Date: 20081223

Docket: A-567-07

Citation: 2008 FCA 418

CORAM: **SEXTON J.A.**
EVANS J.A.
RYER J.A.

BETWEEN:

EGHOMWANRE JESSICA IDAHOSA

Appellant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard at Toronto, Ontario, on December 8, 2008.

Judgment delivered at Ottawa, Ontario, on December 23, 2008.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: SEXTON J.A.
RYER J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] This is an appeal by Eghomwanre Jessica Idahosa, a citizen of Nigeria, who entered Canada in 2001 and claimed Convention refugee status. Her claim was denied and she was ordered deported. She made other applications to remain in Canada, but these were also unsuccessful. Although her removal was originally scheduled for June 30, 2006, it has been deferred, or stayed by judicial order, several times, and Ms Idahosa is still in Canada.

[2] The decision under review in these proceedings is a refusal by an enforcement officer to defer Ms Idahosa's removal to Nigeria scheduled for November 1, 2006. She challenged this refusal in the Federal Court in an application for judicial review. She argued that paragraph 50(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA") stayed the removal order because its execution would directly contravene an order of the Ontario Court of Justice awarding her sole custody of her Canadian-born children and prohibiting their removal from the province.

[3] Justice Hughes of the Federal Court denied Ms Idahosa's application for judicial review of the enforcement officer's decision (2007 FC 1200) and certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA") that the following "serious question of general importance is involved".

> 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?

[4] In my opinion, the certified question is too broad because it omits an important aspect of this case, namely, the absence of any actual or potential dispute over the custody of the children. The custody and non-removal order was sought solely for the purpose of preventing the removal of Ms Idahosa by obtaining a statutory stay under paragraph 50(*a*). The question is whether the statutory stay applies to a custody order obtained in the circumstances of this case. In my view, it does not.

B. LEGISLATION

[5] The provision of IRPA immediately relevant to the disposition of the appeal is as follows.

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 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;
…	[…]

C. FACTUAL BACKGROUND

[6] Ms Idahosa's claim for refugee protection was denied by the Immigration and Refugee Protection Division of the Immigration and Refugee Board in April 2004. Her application for leave to apply for judicial review of that decision was dismissed by the Federal Court in August 2004.

[7] In November 2004, she applied to the Minister of Citizenship and Immigration under IRPA, subsection 25(1) for permanent residence status on humanitarian and compassionate ("H & C") grounds. By this time, she had given birth in Canada to two children, a son born in 2002 and a daughter born in 2004, before her H & C was decided. Her H & C application was based in part on their best interests. It was denied in May 2006.

[8] Meanwhile, in March 2006, the best interests of the children were again considered, this time in the context of a pre-removal risk assessment ("PRRA"). The officer concluded that neither Ms Idahosa nor her children would be at risk in Nigeria, where viable internal flight alternatives

were available to her. In particular, the officer rejected the submission that Ms Idahosa's daughter would be at risk of female genital mutilation ("FGM") in Nigeria, noting that Ms Idahosa is an educated woman with a law degree, who would make every effort to protect her daughter.

[9] In August 2006, Ms Idahosa asked an enforcement officer to defer her removal, pending the determination of a second H & C application. Her request was refused because she had not yet made an application, the best interests of her children had already been considered in the first H & C application and in the PRRA, and the evidence she was presenting in support of the deferral had been submitted to the H & C and PRRA officers. Ms Idahosa subsequently made a second H & C application on December 1, 2006, which, the Court has been informed, is unlikely to be decided for at least another eight months, that is, in mid-2009.

[10] Just a week before her removal scheduled for November 1, 2006, Ms Idahosa applied to the Ontario Court of Justice for an order of temporary custody of her Canadian-born children and a prohibition of their removal from Ontario without further order of the Court. The children have been in Ms Idahosa's sole care and control from birth. Their fathers apparently are in Nigeria and seem to have had no involvement with them. The Minister was given notice of the application and the Minister's representative made an appearance to say that the Minister had no objection to such an order, provided that the Court did not deal with Ms Idahosa's immigration status.

[11] The Judge heard the matter on an urgent *ex parte* basis. In an order dated October 24, 2006, the Judge granted temporary custody of the children to Ms Idahosa and prohibited their removal from Ontario and stated that the Court was not dealing with the issue of her immigration status.

[12] Nonetheless, armed with this custody order, Ms Idahosa asserted to an enforcement officer that paragraph 50(*a*) stayed her removal, because it would directly contravene the order. In a decision of October 25, 2006, the officer refused her request, finding that her removal would not directly contravene the custody order because it did not require her to reside with her children.

[13] She applied to the Federal Court for judicial review of the enforcement officer's decision. Her removal was stayed by an order of the Court, pending the determination by the Federal Court of Appeal of a case raising the same point. In the event, this Court dismissed the appeal for mootness: *Alexander v. Canada (Solicitor General)*, 2005 FC 1147, 2006 FCA 386 ("*Alexander*"). Ms Idahosa's removal was then stayed again by a Judge of the Federal Court, pending the disposition of her application for judicial review.

C. DECISION OF THE FEDERAL COURT

[14] Justice Hughes held that Ms Idahosa's removal, without her children, would not directly contravene the custody order granted by the Ontario Court because it did not require that she remain physically with them. And, if she wished to take them to Nigeria with her, she could request a variation of the part of the order requiring them to remain in the province. In so concluding, the

Judge followed the Federal Court's decision in *Alexander*, which has been applied consistently in that Court.

[15] Justice Hughes also rejected arguments that removal would violate the rights of Ms Idahosa and her children under section 7 of the *Canadian Charter of Rights and Freedoms*, and Canada's international legal obligations under the *United Nations Convention on the Rights of the Child*, the *Universal Declaration of Human Rights*, and the *International Covenant on Civil and Political Rights*.

D. ISSUES AND ANALYSIS

Issue 1: Does IRPA, paragraph 50(*a*) stay the enforcement of Ms Idahosa's removal order because of the custody order issued by the provincial court?

(i) standard of review

[16] The only issue to be decided in this appeal is the interpretation of IRPA, paragraph 50(*a*), which is a question of law. Although paragraph 50(*a*) is contained in the enforcement officer's "home statute", the mandate of enforcement officers is limited to scheduling removals and making the necessary administrative arrangements. Officers' discretion to defer a removal is narrow: see, for example, *Simoes v. Canada (Minister of Immigration and Citizenship)* (2000), 187 F.T. R. 219; *Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 295 (F.C.).

[17] In view of enforcement officers' limited and subsidiary decision-making role in the administration of IRPA, their expertise does not extend to determining whether paragraph 50(*a*) applies to the judicial order in question here. Counsel for Ms Idahosa rely on the *Canadian Charter of Rights and Freedoms* and international law to support their interpretation of paragraph 50(*a*). This is another indication that the legal questions in dispute in this case are outside the officer's field of expertise and, hence, no deference is due to her interpretation of paragraph 50(*a*).

[18] Finally, paragraph 50(*a*) limits the circumstances in which the enforcement of removal orders issued under IRPA are stayed by court orders made under other legal regimes. Compare *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at para. 61 ("*Dunsmuir*"), where correctness was said to be the standard of review applicable to a tribunal's interpretation of a provision in its enabling statute demarcating which of two specialized tribunals should decide a matter.

[19] These circumstances are sufficient to rebut the presumption established in *Dunsmuir* at para. 54 that administrative decision-makers' interpretation of their "home" legislation is normally reviewable on a standard of reasonableness. Consequently, correctness is the applicable standard of review of the legal issues in dispute in this case.

(ii) appellant's position

[20] Ms Idahosa's principal argument is attractively simple. She says that the rights inherent in an award of sole custody include the physical care and control of the child: *Chou v. Chou*

(2005), 253 D.L.R. (4th) 548 (Ont. S.C.J.) ("*Chou*"). Accordingly, the order awarding sole custody to Ms Idahosa gives her the right and responsibility to care for her children on a daily basis. Her removal would preclude this if her children remain in Canada, and the non-removal provision in the custody order prohibits her from taking them with her. Since the enforcement of the removal order would thus directly contravene the custody order, paragraph 50(*a*) stays Ms Idahosa's removal.

[21] *Alexander*, she submits, was wrongly decided. The Applications Judge in that case, Justice Dawson, erred when she concluded (at para. 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.

Justice Dawson, counsel says, overlooked the fact that *Chou* provides (at para. 21) that custody includes, not only control of the child's place of residence, but also "the right to physical care and control".

[22] Counsel argues that custody orders of the kind granted in the present case fill a "gap" in IRPA by ensuring that a parent is not removed before her H & C application has been determined and the best interests of any affected children have been duly considered. As is evident from this case, and others, it can take several years for an H & C application to be decided. Meanwhile, a custody order, in effect, maintains the *status quo* pending the determination of an H & C application, which is the proper forum for balancing the competing interests, including the best interests of any affected children.

(iii) Minister's response

[23] The main thrust of the response made by counsel for the Minister is no less cogent. He says that Ms Idahosa's removal would not "directly contravene" the custody order because it does not require that she keep the children in her care and control. If she decides not to take the children with her, the separation will have resulted from her decision as to what is best for them.

[24] More broadly, he argues, it would be inconsistent with the scheme of IRPA to accede to Ms Idahosa's argument, and bring within the scope of paragraph 50(*a*) custody orders obtained, in the absence of a family law dispute, for the purpose of staying the removal of a person who has been ordered deported. He notes that the propriety of granting custody and non-removal orders in these circumstances is controversial (see *J.H. v. D.A.* (2008), 290 D.L.R 732 (Ont. S.CJ.)) and is the subject of an appeal to be heard next month by the Court of Appeal for Ontario.

[25] Indeed, the custody order granted in the present case seems itself to acknowledge that it does not have the effect claimed by Ms Idahosa. In response to the concern expressed by the Minister's representative, the Judge endorsed on the motion the statement that the Court "will not be dealing at all" with Ms Idahosa's immigration status.

[26] Counsel submits that IRPA establishes a comprehensive scheme for its enforcement, including a provision, subsection 48(2), that removal orders must be enforced as soon as is reasonably practicable. In addition, section 25 confers a broad discretion on the Minister, reviewable on an application for judicial review in the Federal Court, to permit otherwise ineligible non-

nationals to remain in Canada on humanitarian and compassionate grounds. The Federal Court is the proper forum for determining whether the execution of a deportation order should be stayed pending the determination of an H & C application.

[27] To interpret paragraph 50(*a*) as applying to the custody order granted in this case, he says, would have the undesirable effects of creating an alternative system of decision-making in provincial courts when deportation orders affect children, and of encouraging "forum shopping" for decisions that would defer the enforcement of removal orders. It would enable a provincial court, which neither has nor claims jurisdiction over deportation matters, to make an order to prevent or delay a removal.

(iv) interpretation of paragraph 50(*a*)

[28] Despite its notoriety, the courts' current approach to the interpretation of legislation bears repeating. It was most famously formulated in *Rizzo & Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27 at para. 21, by Justice Iacobucci who quoted as follows from Elmer Driedger, *Construction of Statutes*, 2nd ed. (Markham, Ontario: Butterworths, 1983):

> … the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Supreme Court has further distilled matters by stating that courts should interpret legislation by reference to its text, context and purpose: see, for example, *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539 at para. 8. With this guidance firmly in mind, I turn now to the interpretation of paragraph 50(*a*).

(a) *statutory text*

[29] The ordinary and grammatical meaning of the words in paragraph 50(*a*), "a decision that was made in a judicial proceeding", indicates that it applies to the custody order made by the Ontario Court of Justice in this case.

[30] The removal of Ms Idahosa may "directly contravene" the custody order if, properly construed, it requires her to keep the children within her physical care and control, and prohibits her from taking them out of the province. However, the provincial court Judge's statement that he was not dealing with Ms Idahosa's immigration status may put this in doubt. In any event, the basis on which I would dispose of this appeal does not require me to decide if the removal of a parent without her children would "directly contravene" the custody order, whether or not the order specified that they were to remain in the physical care and control of the parent subject to removal. However, if Ms Idahosa wishes to take her children with her, she will presumably first need to ask the Ontario Court of Justice to vary the non-removal order which she herself had requested in order to delay her removal.

(b) *statutory context*

[31] While a literal, abstract reading of paragraph 50(*a*) would seem to support Ms Idahosa's position, a contextual interpretation of the words points the other way, for at least four reasons.

[32] First, it would seem inconsistent with the duty imposed on the Minister by subsection 48(2) to execute removal orders as soon as reasonably practicable to interpret paragraph 50(*a*) as

providing that a removal is stayed by a judicial order issued for the very purpose of preventing removal.

[33] Second, IRPA creates an elaborate administrative scheme in which the consequences of removal, including its impact on children and the possible hardships or risks to which they may be exposed, are balanced against the public interest in the removal of non-nationals who are in Canada without status. In Ms Idahosa's case, immigration officials have already considered these factors twice since her refugee claim was denied, in her first H & C application and in her pre-removal risk assessment, where the risk of FGM was taken into account.

[34] Third, it was open to Ms Idahosa to make a motion in the Federal Court to stay the removal order pending the determination of her second H & C application, the recourse which she should have pursued, rather than a custody order in the Ontario Court of Justice. The Federal Court would have decided whether a stay was appropriate, pending the determination of the H & C application, on the basis of the normal criteria for staying an order, namely, the presence of an arguable issue, irreparable harm, and the balance of convenience.

[35] Fourth, the custody order granted in this case was final; it was not granted merely pending the determination of Ms Idahosa's H & C application. Counsel suggested that if the H & C application were denied, the Minister could ask the Court to revoke the custody order, so that Ms Idahosa could be removed, taking her children with her if she thought that this would be best for them. But why should the Minister be forced to go to court to make this request? And what

guarantee is there that the Ontario Court of Justice would grant a request by the Minister to revoke the order, if it remained of the view that it was in the best interests of Ms Idahosa's children that their mother should continue to care for them in Canada?

[36] In order to avoid conflicts of this kind, and in recognition of the comprehensive nature of the administrative scheme created by IRPA, the expertise of the Federal Courts in immigration law, and the exclusive supervisory jurisdiction conferred on them by Parliament, superior courts of the provinces have generally chosen not to involve themselves in immigration and refugee law, even when issues arise that are within their jurisdiction: see, for example *Reza v. Canada*, [1994] 2 S.C.R. 394.

[37] The endorsement on the motion by the Judge in the present case to the effect that the custody order did not deal with Ms Idahosa's immigration status is true in a formal way, because that court has no jurisdiction over the deportation of non-nationals. However, if the custody order has the effect, *via* paragraph 50(*a*), of staying Ms Idahosa's removal, then, in a substantive sense, the Ontario Court of Justice will have interfered with the administration of IRPA by hindering the Minister in the discharge of the statutory duty to execute removal orders promptly.

[38] As counsel for the Minister put it, if Ms Idahosa's argument succeeded it would quickly lead to the creation of a parallel system of immigration decision-making in the provincial courts when children are affected by the execution of deportation orders.

[39] Thus, it seems to me plainly contrary to the scheme of IRPA to interpret paragraph 50(*a*) as enabling non-nationals to defer their removal by obtaining a custody order from a provincial court on the basis of the best interests of the children, when there is no genuine dispute about custody. There is no "gap" in IRPA that custody orders are needed to fill.

(c) *statutory purposes*

[40] IRPA contains a long list of its purposes, including the promotion of family reunification in Canada: paragraph 3(1)(*d*). Counsel for Ms Idahosa submits that it would further this purpose to interpret paragraph 50(*a*) as staying her removal because of the custody order, and thus keeping her family intact.

[41] However, IRPA has other competing purposes, which include the prompt removal of non-nationals who have been ordered deported: subsection 48(2). Further, taken as a whole, an important purpose of IRPA, together with the *Federal Courts Act*, is to create a comprehensive statutory scheme for the administration of complex legislation and a single forum for judicial oversight of decision-making under it.

[42] On the other hand, subsection 48(1) limits the Minister's duty of prompt removal by recognizing that the enforcement of removal orders may be stayed. Counsel for Ms Idahosa submits that, in enacting paragraph 50(*a*), Parliament contemplated the possibility of a conflict between the policy of prompt removal and court orders which would be directly contravened by removal, and resolved it by giving priority to those orders.

[43] Generally speaking, this is true. However, the question here is whether Parliament intended to give priority to custody orders, no doubt granted in the best interests of the children of a parent subject to removal, when obtained solely to defer the parent's removal, and not to deal with a family law dispute over custody: compare *Alexander v. Powell*, [2005] O.J. 500 (Ont. C.J.) at para. 24. In the absence of a *lis* with a subject-matter that is independent of the matters dealt with under IRPA, the kind of conflict contemplated by paragraph 50(*a*) would seem not to arise.

[44] In my view, the specific purposes of paragraph 50(*a*), and the more general purposes of IRPA, on balance assist the Minister's narrower interpretation of the scope of the provision.

(d) *section 7 of the Charter*

[45] Ms Idahosa does not challenge the constitutional validity of paragraph 50(*a*), but says that it must be interpreted and applied in a manner consistent with the Charter, as mandated by IRPA, paragraph 3(3)(*d*).

[46] Counsel says that the rights protected by section 7 include the right of parents and children not to be separated by state action. To interpret paragraph 50(*a*) as imposing a stay on the removal from Canada of a mother who has been awarded sole custody of her Canadian-born children would be consistent with the section 7 rights of mother and children. I do not agree.

[47] First, section 7 protects individuals from being deprived of the right to life, liberty, and security of the person, except in accordance with the principles of fundamental justice. In her

memorandum of fact and law, counsel does not identify in what respects paragraph 50(*a*) is contrary to the principles of fundamental justice. In oral argument, counsel suggested that removing Ms Idahosa before her second H & C application was decided constituted a breach of the principles of fundamental justice. I do not agree that Ms Idahosa's removal in these circumstances would be so arbitrary as to constitute a breach of the principles of fundamental justice, especially since the best interests of her children have already been considered in her first H & C application and PRRA, and she has a right to request the Federal Court to stay her removal, a right which she is yet to exercise.

[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 v. Canada (Minister of Citizenship and Immigration)* (1995), 184 N.R. 230, 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. In the present case, if Ms Idahosa decides to take her children with her, she may ask the Ontario Court of Justice to revoke the non-removal order which she herself requested. The Court will then decide whether it is in the best interests of the children to be with their mother or to remain in Canada.

[50] To the extent that paragraph 50(*a*) may be ambiguous, section 7 does not, in my view, lend any significant support to Ms Idahosa's interpretation of it.

(e) *international law*

[51] Counsel for Ms Idahosa submits that IRPA, paragraph 3(3)(*f*) requires that IRPA must be interpreted and applied consistently with international human rights instruments to which Canada is signatory, and that only the plainest statutory language will warrant an interpretation that would violate Canada's international legal obligations: see *De Guzman v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 655 (C.A.) at paras. 71-89.

[52] Since paragraph 50(*a*) contains no such language, counsel argues that it must be interpreted consistently with international human rights instruments protecting, for example, the best interests of children and the relationship of parent and child. This means, she says, that paragraph 50(*a*) should be interpreted as imposing a stay on the removal of Ms Idahosa in contravention of the custody order. I do not agree.

[53] First, none of the international human rights instruments on which Ms Idahosa relies prohibits the deportation of foreign nationals simply because removal would result in their separation from their children.

[54] Second, any assessment of whether a statutory provision violates Canada's international legal obligations must be made on the basis of the statute as a whole. IRPA provides opportunities

for the consideration of the best interests of the children of those subject to deportation. The interests of Ms Idahosa's children have been considered by the officer who determined her H & C application and in the PRRA. While great weight must be given to the best interests of children in administrative decision-making, they do not necessarily outweigh all other considerations: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 75; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 268 at para. 10. The denial of Ms Idahosa's H & C application is not under review in this appeal.

[55] It is open to Ms Idahosa to request the Federal Court to stay her removal, pending the determination of her second H & C application. In my opinion, the international instruments on which Ms Idahosa relies do not suggest that she should also have the benefit of an automatic stay of her removal, pending the determination of her second H & C, on the basis of a custody order obtained for the purpose of frustrating her removal.

(f) *conclusions*

[56] When the text of paragraph 50(*a*) is considered in the context of the statutory scheme created by IRPA, and in light of its purposes, I have concluded that Parliament should not be taken to have intended that a removal is stayed by a judicial order obtained from a provincial court for the purpose of preventing or delaying the enforcement of the removal order.

[57] In this case, there was no underlying dispute over custody, and the best interests of the children were considered by the provincial court in the context of their mother's imminent removal.

IRPA provides ample opportunity for those interests to be duly considered by immigration officials as an important, but not necessarily decisive, factor in determining whether, in all the circumstances, it is appropriate to enforce the removal order.

E. CONCLUSIONS

[58] The certified questions were:

> a) 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*?
>
> b) Does the fact that the Order can be varied and that the Minister had an opportunity to speak to the Order make a difference?

[59] I would answer as follows.

> a) Paragraph 50(*a*) does not apply to a provincial court's order awarding custody to a parent of Canadian-born children for the purpose of delaying or preventing the enforcement of a removal order against the parent, when there is no *lis* respecting custody that is unrelated to the removal.
>
> b) On the facts of this case, no.

[60] For these reasons, I would dismiss the appeal.

"John M. Evans"
J.A.

"I agree
J. Edgar Sexton J.A."

"I agree
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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