Date: 20070316

Docket: A-142-06

Citation: 2007 FCA 75

CORAM: **DESJARDINS J.A.**
NOËL J.A.
PELLETIER J.A.

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION
and
MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
Appellants

and

MARIA BONNIE ARIAS GARCIA
ROBERTO SALGADO-ARIAS
RODOLFO VALDES-ARIAS (A.K.A. RODOLFO ARIAS-GARCIA)
Respondents

Hearing held at Montréal, Quebec, on February 7, 2007.

Judgment delivered at Ottawa, Ontario, on March 16, 2007.

REASONS FOR JUDGMENT: DESJARDINS J.A.

CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] Maria Bonnie Arias Garcia, her sons Roberto Salgado-Arias, as well as her second son Rodolfo Valdes-Garcia (a.k.a. Rodolfo Arias-Garcia), two minor children, are subject to a removal order enforceable as of January 19, 2005. Through the operation of subsection 224(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, this removal order has now become a deportation order. Ms. Arias Garcia is a person contemplated by subsection 36(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), and her children are

inadmissible to Canada based on an inadmissible family member pursuant to paragraph 42(*b*) of the Act.

[2] Although they are all named as respondents in the style and cause, the child Rodolfo is the only respondent.

[3] Rodolfo was the subject of a judgment by the Court of Appeal of Québec, dated June 8, 2004, following an application by the father to have him returned to Mexico forthwith. This application was made in accordance with *An Act respecting the Civil aspects of international and interprovincial child abduction*, R.S.Q. c. A-23.01, the Act giving effect to the *Hague Convention on the Civil Aspects of International Child Abduction* (the *Hague Convention*). The Court of Appeal of Québec dismissed the father's application.

[4] A Mexican judgment, dated October 6, 2004, granted the divorce of the two parents. The mother was given custody of Rodolfo and parental authority was conferred to both parents.

[5] On May 26, 2005, a pre-removal risk assessment (PRRA) officer made a negative finding on the PRRA application filed by Ms. Arias Garcia on the grounds that there was no personal risk to her or her children in Mexico and that State protection was available to them. The application for judicial review of this decision was dismissed on March 9, 2006 (A.R., page 272).

[6] An application to stay the removal order was filed pursuant to paragraph 50(*a*) of the Act. It was dismissed on June 17, 2005.

[7] The enforcement of this removal order was suspended until the final decision on the application for judicial review of the decision dated June 17, 2005, filed with the Federal Court of Canada.

[8] The application for judicial review was allowed: 2006 FC 311, [2006] 4 F.C.R. 455. Madam Justice Tremblay-Lamer relied on the case law factors elaborated in *Alexander v. Canada (Solicitor General)*, 2005 FC 1147, [2006] 2 F.C.R. 681 (*Alexander*) (appeal dismissed, as the issue had become moot (2006 FCA 386); adopted in *Perez v. Canada (Minister of Citizenship and Immigration*), 2005 FC 1317). She noted the decision in *Cuskic v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 3 (C.A.), then she stated:

> [33] In my analysis, I have been guided by those factors. In the case at bar, the Quebec Court of Appeal held, I think quite unequivocally, that the return of the child Rodolfo to Mexico should not take place since he had settled into his new environment. I quote the finding of Justice Louise Mailhot in full, at paragraph 41:
>
> > [translation]
> > I find that the evidence shows that the child has settled into his new environment and, for these reasons, I would allow the appeal, quash the trial judgment and dismiss the motion for the immediate return of the child Rodolfo to Mexico, each party to pay its own costs.

[9] Tremblay-Lamer J. determined:

> [48] In short, the removal officer was bound to abide by the temporary stay provided for by paragraph 50(*a*), since the court judgment had a direct effect on the removal order. However, the Court of Appeal's judgment has to be narrowly read. It cannot be interpreted as having the effect of giving Rodolfo permanent

> resident status, status which would have to be given or withheld by the proper authority.
>
> [49] The fact that the child Rodolfo may be the subject of a statutory stay is not a bar to removal of the mother, since the child's best interests cannot in any way be a bar to the removal of a parent who is illegally in Canada (*Legault*). As Dawson J. suggested in *Alexander*, parental custody does not imply physical custody of the child at all times, but the right to control its place of residence. When faced with removal, the mother may apply to the Court of Appeal for a variance of its order to allow the return of Rodolfo to Mexico or make provision for leaving him in Canada.

[10] She certified the following question:

> Can the judgment of a provincial court refusing to order the return of a child pursuant to the Convention on the Civil Aspects of International Child Abduction, [1989] Can. T.S. No. 35, and s. 20 of the Act respecting the Civil Aspects of International and Interprovincial Child Abduction, R.S.Q., c. A-23.01, "the ACAIICA", have the effect of directly and indefinitely preventing the enforcement of a removal order which has taken effect pursuant to the Immigration and Refugee Protection Act, S.C. 2001, c. 27, ("the IRPA")?

ANALYSIS

[11] Since it is essentially a question of law, the trial judge's decision had to be correct. The standard of review that we must apply is therefore that of correctness: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at paragraph 8.

[12] Paragraph 50(*a*) of the Act provides the following:

Stay	**Sursis**
50. A removal order is stayed	50. Il y a sursis de la mesure de renvoi dans les cas suivants :
(*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	*a*) une décision judiciaire a pour effet direct d'en empêcher l'exécution, le ministre ayant toutefois le droit de présenter ses observations à l'instance;

directly contravened by the enforcement of the removal order;	
. . .	[…]
[Emphasis added.]	[Je souligne.]

[13] Paragraph 50(*a*) is an exception to section 48, which provides that a removal order is applied as soon as conditions so permit.

[14] The relevant elements of the Court of Appeal of Québec's decision read as follows:

> [3] For the reasons of Mailhot J., with which Chief Justice Robert is in agreement.
>
> [4] ALLOW the appeal;
>
> [5] SET ASIDE the decision of first instance and DISMISS the application to have the child Rodolfo returned to Mexico forthwith, each party to pay their own costs.
>
> (Appeal Book, page 27)

[15] Tremblay-Lamer J. could not determine that the Court of Appeal of Québec's decision was a decision made in a judicial proceeding that would be " directly contravened" by the enforcement of the removal order, pursuant to paragraph 50(*a*) of the Act.

[16] For a decision made in a judicial proceeding to be "directly contravened" by the enforcement of the removal order, an express provision of an order must be inconsistent or irreconcilable with the removal of the person concerned. Therefore, I agree on this point with paragraph 34 of *Alexander*, referred to above.

[17] The trial judge misunderstood the scope of the Court of Appeal of Québec's decision when she stated: "the Quebec Court of Appeal held, I think quite unequivocally, that the return of the child Rodolfo to Mexico should not take place since he had settled into his new environment" (paragraph 33 of her reasons).

[18] The determination of the Court of Appeal of Québec to the effect that the child Rodolfo had settled into his new environment is part of the reasons of the majority's judgment and not of the decision itself. This determination was made during the analysis of whether the child should be returned to Mexico forthwith rather than kept in his new environment, considering the fact that more than one year had elapsed between the time of the wrongful removal of the child and the commencement of the proceedings for his return (section 20 of the *Act respecting the Civil aspects of international and interprovincial child abduction* and article 12 of the *Hague Convention*).

[19] The grounds raised by the majority to dismiss the father's application only explain the Court of Appeal's decision. The dismissal of the father's application is a judicial decision that does not contain a specific order. This decision therefore cannot be inconsistent or irreconcilable with the removal order.

[20] The respondent submits that in accordance with *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the child's interest must be considered for the purposes of interpreting and applying paragraph 50(*a*) of the Act.

[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.

[23] I would allow the appeal, set aside the decision by the trial judge and I would dismiss the application for judicial review.

[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.

[25] The respondent was seeking to have the enforcement of the deportation order stayed for 60 days if we allow the appeal. The removal officer, not the Court, is responsible for addressing such requests.

"Alice Desjardins"
J.A.

"I concur.
Marc Noël J.A."

"I concur.
J.D. Denis PelletierJ.A."

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-142-06
(APPEAL OF A FEDERAL COURT JUDGMENT DATED MARCH 9, 2006, DOCKET NO. IMM-3836-05).	
STYLE OF CAUSE:	MCI ET AL v. MARIA BONNIE ARIAS GARCIA ET AL.
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 7, 2007
REASONS FOR JUDGMENT:	DESJARDINS J.A.
CONCURRED IN BY:	NOËL J.A. PELLETIER J.A.
DATE OF REASONS:	MARCH 16, 2007

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