A-142-06

2007 FCA 75

Minister of Citizenship and Immigration and **Minister of Public Safety and Emergency Preparedness** (*Appellants*)

v.

Maria Bonnie Arias Garcia, Roberto Salgado-Arias and **Rodolfo Valdes-Arias (a.k.a. Rodolfo Arias-Garcia)** (*Respondents*)

INDEXED AS: GARCIA v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) (F.C.A.)

Federal Court of Appeal, Desjardins, Noël and Pelletier JJ.A.—Montréal, February 7; Ottawa, March 16, 2007.

Citizenship and Immigration — Exclusion and Removal — Removal of Refugees — Appeal from Federal Court decision allowing judicial review of decision refusing stay of removal order against respondent child Rodolfo — Whether Court of Appeal of Quebec judgment refusing to return Rodolfo to Mexico following application by father having effect of directly, indefinitely preventing enforcement of removal order — Immigration and Refugee Protection Act, s. 50(a) providing removal order stayed if decision in judicial proceeding directly contravened by enforcement of order — Court of Appeal's decision not directly contravened by enforcement of removal order as not containing express provision inconsistent, irreconcilable with order — Distinction between judgment, decision — Appeal allowed.

This was an appeal from a decision of the Federal Court allowing an application for judicial review of the decision refusing to stay the removal order against the respondent child Rodolfo. Rodolfo was the subject of a judgment of the Court of Appeal of Quebec dismissing his father's application to have him returned to Mexico forthwith. Quoting from the Court of Appeal's judgment, the Federal Court held that Rodolfo should not be returned to Mexico because he had "settled into his new environment." It also held that the removal officer was bound to abide by the temporary stay provided for by paragraph 50(*a*) of the *Immigration and Refugee Protection Act* (IRPA), since the Court of Appeal of Quebec judgment had a direct effect on the removal order.

At issue was the certified question as to whether the judgment of a provincial court refusing to return a child pursuant to the *Convention on the Civil Aspects of International Child Abduction* and to the *Act respecting the Civil Aspects of International and Interprovincial Child Abduction* of Quebec has the effect of directly and indefinitely preventing the enforcement of a removal order which has taken effect pursuant to the IRPA.

Held, the appeal should be allowed.

Paragraph 50(*a*) of the IRPA provides that a removal order is stayed "if a decision that was made in a judicial proceeding . . . would be directly contravened by the enforcement of the removal order". The Court of Appeal of Quebec's judgment was not "directly contravened" by the enforcement of the removal order. Direct contravention requires an express provision that is inconsistent or irreconcilable with the removal order. The determination of the Court of Appeal of Quebec that Rodolfo should not be removed because he had settled into his new environment was part of the majority's judgment and not of the decision itself. The dismissal of the father's application was a judicial decision that did not contain a specific order. This decision could not be inconsistent or irreconcilable with the removal order. The certified question was therefore answered in the negative.

statutes and regulations judicially
considered

Act respecting the Civil Aspects of International and Interprovincial Child Abduction, R.S.Q., c. A-23.01, s. 20.

Convention on the Civil Aspects of International Child Abduction, The Hague, October 25, 1980, [1983] Can. T.S. No. 35, Art. 12.
Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 36(1), 42(*b*), 48, 50(*a*).
Immigration and Refugee Protection Regulations, SOR/2002-227, s. 224(2).

cases judicially considered

applied:

Alexander v. Canada (Solicitor General), [2006] 2 F.C.R. 681; (2005), 49 Imm. L.R. (3d) 5; 2005 FC 1147; affd (2006), 57 Imm. L.R. (3d) 1; 360 N.R. 167; 2006 FCA 386.

considered:

M.B.G.A. c. R.V.M., [2004] R.D.F. 500 (Que. C.A.); *Perez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1317; *Cuskic v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 3; (2000), 148 C.C.C. (3d) 541; 9 Imm. L.R. (3d) 5; 261 N.R. 73 (C.A.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22.

referred to:

Housen v. Nikolaisen, [2002] 2 S.C.R. 235; (2002), 211 D.L.R. (4th) 577; [2002] 7 W.W.R. 1; 219 Sask. R. 1; 10 C.C.L.T. (3d) 157; 30 M.P.L.R. (3d) 1; 286 N.R. 1; 2002 SCC 33.

APPEAL from a decision of the Federal Court ([2006] 4 F.C.R. 455; (2006), 271 D.L.R. (4th) 565; 289 F.T.R. 77; 57 Imm. L.R. (3d) 23; 2006 FC 311) allowing the application for judicial review of the decision refusing to stay the removal of the respondent Rodolfo. Appeal allowed.

appearances:

Ian Demers for appellants.

Jean El Masri for respondents.

solicitors of record:

Deputy Attorney General of Canada for appellants.

El Masri Dugal, Montréal, for respondents.

The following is the English version of the reasons for judgment rendered by

[1] DESJARDINS J.A.: Maria Bonnie Arias Garcia, her son 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 of cause, the child Rodolfo is the only respondent.

[3] Rodolfo was the subject of a judgment by the Court of Appeal of Quebec, dated June 8, 2004 [*M.B.G.A. c. R.V.M.*, [2004] R.D.F. 500], following an application by the father to have him returned to Mexico forthwith. This application was made in accordance with the *Act respecting the Civil Aspects of International and Interprovincial Child Abduction*, R.S.Q., c. A-23.01, the Act giving effect to the *Convention on the Civil Aspects of International*

Child Abduction [October 25, 1980, [1983] Can. T.S. No. 35] (the Hague Convention). The Court of Appeal of Quebec 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 on 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.B., 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] 4 F.C.R. 455 (F.C.). Madam Justice Tremblay- Lamer relied on the case law factors elaborated in *Alexander v. Canada (Solicitor General)*, [2006] 2 F.C.R. 681 (F.C.) (*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 at paragraph 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, at paragraphs 48-49:

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.

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, at paragraph 52:

> [TRANSLATION] 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:

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; [Emphasis added.]

[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 Quebec's decision read as follows, at paragraphs 3-5:

[TRANSLATION] For the reasons of Mailhot J., with which Chief Justice Robert is in agreement.

ALLOW the appeal;

SET ASIDE the decision of first instance and DISMISS the application to have the child R . . . returned to Mexico forthwith, each party to pay their own costs.

[15] Tremblay-Lamer J. could not determine that the Court of Appeal of Quebec'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 Quebec'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 Quebec 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 Quebec cannot be interpreted as having the effect of conferring permanent resident status on 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 paragraph 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, 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 Quebec 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 [at paragraph 52] in the negative:

> [TRANSLATION] 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] R.T. Can. No. 35, and section 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")?

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.

NOËL J.A.: I concur.

PELLETIER J.A.: I concur.