Date: 20071116

Docket: IMM-5828-06

Citation: 2007 FC 1200

Toronto, Ontario, November 16, 2007

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

EGHOMWANRE JESSICA IDAHOSA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is an adult female citizen of Nigeria. She entered Canada on October 2001 and made a claim for protection as a Convention Refugee. That claim was ultimately dismissed in August 2004. The Applicant made a claim under Humanitarian and Compassionate grounds (H&C) which was refused in May 2006. A pre-removal risk assessment (PRRA) was made in respect of risk should the Applicant be returned to Nigeria. A determination was made that the Applicant would not be at risk and the Applicant was scheduled for removal. The removal of the Applicant was stayed by Order of this Court pending a determination of this application. The issue on this application is whether an Order of the Ontario Court giving custody of her children to the Applicant

and precluding their removal from Ontario has the effect of precluding the Applicant's removal from Canada.

[2] Since her arrival in Canada, the Applicant has given birth to two children in Canada. Those children were the subject of proceedings in the Ontario Court of Justice, Brampton, Ontario, Court File No. 1852/06. The portions of the record of those proceedings that have been made of record here indicate that a Chambers motion was held on October 24, 2006 as a result of which the following Order was made by Justice P. W. Dunn of that Court:

> *1. An Order permitting the hearing of this Motion on an urgent, ex parte basis, pursuant to the Rule 14(12) of the Family Law Rules;*
>
> *2. An Order dispensing with service of the Application, Notice of Motion and any Orders in this matter upon the Respondents, pursuant to Rule 6(16) and Rule 14(11) of the Family Law Rules;*
>
> *3. An Order granting temporary custody of the children Sage Osazenomwan Idahosa, born January 29, 2002, and Izosa Zoe Idahosa, born October 10, 2004 to the Applicant mother;*
>
> *4. An Order prohibiting the removal of the children named above from the Province of Ontario without further Order of this Honourable Court, pursuant to sections 19, 21 and 28 of the Children's Law Reform Act;*

[3] This Order has not been varied nor has any application to vary been made.

[4] It appears that Counsel for the Minister (Mr. Assan, the same Counsel that represented the Minister in the present proceedings before this Court) was present before Justice Dunn who made the following endorsement on the record of the motion before him:

> *Mr. Assan is not opposed to the relief requested in this motion provided this Court does not deal with the immigration status of the [Applicant]. This court will not be dealing at all with that issue.*

[5] The removals officer was made aware of Justice Dunn's Order. In the decision of the Officer dated October 25, 2006 which is the decision under review, of the Officer stated:

> *Counsel states that since the Ontario Court Order granted custody of the children to the subject and prohibits the removal of the children from Canada it also grants the subject a stay under section 50(a) of IRPA.*
>
> *I have carefully reviewed the respective act 50(a) and determine that it does not preclude Ms. Idahosa's removal from Canada. While custody allows the custodial parent to control the children's place of residence, but does not necessarily require that the parent reside with the child. Moreover, in the request dated 22SEP2006, Ms. Idahosa requested that she be allowed to stay in Canada until she can ensure proper care of her children. The 2 weeks federal court stay has since then expired and neither she, nor her counsel has presented any evidence that Ms. Idahosa has made any attempt to approach CAS or made any alternate arrangements for her children's care. It appears that Ms. Idahosa is employing all possibilities to defer her own removal from Canada.*

ISSUES

[6] The issue for determination in this application is whether the Order of Justice Dunn has the effect of staying the removal order in respect of the Applicant having regard to the provisions of section 50(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 as amended (IRPA).

ANALYSIS

[7] Section 50(a) of IRPA provides:

> ***50.*** *A removal order is stayed*
>
> *(a) if a decision that was made in a judicial proceeding — at which the Minister shall be given the opportunity to make submissions — would be directly contravened by the enforcement of the removal order;*

[8] There is no question that the Order of Dunn J. is a decision made in a judicial proceeding and that the Minister, through Mr. Assan, had an opportunity to make submissions.

[9] This care squarely raises the conflict that exists in a federal system such as Canada, where the provincial courts have jurisdiction in respect of marital and family matters, including custody of children and matters incidental thereto such as removal of children from the province. On the other hand, the Federal Court and federal immigration system deals with those who seek to immigrate to Canada or seek to claim status as refugees including removal from Canada of those who fail to qualify.

[10] In the situation arising in the present case, a woman who was a citizen of a foreign country entered Canada and claimed refugee status. She was pregnant at the time from a relationship with a man in her native country and gave birth to a girl in Canada some six months later. While her claim was being processed and the steps to rejection of her claim were followed, the woman had a relationship with a different man in Canada and gave birth to a second child, a son. Both children, by reason of their birth in Canada, are Canadian citizens.

[11] The woman made an *ex parte* application to the provincial court and received an Order, which can be varied, directed to two things. One was the award of custody to the woman of the two children. The other was to prevent removal of the children from the province. Such an order would not have been available unless there was some evidence of dispute as to custody or risk of harm if

the children were to be removed. Those parents in a stable relationship would not seek or need such an order.

[12] The argument made by Applicant's counsel is that "custody" as granted by the Order of Dunn J. means that the Applicant and her children must remain physically united in close proximity and, since the children cannot be removed from Ontario, the mother (Applicant) cannot be removed either. This, Applicant's counsel argues, is the reason for and effect of section 50(a) of IRPA.

[13] Respondent's Counsel argues that a refugee claimant has no fundamental right to remain in Canada and if that claim is ultimately rejected and no other basis for remaining in Canada exists, the person must leave Canada. Counsel further argues that "custody" as Ordered by Dunn J. does not mean that the Applicant must at all times remain physically proximate to the children and within Canada.

[14] A pragmatic solution would be for the Minister to seek a variance of the Order of Dunn J. and for his Court to grant the Minister status to do so as to facilitate the deportation of the mother. This step has not been taken.

[15] Justice Dawson of this Court has made a determination in respect of the same issue as is at issue in the present proceedings arising out of the factual background that is not materially different in *Alexander v. Canada (Solicitor General)*, 2005 FC 1147.

[16] Dawson J. gave a considered and thorough analysis of the issue and concluded, at paragraphs 30 to 41 of her reasons that an Order such as that of Dunn J., in her case given by Justice Waldman, was not meant to defer the execution of a valid removal order. She said:

> ***39*** *As acknowledged by Justice Waldman in the reasons which supported the final order of the Ontario Court of Justice issued on January 19, 2005, courts such as the Ontario Court of Justice are charged with the exclusive responsibility of considering the best interests of children, and the only concern of such courts is the best interests of those children. Given that the best interests of a child will almost always favour the non-removal of a parent from Canada, and yet, as a matter of law, the presence of a child in Canada is not, by itself, to be an absolute impediment to the removal of a parent, I find that the interpretation of subsection 50(a) of the Act urged by Ms. Alexander is contrary to the overall scheme of the Act. As in Cuskic, supra, I find that interpreting subsection 50(a) of the Act so that, in the present circumstances, execution of the removal order would not directly contravene the orders of the Ontario Court of Justice is in accordance with the scheme of the Act.*
>
> ***40*** *In so concluding, I have considered Ms. Alexander's argument that, because she has been granted sole custody of her children, her children must remain in her physical care. It follows, she says, that if she is removed from Canada her children must go with her, and this would remove them from Ontario in direct contravention of the relevant orders. However, I am unable to conclude that the grant of custody, or sole custody, necessitates that the custodial parent maintain physical care of a child at all times. For example, a grant of custody would not, as a matter of law, automatically be affected by the incarceration or extradition of the custodial parent. Similarly, custodial parents may send their children out of the country for education or other reasons. In Chou v. Chou, [2005] O.J. No. 1374, the Ontario Superior Court of Justice recently described the meaning of "custody" in the following terms:*
>
> > *It consists of a bundle of rights and obligations, called "incidents" in sections 20 and 21 of the Children's Law Reform Act, R.S.O. 1990, c. C-12, as amended. Family law cases often deal with the allocation of rights of custody. Those rights include*

> *the right to physical care and control of the child, to control the child's place of residence, to discipline the child, to make decisions about the child's education, to raise the child in a particular religion or no religion, to make decisions about medical care and treatment. [underlining added]*
>
> ***41*** *Thus, custody allows the custodial parent to control the child's place of residence, but does not necessarily require that the parent reside with the child.*

[17] Justice Dawson, however, believed that the matter was one that ought to be considered by a higher court thus she certified the following question:

> *In the circumstances of this case, where:*
>
> *1. A parent is a foreign national who is subject to a valid removal order;*
>
> *2. A family court issues an order, granting custody to the parent of his or her Canadian born child and prohibiting the removal of the child from the province; and*
>
> *3. The Minister is given the opportunity to make submissions before the family court before the order is pronounced;*
>
> *Would the family court order be directly contravened, within the contemplation of subsection 50(a) of the Act, if the parent, but not the child, is removed from Canada?*

[18] An appeal was taken but the matter became moot because the Applicant had succeeded on a humanitarian and compassionate application (2006 FCA 386). The Court of Appeal in this brief reasons, stated at paragraph 4:

> *"The Applications Judge's reasons for decision are clear and not inconsistent with other jurisprudence"*

[19] The decision of Dawson J. was followed by the late Justice Rouleau of this Court in *Perez v. Canada (Minister of Citizenship and Immigration),* 2005 FC 1317 especially at paragraph 16.

[20] Justice Tremblay-Lamer of this Court in *Garcia v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 311 applied the reasons of Dawson J. in *Alexander*. She, however, certified a question which went to the Federal Court of Appeal. On the appeal of *Garcia* to the Federal Court of Appeal, 2007 FCA 75 the decision of Tremblay-Lamer J. was reversed. The question certified by Tremblay-Lamer J. was answered negatively by the Federal Court of Appeal at paragraph 24 of the Reasons of the Court given by Desjardins J.A.:

> ***24*** *I would respond to the following certified question in the negative:*
>
> > *Could a judgment by a provincial court refusing to order the return of a child in accordance with the Convention on the Civil Aspects of International Child Abduction, [1989] R.T. Can. No. 35, and section 20 of An Act respecting the Civil aspects of international and interprovincial child abduction, R.S.Q., c. A-23.01 (ACAIICA) have the effect of directly and indefinitely preventing the enforcement of a removal order which is effective under the Immigration and Refugee Protection Act, S.C. 2001, c. 27 (IRPA)?*
>
> *No.*

[21] The facts of *Garcia* are different from the facts of the present case. In *Garcia*, a mother and her two sons were Mexican citizens but residing in Quebec. They were the subject of a deportation order. The father of one of the sons resided in Mexico. He applied to the Quebec courts for custody. The case went to the Quebec Court of Appeal which refused the father's request for custody. In its reasons, the Quebec Court of Appeal stated that "…*the child has settled in his new environment.*" The Federal Court Trial Judge Justice Tremblay-Lamer had found that the child should not be removed from Canada. The Federal Court of Appeal held that what must be

considered is the Quebec Court of Appeal Order itself and not the reasons. The Order dismissed the father's application to have his son returned to Mexico forthwith the result being that the son was allowed for the time being to remain in Quebec with his mother. The Court of Appeal Order however did not stay the ultimate deportation of the mother and sons. As Desjardins J.A. said at paragraphs 21 and 22:

> ***21*** *It is certain, as Tremblay-Lamer J. noted, that the judgment of the Court of Appeal of Québec cannot be interpreted as having the effect of conferring permanent resident status to Rodolfo (paragraph 48 of her reasons). The judgment had the effect of dismissing the application for the return of Rodolfo to Mexico forthwith. Therefore, Rodolfo remained in the custody of his mother and with his brother. He could continue to attend the school that had become familiar to him. If the minority opinion of the Court of Appeal had prevailed (Morin J.), the child Rodolfo would have been separated from his mother and his brother and he would have had to leave Canada immediately for Mexico.*
>
> ***22*** *Interpreting 50(a) in the manner proposed by the respondent, i.e. granting the child a right to remain in Canada, would have the effect of separating the young family, and keeping Rodolfo in Canada while his mother and brother Roberto were subject to a deportation order. Most importantly, this interpretation would give the judgment of the Court of Appeal of Québec a scope that it does not have.*

[22] I view the Federal Court of Appeal in *Garcia* as cautioning against the separation of a young family. However the separation was a temporary one as the mother and both sons were ultimately deported to Mexico in any event.

[23] In the present case, the mother is seeking to stay indefinitely a deportation to Nigeria on the basis that since arriving in Canada, and while her status in Canada was uncertain, she gave birth to two children in Canada. Those children are the subject of an Order of the Ontario Court precluding their removal from Ontario. That Order, however, can be varied. Further, the endorsement on the

record by the Judge making the Order makes it clear that the Ontario Court is not dealing with immigration issues. On the basis of the decision of this Court in *Alexander*, I find that the Order of the Ontario Court would not be "directly contravened" within the meaning of section 50(a) of IRPA were the removal order to be carried out.

[24] The Applicant raises section 1 and section 7 of the of the *Charter* to argue that execution of the removal order would result in a forced separation of mother and child therefore denying the children their rights preserved by that section. This issue was raised in *Alexander supra* and considered by Dawson J. in paragraphs 47 to 55 of her decision where she rejected such an argument on the basis of the Federal Court of Appeal decision in *Langner v. Canada (Minister of Employment and Immigration)* (1995), 184 NR 230 discussed below.

[25] Further, the Applicant raises the issue as to whether the *Convention on the Rights of the Child* can be invoked to preclude the execution of the removal order. That *Convention* has not been incorporated into Canadian domestic law by legislation, but even if it had been incorporated, there would be no effect. As stated by the Federal Court of Appeal in *Langner* supra at paragraph 11:

> ***11*** *Counsel for the appellants also contended that removal of the parents would be contrary to the international obligations contracted by Canada when it ratified the Convention on the Rights of the Child. Even if these international obligations had been incorporated into Canada's domestic law by legislation, which is not the case, we need only look to articles 9 and 10 of that Convention to find that, here again, Mr. Grey's arguments are entirely devoid of merit. In addition, Mr. Grey made lengthy submissions with respect to a body of case law relating to the European Convention on the Rights of Man. While these cases may in some respects have certain persuasive value, they can have none*

> *in the case at bar since the provisions interpreted in those cases do not correspond to any provision found in the Canadian Charter.*

[26] Lastly, the Applicant argues in her Counsel's Memorandum, but not in oral argument, that the reasons provided by the removal officer were inadequate and fail to demonstrate sufficient attention paid to the circumstances, especially those of the children. The essential part of those reasons have been reproduced earlier in these Reasons. They show that the officer was alive and sensitive to the circumstances particularly those of the children. A removal officer has very limited discretion and no high level of formal written reasons is expected. As Mosley J. said in *Boniowski v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1161 at paragraph 11:

> ***11*** *In my view, given the purpose of Section 48(2) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 ("IRPA") in the statutory scheme, that is to allow for some limited discretion in the timing of a person's removal from Canada, any reasons requirement was fulfilled in the decision letter of September 12, 2003 where the officer indicated that she had received and reviewed the applicants' submissions, and her decision was not to defer removal. The nature of this decision is one where an officer has a very limited discretion, and no actual, formal decision is mandated in the legislation or regulations to defer removal. Instead, the jurisprudence instructs that an officer must acknowledge that she has some discretion to defer removal, if it would not be "reasonably practicable" to enforce a removal order at a particular point in time. For example, the existence of a pending H&C application that was filed in a timely manner, medical factors and the arrangement of travel documents are some of the factors that may be considered by the officer at this time. It would not be reasonably practicable to remove someone who did not have a travel document or who was seriously ill. However, I am not satisfied that a higher level of formal, written reasons is required for this sort of administrative decision.*

[27] Therefore, the application will be dismissed, all grounds raised by the Applicant being rejected. However, I agree with Dawson J. in *Alexander* that there is a question worthy of certification arising in these circumstances. In my opinion, the decision of the Federal Court of

Appeal in *Garcia* does not address the question I propose to be certified. I will therefore certify the following question:

> *Does the removal of a parent who has been granted custody of a Canadian born child by an Order of a provincial court, which order also prohibits removal of the child from the province, create a statutory stay pursuant to section 50(a) of the Immigration and Refugee Protection Act? Does the fact that the Order can be varied and that the Minister had an opportunity to speak to the Order make a difference?*

[28] In order to permit the Court of Appeal to address this question, should the Applicant appeal on the basis of this question, I will order that the Applicant not be removed from Canada until the final disposition of any such appeal or the time for taking such appeal has expired without an appeal having been taken.

[29] There is no order as to costs.

JUDGMENT

For the Reasons provided:

THE COURT ADJUDGES that:

1. The application is dismissed subject to paragraph 3 below;

2. The following question is certified:

   "Does the removal of a parent who has been granted custody of a Canadian born child by an Order of a provincial court, which order also prohibits removal of the child from the province, create a statutory stay pursuant to section 50(a) of the Immigration and Refugee Protection Act? Does the fact that the Order can be varied and that the Minister had an opportunity to speak to the Order make a difference?"

3. The removal of the Applicant from Canada is stayed until the final disposition of any appeal in respect of said certified question or the time for filing such an appeal has expired without any appeal having been made;

4. No Order as to costs.

"Roger T. Hughes"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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