there is an outstanding H&C application that has not been approved in principle by the Minister.

[13] Finally, the Officer considered the hardship that the Applicant may face if removed to Portugal. The Officer noted that he had been previously employed as a landscaper, and insufficient

evidence had been provided to demonstrate he would not be able to seek similar employment in Portugal. The Officer also found that the Applicant had been given reasonable notice of his removal from Canada and therefore had an appropriate amount of time to prepare for it.

[14] The Officer was not satisfied that a deferral of removal was warranted on the above grounds.

Legislation

[15] The *Immigration and Refugee Protection Act*, R.S. 2001, c. 27 [IRPA] provides:

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
[…]	[…]
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.

Effect	Conséquence
(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.

Immigration and Refugee Protection Regulations, S.O.R./2002-227 (the Regulations)

233. A removal order made against a foreign national, and any family member of the foreign national, is stayed if the Minister is of the opinion that the stay is justified by humanitarian and compassionate considerations, under subsection 25(1) or 25.1(1) of the Act, or by public policy considerations, under subsection 25.2(1) of the Act. The stay is effective until a decision is made to grant, or not grant, permanent resident status.	233. Si le ministre estime, aux termes des paragraphes 25(1) ou 25.1(1) de la Loi, que des considérations d'ordre humanitaire le justifient ou, aux termes du paragraphe 25.2(1) de la Loi, que l'intérêt public le justifie, il est sursis à la mesure de renvoi visant l'étranger et les membres de sa famille jusqu'à ce qu'il soit statué sur sa demande de résidence permanente.

Issues

[16] The Applicant submits that the Officer erred by failing to exercise his discretion and to do so in a reasonable and equitable manner

.

[17] The issues in this application are:

a. was the decision of the Officer not to exercise his discretion reasonable?

b. did the Officer make a reviewable error stating the Applicant was on social assistance?

Standard of Review

[18] The Applicant makes no submissions on the appropriate standard of review. The Respondent submits that the standard of review of an enforcement officer's decision is reasonableness, noting in particular that an officer's discretion to defer removal is limited.

[19] I agree with the Respondent that the standard of review of an enforcement officer's decision is reasonableness: *Baron v Canada (Minister of Public Safety and Emergency Preparedness*), 2009 FCA 81 at para 67 [*Baron*].

Analysis

[20] Both parties refer to case law regarding stay applications, but I must observe that the present matter concerns a judicial review of the Officer's decision to refuse the request for deferral of the Applicant's removal, which is different from an application for a stay of removal.

[21] While the jurisprudence of stay applications may be helpful in forming some judicial review applications, they do not involve the same legal test. Stay applications require an application of the test formulated in *Toth v Canada (Minister of Employment and Immigration*), (1988), 86 NR 302 (FCA) [*Toth*] whereas in a judicial review application, the Court must assess the reasonableness of the Officer's decision in his application of the facts to the law.

[22] The Applicant acknowledges that the relevant IRPA provision, s.48(2), allows the Officer the discretion to schedule a removal only when the conditions set out in the provision are met – that

is, once it is reasonably practicable to do so. The Applicant submits that special considerations exist here, including the fact that the Applicant has lived in Canada for 20 years and is only asking to stay for a few months to take care of his father. The Applicant also states that he had submitted his H&C application in a timely manner soon after the stay of removal order was cancelled. He therefore objects to the Officer's refusal to defer his removal.

[23] The Officer's discretion to do so was described by Justice Lemieux in the case *Umukoro v Canada (Minister of Citizenship and Immigration*), [1999] FCJ No 436 (TD) at para 24 [*Umukoro*]:

> The jurisprudence of this Court is clearly to the effect that a removal officer such as Carolyn Moffett has some discretion under the Immigration Act concerning removal once the removal officer has become involved in making deportation arrangements. The reason this discretion exists is because removals under section 48 of the Immigration Act are to be carried out "as soon as reasonably practicable."
>
> (emphasis added)

[24] *Umukoro* dealt with an application for a stay of removal, and Justice Lemieux's words were in the context of the irreparable harm analysis of the *Toth* test. This case dealt with the removal provision under the former *Immigration Act*. However, it would appear that the principle that the appropriateness of a removal officer's exercise of discretion depends on the circumstances of each case remains relevant.

[25] The case law submitted by the Applicant, all dealing with requests for a stay, point to the limited nature of the Officer's discretion to defer a removal order, which may include consideration of factors such as illness, other impediments to travelling, and pending H&C applications that were

brought on a timely basis but yet have to be resolved due to backlogs in the system: *Simoes v Canada (Minister of Citizenship and Immigration*), [2000] 187 FTR 219 (TD) at para 12 [*Simoes*].

The Father's Illness

[26] The Applicant submitted his father was seriously ill, and receiving treatment for gastric cancer. He now submits the father's life expectancy for his condition less than five years. However, the evidence and submission before the Officer was that his father was undergoing chemotherapy treatment and would be unable to work for six to 12 months.

[27] The Applicant contends his parents rely on him for support. The Applicant also submits that the Officer made an error in finding that the Applicant would not be able to financially support his parents because he stated he was receiving social assistance. The Applicant states in his affidavit that at the interview he did not tell the Officer he received social assistance.

[28] The Respondent disputes the Applicant's evidence on this matter, but is nevertheless of the opinion that whether the Applicant was on social assistance was not an error central to the Officer's decision in that it would not change the ultimate finding that deferral was not warranted. Given that the Applicant's record showed his employment to be sporadic and that there was no evidence that he was employed at the time of the deferral request, the Respondent submits that it was open to the Officer to find that the Applicant was unable to support his parents financially.

[29] I agree with the Respondent. Even if the Officer had made an error in concluding that the Applicant was on social assistance, his employment was at best sporadic. The Applicant did not

provide evidence to the Officer demonstrating employment. The Officer's Notes to File indicate the Applicant was not currently employed and being supported by his mother. The Officer's conclusion that the Applicant was on social assistance is not a material error central to the decision.

Pending H&C Applications

[30] The Applicant submits he submitted a timely H&C application as soon as his stay of removal had been cancelled.

[31] The Officer noted that there was no evidence that a decision on the Applicant's H&C application was imminent. The Officer fully canvassed the question of deferral of removal when H&C applications where pending.

[32] In [*Baron*], the Federal Court of Appeal dealt with an application for judicial review of an officer's refusal to defer removal from Canada. The Federal Court of Appeal addressed the H&C applications stating at paras 50 to 51:

> I further opined that the mere existence of an H&C application did not constitute a bar to the execution of a valid removal order. With respect to the presence of Canadian-born children, I took the view that an enforcement officer was not required to undertake a substantive review of the children's best interests before executing a 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.
>
> (emphasis added)

[33] In my view, the decision in *Baron* fully addresses the Applicant's submissions on the H&C application. The Applicant has made an H&C application and, if successful, he would be able to return.

Conclusion

[34] The Applicant disagrees with the way the Officer weighed the factors, but the Officer correctly outlined the relevant legal provisions, acknowledged the Applicant's concerns but reasonably concluded that this was not an appropriate case to defer the Applicant's removal. The Officer provided adequate reasons that were based on the evidence that was before him.

[35] I consider the Officer's decision not to grant a deferral of removal on these grounds to be reasonable. I do not see any reviewable error made by the Officer in deciding not to grant the deferral of removal.

[36] I would dismiss this application for judicial review.

[37] The parties do not propose a question of general importance for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed; and

2. I do not certify a question of general importance.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-85-11
STYLE OF CAUSE:	PAULO JORGE MOTA FURTADO v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	July 14, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	Mandamin J.
DATED:	July 29, 2011

APPEARANCES:

Wennie Lee	FOR THE APPLICANT
Tamrat Gebeyehu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

LEE & COMPANY Barristers and Solicitors North York, Ontario	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada	FOR THE RESPONDENT