Date: 20080502

Docket: IMM-4533-05

Citation: 2008 FC 572

Ottawa, Ontario, May 2, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

KARLENE THOMPSON BLAKE

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Ms. Karlene Thompson-Blake (the "Applicant") seeks judicial review of the decision made by an Enforcement Officer (the "Officer") on July 12, 2005. In that decision, the Officer determined that an Order of the Ontario Court of Justice issued on February 10, 2005 granting the Applicant sole custody of her children and prohibiting their removal from Ontario, does not constitute a

statutory stay pursuant to subsection 50(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as amended, (the "Act"). The Applicant now seeks an Order quashing the decision to remove her to Jamaica, a declaration that a statutory stay arises by virtue of the Order of the Ontario Court of Justice for the purposes of subsection 50(a) of the Act, and an Order prohibiting her removal from Canada pending the determination of her application for landing in Canada on the basis of humanitarian and compassionate grounds.

II. Facts

[2] The Applicant is a citizen of Jamaica. She first entered Canada in 1987 as a permanent resident. She is the mother of two Canadian born children, a daughter, Krishana Danielle Brown, born November 3, 1992 and Kemoi Blake, born September 7, 1996.

[3] On April 27, 2000, a removal order was issued against the Applicant, following her conviction of a number of criminal offences including credit card fraud and importation of a narcotic.

[4] The Applicant sought to appeal the removal order to the Immigration Appeal Division (the "IAD") on the basis of humanitarian and compassionate grounds, pursuant to the former *Immigration Act*, R.S.C. 1985, c. I-2 (the "former Act"). On October 11, 2001, the IAD dismissed the appeal.

[5] On April 17, 2003, the Applicant applied for a Pre-Removal Risk Assessment ("PRRA") pursuant to the Act. A negative decision was made on this application on June 4, 2003.

[6] By letter dated October 5, 2004, the Applicant was advised that her removal from Canada had been scheduled for January 15, 2005. On January 11, 2005, the Applicant submitted an application to remain in Canada on H&C grounds. On January 19, 2005, she sent the Officer a copy of an *ex parte* interim Order dated January 17, 2005 that had been issued by the Ontario Court of Justice (the "Custody and Non-Removal Order"). The relevant part of that Order reads as follows:

> …
> 2. The Applicant mother and Moving Party, Karlene Thompson-Blake, shall have sole custody of the children: Krishana Danielle Brown, born November 3, 1992 and Kemoi Blake born on September 1996.
>
> 3. The children, Krishana Danielle Brown, born November 3, 1992, and Kemoi Blake born September 7, 1996, shall not be removed from the Province of Ontario by the Applicant mother or Respondents or anyone acting on either party's behalf without further order of this Court.
> …

[7] On February 10, 2005, Mr. Justice Scully of the Ontario Court of Justice issued a final Order granting the Applicant sole custody of her children. He also ordered that the children not be removed from the Province of Ontario. Although the Minister of Citizenship and Immigration was named as a Respondent in that matter, he did not appear at the hearing. The terms of the Order were as follows:

> …
> 2. Karlene Thompson-Blake shall have final sole custody of Krishana Danielle Brown born November 3, 1992 and Kenoi Blake born September 7, 1996.
>
> 14.(1)The above named children shall not be removed from the Province of Ontario, pursuant to section 19, 21 and 28 of the Children's Law Reform Act.
>
> (2) Order to be issued forthwith.

[8] By letter dated July 12, 2005, the Applicant was advised that her removal from Canada had been rescheduled for August 19, 2005.

[9] The Applicant met with the Officer on July 12, 2005. She brought the Custody and Non-Removal Order to the attention of the Officer and suggested that this Order precluded execution of the Removal Order. The Officer disagreed, on the basis that the Removal Order related only to the Applicant and did not concern the children. The Officer's Field Operating Support System ("FOSS") notes, dated July 12, 2005, provide as follows:

> Interview conducted with above-mentioned subject on this date. Notified of removal arrangements for 19 Aug 2005. Her consultant was present also made aware of the situation. Subject was verbally combative about the family court order that stated her children could not be removed from the country. She was informed that the department is enforcing a removal order directed to her and not her children. Her consultant asked what would be done regarding her children. She was informed that the removal order pertained to the subject only, that the department was in no way suggesting that the children were being removed, but should she require assistance we may be able to aid. …

[10] The Applicant subsequently moved for a stay of her removal and by Order dated August 8, 2005, a stay of removal was granted, pending disposition of this judicial review application. On August 14, 2005, leave was granted to the Applicant to bring this judicial review application.

[11] The Applicant subsequently filed a further application for leave and judicial review in cause number IMM-4686-05, relative to the Officer's decision not to defer her removal. On December 21, 2005, that application for leave was dismissed.

[12] On August 23, 2006, Madam Justice Dawson issued Reasons for Order and Order in *Alexander v. Canada (Solicitor General)*, [2006] 2 F.C.R. 681. In that decision, she held that the Ontario Court of Justice interim and final Orders granting an applicant custody of children and prohibiting their removal from Ontario did not give rise to a statutory stay of removal for the purposes of subsection 50(a) of the Act. 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?

[13] The within matter was set for hearing on November 20, 2006. On that date, the hearing was adjourned upon the consent of both parties, pending the disposition by the Federal Court of Appeal in *Alexander*. On November 28, 2006, the Federal Court of Appeal dismissed the *Alexander* appeal on the grounds of mootness; see *Alexander v. Canada (Solicitor General)* (2006), 360 N.R. 167.

III. Submissions

A. *The Applicant's Submissions*

[14] The Applicant challenges the Officer's decision on the grounds that it contravenes subsection 50(a) of the Act and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (the "Charter") and further, that it is not supported by sufficient reasons.

Standard of Review

[15] The Applicant argues that since this proceeding raises the issue of the interpretation of subsection 50(a) of the Act, as well as the application of the Charter, the applicable standard of review is that of correctness. In this regard, she relies upon the decision in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

Interpretation of Subsection 50(a) of the Act

[16] The Applicant argues that subsection 50(a) must be interpreted according to its ordinary meaning. Its statutory language must be read in its entire context and the grammatical and ordinary sense; see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. She submits that the Custody and Non-Removal Order will be breached for the purposes of subsection 50(a) upon a plain language reading of that provision, if the Applicant is removed from Canada and her children are subsequently taken from her physical care and custody.

[17] Next, the Applicant argues that subsection 50(a) must be interpreted in accordance with the purpose and overall scheme of the Act. She argues that section 12 of the *Interpretation Act*, R.S.C. 1985 c. I-21, as amended, requires that each federal enactment "shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its object". She submits that statutory stays pursuant to subsection 50(a) should be interpreted with due regard for the Act's "overall scheme" relying upon the decision in *Cuskic v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 3 (C.A.) at para. 20.

[18] Next, the Applicant submits that the execution of the Officer's decision would contravene the Custody and Non-Removal Order for the purposes of section 50(a) of the Act. In this regard, she relies on *Cassells v. Canada (M.C.I.)*, 2001 FCT 263, where the Court found that a summons to

appear before the family court constituted a statutory stay pursuant to subsection 50(a). If such a summons gives rise to a statutory stay, she submits that a court order "where the best interests of the child have been thoroughly examined must also create a statutory stay".

[19] The Applicant refers to section 234 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 which list two circumstances where a decision made in a judicial proceeding would not be contravened by the enforcement of a removal order, that is the withdrawal of criminal charges or any summons or subpoena if the person concerned were removed from Canada, upon an agreement between the Department of Citizenship and Immigration and the federal or provincial Attorney General, as the case may be.

[20] The Applicant refers to paragraph 3(1)(d) of the Act which provides that one of the statutory objectives is the reunification of families in Canada. She also refers to paragraph 68 of the decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1992] 2 S.C.R. 817 where the Supreme Court of Canada emphasized the importance of the objective of family reunification, as set out in the Act.

[21] The Applicant argues that the Custody and Non-Removal Order must be interpreted with regard to the general regime for family law in Ontario and in particular the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "CLRA").

[22] Next, the Applicant submits that custody constitutes physical care and control of children. In this regard, she relies on the decision in *Harsant v. Portnoi* (1990), 74 O.R. (2d) 33 (Ont. H.C.) at page 37.

[23] The Applicant disagrees with the conclusions of Madam Justice Dawson at paragraph 40 of *Alexander* where the Court concluded that the right to "control the child's place of residence" does not necessarily mean that the parent reside with the child, even while exercising control of the child's residence. The Applicant argues that this reading of *Chou v. Chou*, [2005] O.T.C. 256, [2005] O.J. No. 1374 is flawed.

<u>Section 7 of the Charter</u>

[24] The Applicant further argues that the Officer's decision offends section 7 of the Charter. She refers to paragraph 3(3)(d) of the Act which provides that the Act is to be applied in a manner that ensures that decisions made under it are consistent with the Charter. She submits that the Charter can assist with the interpretation of the scope of legislation where there is ambiguity and that an interpretation that is consistent with the Charter should be preferred over one that is not; see *Christian Horizons v. Ontario Human Rights Commission* (1993), 64 OAC 395 (Div. Ct.) at 397 and *Canada (Commissioner of the Royal Canadian Mounted Police)(Re)*, [1993] 2 F.C. 351 (T.D.).

[25] The Applicant also cites *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at para. 76, where Chief Justice Lamer recognized that separating a child from his or her parent may seriously affect the child's psychological integrity and well-being.

[26] The Applicant argues that in interpreting section 7 of the Charter, it is necessary to consider Canada's international obligations and to the extent possible, to presume that the Charter provides protection equivalent to that granted by similar provisions in international documents ratified by Canada. In this regard, she relies on the decisions in *Re Public Service Employees Relations Act*, [1987] 1 S.C.R. 313 at 349; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; and *United States v. Burns*, [2001] 1 S.C.R. 283.

[27] The Applicant refers to paragraph 3(3)(f) of the Act which provides that the Act is to be applied in a manner that complies with international human rights instruments to which Canada is signatory. She submits that such instruments are "determinative of the meaning of IRPA", relying on the decision in *De Guzman v. Canada (Minister of Citizenship and Immigration)* (2004), 257 F.T.R. 290 (F.C.); aff'd (2005), 345 N.R. 73 (F.C.A.); leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 70 and *Martinez v. Canada (Minister of Citizenship and Immigration)*, [2003] FC 1341.

[28] The Applicant submits that Canada ratified the United Nations *Convention on the Rights of the Child*, [1992] Can. T.S. No. 3 (the "CRC") and that the CRC establishes a framework within which all legislative and administrative decisions should be made.

[29] The Applicant also argues that Canada is signatory to additional instruments that recognize the best interests of the child and the importance of the parent child relationship, for example the *Universal Declaration of Human Rights*, Article 12 and the *International Covenant on Civil and Political Rights*, Articles 17 and 23.

[30] Finally, the Applicant cites a decision of the United Kingdom in which the Court found that a parent of a child who was a United Kingdom citizen could invoke a right of residence deriving from that child; see *Man Lavette Chen and Kunqian Catherine Zhu v. Secretary for the Home Department*, case C-200/02, 18 May 2004.

[31] The Applicant argues that the violation of section 7 arising from the Officer's decision cannot be justified under section 1. She submits that section 7 violations can only be justified under section 1 in the most exceptional circumstances, relying upon the decisions in *Re Motor Vehicle Act*, [1985] 2 S.C.R. 486 at para. 83 and *R. v. Ruzic*, [2001] 1 S.C.R. 687 at paras. 91-92.

<u>Adequacy of the Officer's Reasons</u>

[32] Finally, the Applicant submits that the Officer breached the obligations of procedural fairness by failing to provide adequate reasons for the decision. In this regard, she relies on the decisions in *Baker* and *Diaz v. Canada (Minister of Citizenship and Immigration)* (1999), 173 F.T.R. 139, for the propositions that procedural fairness requires that decisions with significant consequences for an individual require the support of reasons.

B. *The Respondent's Submissions*

Interpretation of Subsection 50(a) of the Act

[33] The Respondent argues that the Officer's decision is consistent with the grammatical and ordinary meaning of subsection 50(a) of the Act. In this regard, he relies upon dictionary meanings of "direct", "directly" and "contravene". The Respondent argues that, in light of the use of these words in subsection 50(a), that the Custody and Non-Removal Order could only give rise to a statutory stay if it would be "unambiguously violated by the Applicant's removal from Canada". The Respondent then submits that the custody element of the Order would not be violated by the Applicant's deportation because the Order does not alter the rights or obligations held by the Applicant as a custodial parent prior to the issuance of the Order or, for that matter, of the rights and obligations of any parent towards his or her children.

[34] The Respondent further argues that the residency portion of the Custody and Non-Removal Order would not be violated by the Applicant's deportation because the children are not being removed from Ontario.

[35] The Respondent states that the interpretation of the words "directly contravened" by Madam Justice Dawson in *Alexander* is supported by jurisprudence under the former Act and in that regard, refers to the decision in *Mobtagha v. Canada (Minister of Employment and Immigration)* (1992), 53 F.T.R. 249 (F.C.T.D.). In that case, the Court determined that a custody order issued by the Lieutenant-Governor of Quebec did not give rise to a statutory stay pursuant to paragraph 50(1)(a) of the former Act because it was not "an order made by any judicial body or officer in Canada" and nothing in the order required the applicant to be in Canada or to appear before a tribunal at a particular time or place.

[36] The Respondent further submits that the Officer's decision is consistent with the immigration scheme established by Parliament. He relies on the decision in *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at 733 where the Supreme Court clearly stated that non-citizens do not have an unqualified right to enter or remain in Canada.

[37] According to the Respondent, the comprehensive statutory scheme of the Act allows for immigration and provides protection where appropriate, but necessarily also provides for the removal of foreign nationals, deferral of removal and for statutory and judicial stays. He submits

subsection 50(a) was not intended to allow foreign nationals to purposely avoid other alleged obligations under the Act and refers to the decision in *Louis v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1244 where the Court rejected the argument that a statutory stay arose pursuant to paragraph 50(1)(a) of the former Act because the applicant was required to attend a civil matter. In rejecting this argument, the Court said paragraph 50(1)(a) of the former Act was not enacted to allow persons to avoid other obligations under that legislation.

[38] The Respondent also argues that the best interests of the child do not automatically entitle a foreign national to enter and remain in Canada. Although Canadian family courts, including the family courts of Ontario, address the best interests of the child in deciding custody and access matters, the best interests of the child is but one factor to be considered pursuant to the statutory scheme governing immigration; see *Baker*, *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358, leave to appeal to the S.C.C. refused, [2002] S.C.C.A. No. 220 and *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 F.C. 555 (Fed. C.A.).

[39] The Respondent submits that a finding that the Custody and Non-Removal Order gives rise to a statutory stay pursuant to subsection 50(a) would lead to the “absurd result” that a family with custody and residency orders would enjoy a relative advantage over those without such orders. This

result would undermine the fairness, integrity and confidence in Canada's immigration system; see *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261 at para. 22.

[40] The Respondent argues that the *Federal Courts Act*, R.S.C. 1985 c. F-7, as amended, in subsection 18(3), section 18.1 and section 18.2 makes it clear that this Court exercises exclusive jurisdiction to issue prerogative relief against federal decision-makers and that such relief can only be obtained through an application for judicial review. He submits that some recent Provincial Court decisions show that foreign nationals "are increasingly attempting to use paragraph 50(a) of the Act and provincial courts" to undermine the legislative framework established by Parliament. In this regard, the Respondent refers to the decision in *Varvara v. Costantino*, [2003] O.J. No. 5980 (C.J.).

[41] Next, the Respondent submits that the Officer's decision is consistent with the objectives and intentions of Parliament as set forth in subsection 25(1) of the Act and section 233 of the Regulations. Subsection 25(1) provides that H&C decisions are to be made taking into account the best interests of a child who is directly affected. These best interests are to be a primary but not determinative consideration; see *Baker*, *Legault*, and *Hawthorne*.

[42] Section 233 of the Regulations provide for a statutory stay where an H&C application is approved. The Respondent submits that from this, it can be inferred that Parliament did not intend that an outstanding H&C application would prevent the removal of a foreign national.

Section 7 of the Charter

[43] The Respondent submits that Madam Justice Dawson was correct in *Alexander* in finding that section 7 of the Charter does not preclude the removal of foreign nationals who have Canadian born children. It notes that *Baker* does not overrule *Langner v. Canada (Minister of Employment and Immigration)* (1995), 29 C.R.R. (2d) 184, 184 N.R. 230 (F.C.A.) and *Langner* remains good law. Further, the Respondent argues that *Baker*, *Legault*, *Hawthorne* and other cases specifically contemplate the separation of a foreign national from his or her Canadian born children but make no findings that such a separation violates section 7 of the Charter.

[44] Further, the Respondent suggests that the Charter does not apply to court orders that concern custody and access and relies in this regard on the decision in *Young v. Young*, [1993] 4 S.C.R. 3. He argues that the best interests of the child is not a principle of fundamental justice; see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at para. 10.

[45] The Respondent deals with the Applicant's submissions upon the application of international laws as a separate issue, rather than in connection with the interpretation of the Charter. He submits that international law does not prevent sovereign states from deporting foreign nationals where such deportation would result in separation from their children. In the first instance,

the Respondent notes that the CRC has not been incorporated into domestic law and further, that in both *Langner* and *Baker*, the Court rejected the suggestion that the CRC precluded the separation of a parent and child in deportation proceedings. Further, the Respondent submits that the best interests of the child under the CRC is a primary but not the only relevant consideration and may be subordinated to other considerations. In this regard, he relies upon the decision in *Canadian Foundation*.

[46] The Respondent also submits that the foreign jurisprudence relied upon by the Applicant has no persuasive value since the provisions interpreted in those decisions do not correspond to any provision in the Charter; see *Langner*. As well, the Respondent says that these authorities have no legal force in Canada.

[47] Further, the Respondent submits that the Act is not inconsistent with international law because international law does not stop a sovereign state from deporting a foreign national where deportation would lead to separation of parent and child. Whether or not paragraph 3(3)f of the Act makes the CRC or other international instruments to which Canada is signatory determinative of the meaning of the Act, where there is no clearly expressed intention to that effect, is irrelevant.

Adequacy of the Officer's Reasons

[48] Finally, the Respondent argues that the Officer did not fail to give sufficient reasons. He notes that a removal officer has limited discretion pursuant to section 48 of the Act to defer a removal order. In exercising that discretion, an officer can consider circumstances directly affecting travel arrangements and other compelling individual circumstances.

IV. Discussion and Disposition

[49] This application for judicial review raises two issues, as follows:

a. What is the applicable standard of review? And

b. Did the Officer commit a reviewable error in determining that the Custody and Non-Removal Order did not constitute a statutory stay for purposes of subsection 50(a) of the Act?

Standard of Review

[50] The principal issue here is the interpretation of subsection 50(a) of the Act which provides as follows:

50. A removal order is stayed (a) if a decision that was made	50. Il y a sursis de la mesure de renvoi dans les cas suivants :

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;	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;

[51] Since the question of statutory interpretation is involved, the appropriate standard of review is that of correctness. The present proceeding also raises an issue as to the scope of section 7 of the Charter. That is also a question of law that attracts the correctness standard of review. The decision in *Pushpanathan* supports this view.

[52] The adequacy of reasons raises an issue of procedural fairness that is also reviewable on a standard of correctness; see *Fetherston v. Canada (Attorney General)* (2005), 332 N.R. 113 (C.A.). This approach was taken by Justice Dawson in *Alexander* at paras. 23 and 24.

Review of the Officer's Decision

[53] The Applicant argues that the Officer erred in law by finding that the Order of the Ontario Court of Justice awarding her sole custody of her two Canadian born children and an Order that the children not be removed from the Province of Ontario does not give rise to a statutory stay pursuant to subsection 50(a) of the Act.

[54] The first matter to be addressed here is the legislative context which governs the Applicant's status. She is a permanent resident who is the subject of a removal order made pursuant to the former Act. She is subject to the requirements of immigration law. In that regard, I refer to the decision of the Supreme Court of Canada in *Chiarelli* at 733-734, where Justice Sopinka said the following:

> Thus Parliament has the right to adopt an immigration policy and to enact legislation prescribing [page734] the conditions under which non-citizens will be permitted to enter and remain in Canada. It has done so in the *Immigration Act*. Section 5 of the Act provides that no person other than a citizen, permanent resident, Convention refugee or Indian registered under the *Indian Act* has a right to come to or remain in Canada.
> …

[55] The interpretation of subsection 50(a) must be approached in the context of the governing legislation. According to the decision of the Supreme Court of Canada in *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, the context is that of immigration law. In *Prata v. Canada (Minister of Manpower and Immigration)*, [1976] 1 S.C.R. 376, the Supreme Court of Canada said that immigration is a privilege, not a right.

[56] In *Rizzo and Rizzo Shoes Ltd. (Re)* at 41, the Supreme Court of Canada said that the proper approach to statutory interpretation is a purposive one, that is, one that goes beyond mere reliance

on the words of the statute. The language of a particular statutory provision must be read in context having regard to the scheme of the legislation, its object and the intention of Parliament.

[57] The scheme of the Act is to regulate the entry of non-citizens into Canada. At the same time the Act identifies, as one of its objectives, the reunification of families, that is in paragraph 3(1)(d). The Act also refers to respect for international conventions in paragraph 3(3)(f). However, the Courts have repeatedly ruled that the best interests of the children are not paramount in the scheme of immigration law. In this regard, I refer to the decisions *Legault*, *Hawthorne* and *De Guzman*.

[58] The Act does not contemplate that the making of a custody order *per se* will give rise to a statutory stay pursuant to subsection 50(a). The Custody and Non-Removal Order in question was made pursuant to a provincial statute, that is the CLRA of Ontario. The intent, purpose and scope of that legislation do not trump the legislative scheme set out in the Act. Insofar as the Order in question arises under a statutory scheme enacted by the Province of Ontario for the purposes and objectives that are unrelated to the purposes of the Act, this Court is not required to apply provincial law. In that regard, I refer to the decision in *ITO - International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at 781-782 where Justice McIntyre discussed the application of provincial law where "jurisdiction is otherwise founded on federal law." The interpretation and application of the Act, insofar as it regulates the entry and exclusion of non-citizens, does not require the application of family law principles arising from provincial legislation.

[59] Section 50 is to be read in the overall context of the Act. That means reference must be made to section 48 which requires that removal orders be executed “as soon as practicable”. Subsection 48 provides as follows:

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.

[60] In the scheme of the Act, only Canadian citizens and permanent residents have an unqualified right to remain in Canada. Permanent residents may be removed, under certain circumstances. The Applicant, as a result of criminal activities and convictions, became vulnerable to removal. Once the Removal Order against her became effective, the Respondent was obliged to discharge his statutory duty, pursuant to section 48 to effect that removal as soon as practicable, unless that removal was stayed by an order of the Court or by operation of law. This statutory obligation cannot be displaced by the making of a custody order, pursuant to another statutory scheme.

[61] The Custody and Non-Removal Order made on February 16, 2005 by Mr. Justice Scully pursuant to the CLRA is not an "order" that gives rise to a stay pursuant to section 50 of the Act.

[62] I turn now to the Applicant's submissions concerning the breach of her Charter rights to fundamental justice and security of the person. The Applicant alleges that the Officer's refusal to recognize the Custody and Non-Removal Order as the basis of a statutory stay pursuant to section 50 of the Act constitutes a breach of section 7 of the Charter. This submission cannot succeed.

[63] In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 47, the Supreme Court of Canada said that there is no independent right to fundamental justice itself and there will be no violation of section 7 if there is no deprivation of life, liberty or security of the person.

[64] The issue of security of the person was considered by the Supreme Court of Canada in *G.(J.)* at p. 147, the Court found that the constitutional guarantee of security of the person does not protect against "ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action." The idea of "government action" is relevant for a section 7 inquiry. The anxiety must be caused by some state action or interference.

[65] In the present case, the Applicant's right to security of the person is not infringed by the action of the government in seeking to remove her from Canada. The Custody and Non-Removal Order relates to her children, who are Canadian citizens. The Order does not affect the Applicant's personal security and does not engage section 7 of the Charter in relation to her.

[66] Moreover, in *Alexander*, Justice Dawson said, with reference to *Chou*, that "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".

[67] I agree with the arguments presented by the Respondent that the best interests of a child is not a principle of fundamental justice. This issue was discussed by the Supreme Court of Canada in *Canadian Foundation for Children*.

[68] Since I am not persuaded that section 7 of the Charter applies to the Applicant's situation, it is not necessary to consider the arguments made respecting section 7 of the Charter.

[69] The only issue remaining is the alleged breach of procedural fairness, arising from the absence of reasons for the Officer's decision.

[70] I agree with the arguments made by the Respondent that no breach of procedural fairness occurred. Not every administrative decision requires the delivery of reasons. I refer to the decision in *Boniowski v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1161, 44 Imm. L.R. (3d) 31, where Justice Mosley said the following:

> 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.

[71] In the result, this application for judicial review is dismissed. Counsel for the Respondent submitted the following questions for certification, having reviewed same with Counsel for the Applicant. Notwithstanding the decision of the Federal Court of Appeal in *Garcia v. Canada*

(Minister of Citizenship and Immigration), [2008] 1 F.C.R. 322, I am satisfied that the proposed questions meet the test for certification of a question, as discussed in *Zazai v. Canada (Minister of Citizenship and Immigration)*, 36 Imm. L.R. (3d) 167.

[72] Accordingly, the following questions will be certified:

1) 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?

2) If it does not create a statutory stay pursuant to s. 50(a) of IRPA, then does removal of the mother/parent constitute a violation of section 7 of the Charter?

JUDGMENT

This application for judicial review is dismissed. The following questions are certified:

1) 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?

2) If it does not create a statutory stay pursuant to s. 50(a) of IRPA, then does removal of the mother/parent constitute a violation of section 7 of the Charter?

"E. Heneghan"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4533-05
STYLE OF CAUSE:	Karlene Thompson Blake and Minister of Public Safety and Emergency Preparedness
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 28, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	HENEGHAN J.
DATED:	May 2, 2008

APPEARANCES:

Ms. Carole Simone Dahan	FOR THE APPLICANT
Mr. Robert Bafaro	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Carole Simone Dahan Toronto, Ontario	FOR THE APPELLANT
John H. Sims, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT