Federal Court  Cour fédérale

Date: 20151125

Docket: IMM-5804-14

Citation: 2015 FC 1309

Ottawa, Ontario, November 25, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

CURTIS LEWIS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] challenging a decision of an Inland Enforcement Officer [the Officer] of the Canadian Border Services Agency [CBSA] refusing the Applicant's request for a deferral of removal.

[2] For the reasons that follow, the application is dismissed.

II. Background

[3] The Applicant, Mr. Curtis Lewis, is a Guyanese national who first came to Canada in 1966 and has lived in Canada as a permanent resident for almost his entire life. He has never returned to Guyana and all of his family resides in North America.

[4] The Applicant does, however, have a criminal record in Canada. He has four assault convictions from 1979, 1985, 1993 and 2003. For the older convictions, the longest sentence he received was 14 days and for the 2003 conviction he pled guilty and accepted a one year conditional sentence, during which he was gainfully employed and completed community service. The 2003 conviction resulted in an admissibility hearing before the Immigration Division of the Immigration and Refugee Board [the IRB] in July 2004 and a subsequent appeal before the Immigration Appeal Division [the IAD] in November 2005, wherein he was granted a one year stay subject to certain terms and conditions.

[5] He was not represented by counsel before either the IRB or the IAD and it is his submission, in this application, that he did not believe that he had any reporting conditions to CBSA and believed the stay would be "over and done with" one year from the date of the hearing. The Applicant did not have any charges or convictions after obtaining the IAD stay, but he submits that his housing situation became unstable eight to ten months after obtaining the stay and subsequently became homeless for some time. His evidence on this application is that he did

not believe that he could update his address with the IAD to "homeless," since his prior experience with CBSA was that they required a new address to update his address.

[6] The Applicant has a young daughter, herein referred to as "C.D." or "the child," who was born in 2007 in Edmonton. Like her mother, C.D. is a registered Inuvik Native Indian of the Gwich'in Tribal Council. The Applicant and C.D.'s mother began a relationship in 2005, but C.D.'s mother struggled with alcohol and drug addiction which took a toll on their relationship and her ability to care for C.D. The family lived together until C.D. was approximately three years old, at which point her mother's addictions resurfaced and it was no longer a safe or suitable environment for a child. C.D. was placed in foster care for six months, with 3-4 visits per week from the Applicant, until he was able to move out on his own and provide a home for her. The Alberta Provincial Court granted the Applicant sole custody of C.D. in October 2011 finding that this was in her best interest.

[7] To this point, the Applicant contends that he was unaware that there was any issue regarding his immigration status. However, after giving a statement to police in October 2007, the police informed him that there was an immigration warrant for his arrest. He was arrested and then released on a bond. It is his evidence on this application that at this stage he still did not understand the situation or the consequences of not reporting his address change to the IAD.

[8] The Applicant and C.D. have been living in Toronto, but his evidence on this application is that he intended to move back to Edmonton where he would have more employment opportunities and community support and where there would be more opportunities for C.D. to

see her mother and learn about her Aboriginal heritage and culture. He requested to move back to Edmonton in the summer of 2014, but this request was denied by the CBSA.

[9] On July 11, 2014, a removal order was issued on the Applicant and removal to Guyana was scheduled for August 1, 2014. In mid-July 2014, the Applicant retained counsel and filed applications to reopen his IAD appeal and for permanent residence on humanitarian and compassionate grounds [H&C]. His H&C application cited his long-term residency in Canada, his clean criminal record for over a decade, the inadvertence that caused him to lose his status in Canada, and the best interests and *Charter* rights of his Aboriginal daughter. Given his impending removal date, the Applicant also sought a deferral of removal on July 24, 2014, citing his outstanding applications and the rights and interests of C.D.

III. Impugned Decision

[10] On July 28, 2014, the Officer refused the Applicant's request for a deferral of removal. She found that the outstanding IAD and H&C applications were not filed in a timely manner and that his removal would not prevent these applications from being considered or prevent him from re-entering Canada if successful, so they did not warrant a deferral of removal.

[11] The Officer then stated that, while it was beyond her authority to perform an "adjunct H&C evaluation," she had reviewed the specific considerations raised within the H&C application. She acknowledged that there would be a period of adjustment for the Applicant in Guyana, but determined that familial separation is an inherent part of the removals process and she was not satisfied that this separation would be more than temporary in nature. She was also

not satisfied that he would not be able to rely on his Canadian work experience to find employment immediately upon arrival in Guyana.

[12] With respect to the best interests of the child, the Officer again noted that she lacked the authority to consider C.D.'s long term interests. She acknowledged that the removals process is difficult for children, but found that C.D.'s best interests would be sufficiently attended to by her father, whose "care and support will attenuate any period of adjustment she may experience after she has departed from Canada." The Officer noted that counsel had submitted that C.D. suffers from asthma and requires inhalers to manage her condition, but she found that there was insufficient evidence to establish that C.D. "suffers from any medical condition which renders her unable to travel by air" or that C.D. "will be unable to receive treatment for this or any other medical condition she may have in Guyana."

[13] Regarding C.D.'s Aboriginal and *Charter* rights and interests, the Officer found:

> I find it important to note, however, that contrary to counsel's assertions, [C.D.] is not under an enforceable removal order from Canada. I note that as a member of one of Canada's First Nations, [C.D.] is entitled to enter into, remain in, and exit Canada as she and her legal guardian(s) so choose.
>
> [...]
>
> I acknowledge that [C.D.'s] aboriginal heritage is of critical importance to her and also to her Father. I am not satisfied, however, that counsel's submissions establish that Mr. Lewis' removal from Canada will prevent [C.D.] from maintaining a close connection with her Aboriginal community, its culture and traditions. I note, for instance, that [C.D.] may return to Canada at any time to participate in "dances, pow wows, speakers and special events, as well as native Aboriginal centres and Native art shows," referred to by her Father in his affidavit, and also note that she may enter Canada whenever her legal guardian permits it to visit her

> mother, her mother's family and the Gwich'in band in Yellowknife.

[14] The Officer then stated that the Applicant has a history of non-compliance under the IRPA and recited the Applicant's criminal record and failures to report to the Bond Reporting Centre on various occasions between December 2009 and June 2013.

[15] After receiving the decision, the Applicant's counsel sought and received further details from the Officer regarding the basis of her findings on the Applicant's criminal record. The Applicant was granted a judicial stay of removal by Justice McVeigh of this court on August 1, 2014.

IV. Issues

[16] The Applicant has raised the following issues:

1. Whether the Officer's decision contravened the Applicant's Aboriginal child to liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, pursuant to Section 7 of the Canadian *Charter of Rights and Freedoms* [the *Charter*]?

2. Whether the Officer erred and/or rendered an unreasonable decision in her assessment of the best interests of the child [BIOC]?

3. Whether the Officer rendered an unreasonable decision not based upon the issues and evidence before her?

V. Standard of Review

[1] The question of whether Section 7 of the *Charter* is engaged and infringed in matters pertaining to a First Nations child may be a question of law, in which case the standard of review is normally one of correctness with some degree of deference to the Officer's conclusions where there is some exercise of discretion on its application (*Dunsmuir v New Brunswick*, 2008 SCC 9).

[2] However, the Respondent argues that to determine whether administrative decision-makers have exercised their statutory discretion in accordance with *Charter* protections, the review should be in accordance with an "administrative law approach." This approach applies the standard of review of reasonableness whereby the reviewing court pays deference to the decision-maker and examines whether the discretion is exercised in light of pertinent constitutional guarantees and the values they reflect.

[3] I agree that the administrative law approach should be applied in this matter. The manner of its application is described in *Doré v Barreau du Québec*, 2012 SCC 12 at paragraphs 35, 36 and 44 [*Doré*] as follows:

> [35] The alternative is for the Court to embrace a richer conception of administrative law, under which discretion is exercised "in light of constitutional guarantees and the values they reflect" (*Multani*, at para. 152, *per* LeBel J.). Under this approach, it is unnecessary to retreat to a s. 1 *Oakes* analysis in order to protect *Charter* values. Rather, administrative decisions are

always required to consider fundamental values. The *Charter* simply acts as "a reminder that some values are clearly fundamental and … cannot be violated lightly" (Cartier, at p. 86). The administrative law approach also recognizes the legitimacy that this Court has given to administrative decision-making in cases such as *Dunsmuir* and *Conway*. These cases emphasize that administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise. Integrating *Charter* values into the administrative approach, and recognizing the expertise of these decision-makers, opens "an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship" (Liston, at p. 100).

[36] As explained by Chief Justice McLachlin in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual (see also Bernatchez). When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference (para. 53; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 39). When a particular "law" is being assessed for *Charter* compliance, on the other hand, we are dealing with principles of general application.

[...]

[44] This Court elaborated on the applicable standard of review to legal disciplinary panels in the pre-*Dunsmuir* decision of *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, where Iacobucci J. adopted a reasonableness standard in reviewing a sanction imposed for professional misconduct:

> Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of its enabling statute, and the nature of the question in dispute all suggest a more deferential standard of review than correctness. These factors suggest that the legislator intended that the Discipline Committee of the self-regulating Law Society should be a specialized body with the primary responsibility to promote the objectives of the Act by overseeing professional discipline and, where necessary, selecting

> appropriate sanctions. In looking at all the factors as discussed in the foregoing analysis, I conclude that the appropriate standard is reasonableness *simpliciter*. Thus, on the question of the appropriate sanction for professional misconduct, the Court of Appeal should not substitute its own view of the "correct" answer but may intervene only if the decision is shown to be unreasonable. [Court's emphasis added; para. 42.]

[Emphasis added]

[4] I think it is questionable whether the Removals Officer has the jurisdiction to consider risk assessments that may violate Section 7 of the *Charter*, given the Officer's limited task of determining whether the circumstances complained of expose the Applicant to a "risk of death, extreme sanction or inhumane treatment": *Canada (Minister of Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at paras 43-44 [*Shpati*].

[5] I also note that the limitation on the scope of the Removals Officer's discretion similarly limits her expertise to integrate *Charter* values into the administrative approach, inasmuch as the Supreme Court has concluded that "recognizing the expertise of these decision-makers, opens 'an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship' " (*Doré* at para 35).

[6] In *Shpati* at paragraphs 47-48, Justice Evans addressed the reviewing judge's comments on the problems caused by the lack of expertise of the Removals Officer to consider legal issues and therefore found that Parliament could not have "intended that it was reasonably practicable for a removals officer, who was not trained in these matters, to deprive an applicant of the very

recourse Parliament had given him," which in *Shpati* related to questions of the decision's mootness.

[7] Justice Evans concluded that the answer to any limitation placed upon the exercise of the officer's discretion regarding the potential mootness of the matter was found in the legislative scheme for a motion to stay a removal before the Federal Court, stating at paragraph 51 as follows:

> [51] The Federal Court can often consider a request for a stay more comprehensively than an enforcement officer can a deferral. This may result in a degree of bifurcation between the Federal Court and enforcement officers. However, in my opinion, it is the decision-making scheme that Parliament has enacted.
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> [Emphasis added]

[8] In my view, once the stay is granted that bifurcation of roles must continue for the purpose of the judicial review application. The same principle would by analogy extend not only to considering legal issues, such as mootness, but to other issues such as the application of *Charter* values in assessing the reasonableness of an officer's decision regarding risk: *Peter v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 1073 at paras 271-3 [*Peter*].

[9] Inasmuch as the stay of removal in this matter was granted on the basis of the constitutionality issue raised by the Applicant, it is for this Court to determine whether the *Charter* values were required to be considered, and if so, whether they were properly integrated into the Removal Officer's exercise of discretion on a standard of reasonableness.

[10] Finally, I conclude that the issue of a Removals Officer's determination that there was an insufficient factual basis to support any arguments concerning the infringement of Section 7 is to be reviewed on the reasonableness standard.

VI. Analysis

[11] I find that the principal reviewable issue in this matter is whether the Applicant's aboriginal child's rights pursuant to Section 7 of the *Charter* were required to be but were not reasonably reflected in the Officer's decision. On this issue, I reject the Applicant's arguments and find that no *Charter* values apply in this matter of a decision which was otherwise reasonable.

A. *The Underlying Factual Scenario is Hypothetical*

[12] The Applicant appears to be arguing the alternative that either he and his daughter remain in Canada indefinitely, or if he is removed she would be with him never to return to Canada and inevitably lose all connection to her heritage and community. The Officer did not accept these extremes as a finding of fact, which I find reasonable.

[13] The Applicant may choose to take the child with him (if no objection is taken by the mother – see below), or provide for extended return visits with the "strong and positive network of friends and community in Edmonton that [he] can rely on to assist with [her] care." The Applicant's materials reference close family friends, neighbours, the child's extended family

members, and other potential caregivers some of whom "babysit and care for the child on a regular basis."

[14] The Applicant has not addressed the issue of whether there may be alternative caregivers, when from his own evidence it appears that such persons exist. As mentioned, his materials repeatedly affirm that the child has an extensive network of friends, relatives and caregivers in Canada, in particular an aunt living in Yellowknife who cared for the Applicant's spouse when their mother was unable to provide for them. The Officer properly noted that there was no legal requirement that C.D. leave Canada, and that she can return at any time she wants to participate in "dances, pow wows, speakers and special events, as well as native Aboriginal centers and Native art shows, referred to by her Father and his affidavit."

[15] In addition, the Court could not help but notice that there may be issues facing the Applicant should he attempt to remove the child from Canada as of a right. The Order made by the Provincial Court of Alberta under the *Family Law Act* of Alberta, names the mother as a respondent. The mother did not appear although served personally and filed no response to the claim. The powers ascribed to the Applicant include responsibilities, decision-making and entitlements regarding the child. The Applicant's rights are not unlimited however, inasmuch as the mother is entitled to "share the right to receive any health, educational and other information that may significantly affect the child."

[16] Obviously removing the child from Alberta to Ontario, and thereafter the potential removal of the child to Guyana is information that should be shared with the mother, as it would

significantly affect the child and the mother's rights of access, which were not defined in the parenting Order, presumably because the mother did not attend the hearing. There was no indication on the record or at the hearing that the Applicant had informed the mother, either of the child's move to Ontario or her potential removal from Canada.

[17] Mobility rights where children are involved is a highly contentious issue in family law. Given the need for authorities to consider the protection of the cultural heritage of Aboriginal children, there may be issues as to whether there are preferable alternatives to permit C.D. to remain in Canada. As mentioned, there is also no evidence that the Applicant has considered other guardianship alternatives if removed, particularly as in respect to maintaining the child's Aboriginal cultural heritage.

[18] I conclude that there is sufficient evidence to support the Officer's finding that the Applicant's removal will cause his daughter to lose her connection with her culture and heritage is speculative. The *Charter* submission is premature as alternative remedies were not exhausted.

[19] I also note that an alternative remedy is available to the Applicant regarding the child's best interests which will be considered in his H&C application by a specialized decision-maker. This reinforces the Court's conclusion that it is inappropriate and premature to seek *Charter* relief. See *Spooner v Canada (Minister of Citizenship and Immigration)*, 2014 FC 870 at paragraph 30 citing *Covarrubias v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365 as follows:

> [30] Further, I accept the submissions of the Respondent that an alternate remedy is available to the Applicant by way of an H & C

> application pursuant to subsection 25(1) of the Act. This remedy was discussed by the Federal Court of Appeal […]:
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> > …it is inappropriate for the appellants to turn to the Court for relief under the *Charter* before exhausting their other remedies.

B. *Section 7 is not engaged*

[20] The first stage of a Section 7 *Charter* analysis is to determine whether the impugned law or state action has deprived the child of her right to life, liberty, or security, such that this *Charter* value should be reflected in the Officer's decision. Not every adverse impact on the protected interests will engage Section 7 – the law or state action in question must have had a serious and profound impact on the claimant and there must be "a sufficient causal connection between the state-caused effect and the prejudice suffered by the claimant": (*Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 75 [*Bedford*] citing *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 60). This is a flexible standard that allows the circumstances of each particular case to be taken into account and it "does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of possibilities" (*Bedford* at paras 75-76).

[21] The Applicant submits that Canada has certain legal obligations arising from C.D.'s First Nation status and that by removing her father, these obligations would be breached. The Applicant relies heavily on the Ontario Court of Appeal decision *United States of America v Leonard*, 2012 ONCA 622 [*Leonard*] which involved two appeals brought by Aboriginal accused persons who claimed that extradition without consideration of their Aboriginal

background and circumstances violated their rights under sections 6 and 7 of the *Charter*. The Court in *Leonard* acknowledged that the extradition decision was political in nature and owed substantial deference, but nevertheless overturned the Minister's decision. The Court found that the principles enunciated by the Supreme Court of Canada in *R. v Gladue*, [1999] 1 SCR 688 [*Gladue*] extend beyond the realm of criminal sentencing and "should be considered by all 'decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system'… whenever an Aboriginal person's liberty is at stake in criminal and related proceedings" (*Leonard* at para 85, citing *Gladue* at para 65; see also *R. v Ipeelee*, 2012 SCC 13 [*Ipeelee*]).

[22] I do not find that there is anything in these decisions suggesting that Section 7 interests in respect to First Nation Canadians extend beyond the criminal law field. This is understandable as Section 7 interests often have parallels to those in criminal law. The *Charter* values discussed in these decisions relate to the historical overrepresentation of aboriginal people in the criminal justice system, besides being supported by the language of section 718.2 (e) of the *Criminal Code*: *Gladue* at paras 61, 64 and 87.

[23] It is common ground that Section 7 interests relevant in immigration law where risks to life, liberty and cruel and inhumane treatment arise such as are considered under sections 96 and 97 of the Act and in relation to the removal of foreign nationals: *Németh v Canada (Minister of Justice)*, 2010 SCC 56; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1; *Orelien v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 592; *Nguyen v*

Canada (Minister of Employment and Immigration), [1993] 1 FC 696; *Farhadi v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 646 at para 3.

[24] First Nation members however, are not normally in refugee situations in Canada. Similarly, the child in this matter, if she leaves with the Applicant, is not at risk of being exposed to a Section 7 protected interest. Her interests relate to the best interests of the child that may be considered in an H&C application and not subject to review by the Removals Officer.

[25] It is the Applicant's position that the finding in *Leonard* that the *Gladue* factors are to be considered beyond criminal law was affirmed by the Supreme Court in *R v Anderson*, 2014 SCC 41 at paragraphs 21-28 [*Anderson*]. I do not find this to be the case. In *Anderson*, reference is made to the respondent's argument at paragraph 17: "all state actors (including Crown prosecutors) must consider Aboriginal status where a decision affects the liberty interest of an Aboriginal person. He maintains that this is a principle of fundamental justice." There is no indication that this submission was accepted, particularly because the matter involved prosecutorial discretion in a criminal law matter. But even if it were accepted, I do not find that the accompanying Aboriginal child of a parent being removed is someone whose liberty interest is being affected and thereby falling within the protected interests of Section 7.

[26] The Applicant further submits that Canadian courts have recognized that *Gladue* considerations apply to child welfare decisions. He cited *Children's Aid Society of Brant v G. (C.)*, 2014 ONCJ 197. This was an oral decision wherein the Children's Aid Society of Brant was seeking a Crown wardship order without access to the mother so that the child could be adopted.

No mention was made of *Gladue* or *Charter* rights in the brief reasons. The only relevant passage appears to be as follows:

> 10 In Brantford we've started an Aboriginal Persons' Court for criminal offenders with First Nations backgrounds. Our goal is to first find out as much as we can about the offender and then fashion a sentence to address his or her criminogenic factors, while at the same time holding them accountable for their behaviour.
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> 11 The background of the Aboriginal offender is so important. The effect of residential schools, poverty, displacements, substance abuse, all impact on why that person is before the court.
>
> 12 Surely a thorough canvassing of those factors with the mother in this case would help us understand why she's in child protection court. Yet, with knowing virtually nothing about [the] mother's background, we've given her a grand total of 13 months to learn how to become a mother.

[27] The Court has also considered a somewhat similar case that occurred in *New Brunswick (Minister of Social Development) v A. (M.)*, 2014 NBQB 130. In that matter, the Court concluded in a guardianship application brought by the Minister that there was a requirement to consider the child's interests. The Court stated as follows in respect of these issues at paragraphs 82-3:

> 82 Section 1 of the *Family Services Act* specifically requires a consideration of religious and <u>cultural</u> issues, (emphasis mine), yet, there was no attempt to address these, other than a statement from the lead social worker, Tara Thibeault, that she grew up in an area of New Brunswick where an aboriginal community was located.
>
> 83 The Supreme Court of Canada within the sentencing context in criminal proceedings has instructed judges to consider aboriginal community values. (See *R. v. Gladue*, 1999 CanLII 679 SCC). <u>Similar considerations should apply in child protection hearings</u>.
>
> [Emphasis added]

[28] No one refutes the requirement that courts should consider the historical and cultural circumstances of Aboriginals in matters where their interests are being negatively affected by Court procedures. But these cases do not stand for the proposition argued that family law interests constitute Section 7 interests. The special Aboriginal interests are raised in the first instance by relevant legislation. In addition, it is clear that consideration must be given to the historical and cultural background of Aboriginal persons when raised by the parties. For example, in matters concerning the best interests of Aboriginal children, in whatever form raised, these are highly relevant extra-added factors that decision-makers must consider. However, I do not find that these are *Charter* issues under Section 7 as argued here.

[29] In my view, the child's *Charter* rights are not engaged by her father being removed from Canada. As noted by the Removals Officer, the child is a Canadian citizen and is entitled to leave and re-enter Canada as she sees fit. While C.D. has a right to enter, remain in and leave Canada freely (*Charter*, s 6(1) and IRPA, s 19) and a right to life, liberty and security of the person (*Charter*, s 7), these rights are not raised in matters involving the removal of a parent and do not extend to mandating that a non-citizen remain in Canada.

[30] I also conclude that there is no legal basis for a submission that the child's Section 7 rights would be engaged or breached by the Applicant's removal. The child lacks standing to raise a Section 7 interest on behalf of the Applicant as she is not being extradited and is not being removed from her heritage, except by the choice and actions of the Applicant.

[31] These arguments are in addition to the speculative and premature nature of the Applicant's submissions.

C. *The consideration of an Aboriginal child's rights is not a principle of fundamental justice*

[32] In order to constitute a principle of fundamental justice it must (1) be a legal principle, (2) enjoy consensus that the rule or principle is fundamental to the way in which the legal system ought to fairly operate, and (3) be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person: *R. v B. (D.)*, 2008 SCC 25 at para 46; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 8.

[33] The Removals Officer operates under the direction of section 48(2) of the Act to enforce a removal order as soon as possible. Where there is no serious issue that the child would be at risk of serious harm in the country to which she is to be removed, the Officer's jurisdiction is limited to consideration of short-term issues, which would also apply in respect of Section 7. With regard to the specific concern raised here, there could be no loss of cultural heritage in the timeframe of consideration that falls within the Officer's jurisdiction. The longer term interests of the child, as indicated, are determined in H&C proceedings where the best interests of the child are a primary factor for consideration.

[34] Along the same lines, I disagree with the Applicant's arguments that the rights protected by Section 7 include the right of parents and children not to be separated by state action. Obviously this occurs regularly when Aboriginal offenders are imprisoned, in effect engendering

the same separation of parent and child that would occur when the Applicant is removed from the country and the child remains in Canada. Canadian family and child protection legislation would ensure that appropriate alternative arrangements would be made for the child's protection and guardianship if this were to occur, including imposing the requirement to consider ways to maintain the child's aboriginal identity. I may take judicial notice as well, that child protection agencies always seek alternative relatives or suitable persons with whom to place a child, with wardship being an outcome of last resort.

[35] I find that the principle contended for by the Applicant therefore, does not meet the second requirement that it enjoys consensus as a principle that is fundamental to the way in which the legal system ought to fairly operate. The principle that would render the consequences of an enforcement order on a child, not involving risk to the child or the Applicant for that matter, subject to *Charter* considerations would be contrary to the long-standing requirement to enforce removal orders expeditiously to maintain the legitimacy and viability of our refugee and immigration processes.

[36] Indeed, it is not clear, except where the removals process itself concerns situations of risk on removal of a foreign national, such as was raised in *Peter* where the removals process itself was challenged as unconstitutional for insufficiently screening for risk, that *Charter* values play any role in the limited exercise of discretion under section 48 of the Act.

[37] Finally, I also point out that the only reason that this issue is being raised here is because the Applicant failed to raise it in a timely H&C application. Because of this, as a last desperate

move, he raised it before the Removals Officer. This is no basis to attempt to graft on an issue that relates to humanitarian and compassionate grounds in what is a last-chance risk-screening procedure to ensure that the Applicant is not being returned to a changed country situation where sections 96 and 97 protections should be reconsidered to apply.

[38] In conclusion, I find that the deportation of parents of Canadian-born Aboriginal children does not violate the Section 7 rights of either the parents or their children. In this regard, I find the following decision applicable, *Idahosa v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 418 at paragraphs 46-49 citing *Langner v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 469 as follows:

> [48] Second, counsel directed us to no case in which a court has held that section 7 invalidated the removal of a non-national who had not established that she would be at risk of serious harm in the country to which she was to be removed. The absence of case law to this effect is no doubt explained in part by section 6 of the *Charter*, which confers only on Canadian citizens a constitutional right to enter and remain in Canada.
>
> [49] Third, this Court in *Langner* […] held that the deportation of the parents of Canadian-born children violated the section 7 rights of neither the parents nor their children. The Court pointed out that the separation of parents from their children is the result of the parents' decision not to take their children with them when removed from Canada. […]

D. *Whether the Officer erred and/or rendered an unreasonable decision in her assessment of the BIOC?*

[39] The Removals Officer was alive, alert and sensitive to the best interests of the child and reasonably engaged with and considered the child's short-term interests, particularly as the

factual underpinning was speculative and premature. I conclude that to the extent that the Officer was entitled to exercise her discretion, the effect of her decision was to appropriately recognize the speculative basis for any *Charter*-based argument and to otherwise reject the Applicant's *Charter* and other arguments in accordance with the requirements of the reasonableness standard.

[40] As noted above, the child lacks standing to raise a Section 7 interest on behalf of the Applicant as she is not being extradited and is not being removed from her heritage, except by the choice and actions of the Applicant. I agree with the Respondent that to the limited extent that any Section 7 interests apply, which I find not to be the case, they are incorporated into the overall assessment of the fairness of the Removals Officer's decision, in accordance with the principles of fundamental justice. Applicants are entitled to procedural fairness in submitting deferral requests and having them considered. This is a sufficient mechanism to address the Applicant's concerns on fairness and the application of the *Charter*.

[41] My only concern with the Officer's decision was her attempt to carry out a form of H&C analysis, which in ordinary circumstances should not be undertaken. However, I recognize that in the context of facing a novel *Charter* argument, her consideration of these factors was not entirely inappropriate. In any event, I conclude that the Officer was satisfied that the child's needs, including the need to reconnect with her cultural heritage, would be met in the short-term and that this was sufficient to discharge her obligations under section 48 of the Act.

VII. Certified Question and Conclusion

[42] The Applicant proposes the following certified questions with regard to this application:

1. Do the principals set out by the Supreme Court of Canada in *R. v Gladue, R. v Ipeele*, and *R. v Anderson* apply, *mutatis mutandis*, to removals under section 48 of the IRPA such that there must be a full consideration of the impact on an Aboriginal child of the removal from Canada of her non-citizen custodial parent prior to the execution of the removal order?

2. Does Section 7 of the *Charter of Rights and Freedoms* mandate *Gladue*-like consideration of the impact of the removal of an Aboriginal child's custodial parent prior to the execution of the removal order?

[43] The Respondent submits that this application should be disposed of on the basis of the reasonableness of the Officer's decision, rather than a *Charter* analysis based on a mere possibility. I tend to agree with this submission, but I am concerned that there may be some disagreement with the Court's interpretation of the Officer's reasons on this point.

[44] I am also of the view that the issues raised are novel and significant in respect of the consideration of the *Charter* and other interests of Aboriginal children, including their interplay in H&C applications and removal procedures. I also believe that the Respondent may have overstated the law in submitting that both proposed questions have already been answered by the

jurisprudence, and therefore neither constitutes a "question" requiring an answer from the Court of Appeal.

[45] Accordingly, I am prepared to certify the two questions proposed by the Applicant.

[46] The Application is dismissed and the questions proposed by the Applicant are certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the Application is dismissed and

2. the following questions are certified for appeal:

    a. Do the principals set out by the Supreme Court of Canada in *R. v Gladue*, *R. v Ipeele*, and *R. v Anderson* apply, *mutatis mutandis*, to removals under section 48 of the IRPA such that there must be a full consideration of the impact on an Aboriginal child of the removal from Canada of her non-citizen custodial parent prior to the execution of the removal order?

    b. Does Section 7 of the *Charter of Rights and Freedoms* mandate *Gladue*-like consideration of the impact of the removal of an Aboriginal child's custodial parent prior to the execution of the removal order?

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	CURTIS LEWIS v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 6, 2015
JUDGMENT AND REASONS:	ANNIS J.
DATED:	NOVEMBER 25, 2015

APPEARANCES:

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