Date: 20060615

Docket: IMM-3395-05

Citation: 2006 FC 761

Ottawa, Ontario, June 15, 2006

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

NYDIA MUNAR

Applicant(s)

and

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

Respondent(s)

REASONS FOR JUDGMENT AND JUDGMENT

[1] By this application the Applicant, Nydia Munar, seeks to set aside a decision denying her request for a deferral of a removal order. She contends that decision was wrongly made and patently unreasonable because it failed to appropriately consider the best interests of her two young Canadian-born children.

Background

[2] The Applicant does not have an admirable immigration history. She came to Canada from the Philippines in 1996 as a visitor but, after September, 1997, she remained here without any status. She left behind in the Philippines six children.

[3] In 1999 the Applicant applied for refugee protection, claiming to be an abused spouse. Her claim for refugee protection was denied by a decision made on November 21, 2000.

[4] The Applicant's two Canadian children were born, respectively, in 2000 and 2003, and are the subject of a joint custody order issued by the Ontario Court of Justice on July 12, 2005.

[5] For much of the time since at least 2000, the Applicant has been under an effective removal order by the Canada Border Services Agency (CBSA). The Applicant has consistently frustrated CBSA in its efforts to effect her removal from Canada. She was scheduled for a removal interview in 2002 but failed to appear, and a warrant was issued for her arrest. As a result of a police investigation, she was arrested on August 7, 2003 and released the same day on conditions, including regular reporting.

[6] In August, 2003, the Applicant requested a Pre-Removal Risk Assessment (PRRA) but that application was rejected on January 26, 2004. When she reported as requested on April 22, 2004, the Applicant was told to obtain passports for herself and for her two Canadian children to facilitate her removal, then scheduled for July 2, 2004. On June 25, 2004, the Applicant appeared for a

removal interview but without passports for her children. In the result, the pending removal arrangements were cancelled.

[7] On September 28, 2004, the Applicant again reported for a removal interview and, once again, she did so without having obtained passports for her children. She was told to report again on October 22, 2004 in preparation for a scheduled removal on November 4, 2004.

[8] On October 22, 2004, the Applicant failed to report and the removal arrangements were again cancelled. Further investigation revealed that the Applicant had moved and an arrest warrant was issued on November 17, 2004. That warrant was executed on May 6, 2005 and the Applicant was held in detention without her children. The arrangements for the care of her two children at that point appear to have been somewhat unstable, and the Children's Aid Society (CAS) was involved in monitoring their situation. A new removal date of June 3, 2005 was scheduled but that process was stayed by an Order of Justice Yves de Montigny pending the completion of the earlier of her Humanitarian and Compassionate (H & C) application, or the conclusion of this application for judicial review. At this point, the Applicant's H & C application remains outstanding and no assessment of the impact of the Applicant's removal upon her Canadian children has been completed.

[9] At the time of granting a stay of the removal Order in this case, Justice de Montigny described the circumstances of the Applicant's children at paragraphs 41 and 42 of his decision in *Munar* v. *Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1448, 2005 FC 1180:

> 41 In the present case, the two kids of the applicant are very young, and nobody seems prepared to care for them besides their mother. Yet, she cannot take them with her since her application for an order seeking sole custody has not yet been dealt with. Therefore, I conclude that the applicant has raised a serious question, even on the more probing standard required in a case like this one, when claiming that the removals officer failed to exercise her discretion appropriately and was not "alert, alive and sensitive" to the childrens' best interests.
>
> 42 There is no doubt in my mind that the Applicant's two Canadian born children will suffer irreparable harm if she is removed from Canada and they are left behind. The evidence clearly shows that the situation of these children would be at best precarious, since neither their father nor the Applicant's current partner seem prepared to nurture them on a long term basis, let alone provide them with a loving and stable environment. Such a clear infringement of the best interests of a child and of its most basic human rights must necessarily constitute an irreparable harm.

[10] The Applicant's counsel requested by letter a deferral of removal on the basis of the outstanding H & C application and the need to ensure that the children's interests were protected by that process. She also referred to the children's somewhat uncertain custodial situation and to the Applicant's desire to take the children with her in the following passage:

> … She has two Canadian-born children and their welfare and best interests must be considered when the mother is going to be removed. It is best to allow a full consideration of this case by the H&C decisionmaker, so the removal should be deferred until a determination is made on the H&C application.
>
> If Nydia must leave Canada, she wants to take the children with her, as there will be a severe hardship if she should be separated from her children. Nydia has another lawyer who is seeking an order for Nydia to have sole custody of the children, and the father is cooperating. Their father is trying to obtain the children's birth certificates as you requested so that the children may travel with her. Both of these steps should be completed before Nydia can leave the country, and so her removal should be delayed so these matters can be finalized. Although Nydia was asked to get passports for the children some time ago but failed to do so, she has been afraid and

> hoping that she would not have to leave. Given that Nydia has been here for 10 years, and is worried about her children, I suggest that this is understandable.

[11] The decision under review here is in the form of a bare denial letter dated June 1, 2005. The background to the decision is, however, contained within the file notes which are part of the Record. The Removal Officer summarized her decision in the following passage found in the case history notes which state:

> As shown by case history, subject has demonstrated complete disregard and contempt of the immigration process, but she has been given ample and extensive opportunity, time and time again, to obtain passports for her children that she wishes to be with her. This officer has no objection of allowing the children to travel with her and the department will purchase the airline tickets for them, if subject states she can't afford it. Upon talking to children's aid, I advised I would defer removal if they were able to find the children's passports and or birth certificates and apply for the passports. CAS worker was to get back to me. I left CAS worker a message, upon receiving confirmation from the Philippine Consulate that they were ready to issue travel document, asking if she had been able to obtain any documentation for the children. That call was never returned.
>
> The new AFL was applied for after subject failed to report. Counsel was sent copies of call-ins, etc and still client never showed.
>
> THERE IS A COPY OF THE ONE CHILD'S BIRTH CERTIFICATE ON FILE, THEREFORE SUBJECT ALREADY HAS BIRTH CERTIFICATES. She again is trying to circumvent removal, by stating that she doesn't have birth certificates as per counsel's May 31st, 2005 letter.
>
> Subject has had over 1 year to obtain the children's passports. There has been over 3 instances where subject could have been arrested and detained, but was not, due to the children. The department has tried to be as accommodating as possible, but subject refuses to cooperate and has by her own actions, put herself in the situation of being separated from her children. If subject is so worried about her children, why then would she put herself in this situation. I believe she is using the children for her own benefit, not theirs. Subject also has 6 children she left in the Philippines. (Their emphasis)

[12] The Removal Officer's final case history notes set out above do not constitute the entire record of her activity, and her consideration of the children in response to the Applicant's request for a deferral of removal. It is clear from other file notes that she was in consultation with CAS. In other notes to the file, she reported as follows:

> Received message from GFX stating Children's Aid had been in contact with her, stating children can't stay with common-law husband.
>
> …
>
> Talked to refugee law office – Elana & advised PC to have children's ppts' delivered to IHC if she wished them to travel with her. Ok Birth certificates and ppt applications signed by common-law. I would not defer removal until H & C done. PC filed after no-show for removal. Also the removal cancelled as she did not obtain T. DOCS for herself or her children. PC trying all delay tactics to avoid removal. Elana advised she'd tell PC to have whatever docs for kids delivered.
>
> …
>
> Gina Fargnoli at TIHC called and advised that Children's Aid had called her stating that the children were not able to stay with subject's boyfriend, who is not father of children.
>
> Gina talked to PC and found out that she has not obtained passports for the children for the children and that the children were okay where they were.
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> Gina then talked to Children's Aid, Michelle Lawrence 416-395-1931, who stated that the boyfriend called them, as he stated he couldn't take care of them. Gina advised that we did not want the children in the detention centre, as subject has used them to delay her removal from Canada. Gina advised that they could come for the weekend, but must leave afterwards. If no one picked them up, then she would call Children's Aid to deal with them.
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> I called Michelle Lawrence and she advised that biological father is not in the picture. He has a wife and subject does not trust either to take care of her children. Boyfriend has been on seen [sic] for 9

> months. He stated he can't take care of children. Michelle is going to talk to boyfriend and find out if the children have passports. She will make attempt to obtain passports for the children, if they don't have them. I reitereated [sic] to Michelle concerning the amount of time and opportunities that we have given subject to obtain these documents.

Issue

Did the Removal Officer properly exercise her discretion with respect to the Applicant's deferral request, having particular regard to the interests of her two Canadian children?

Analysis

[13] The recent decision by Justice Richard Mosley in *Zenunaj v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 2133, 2005 FC 1715 (paragraphs 19 and following) contains a useful discussion about the standard of review which applies to the decision of a removal officer to deny a deferral request. After considering the recent Supreme Court of Canada decision in *Mugesera v. Canada (Minister of Citizenship and Immigration)* (2005), 254 D.L.R. (4th) 200 (S.C.C.); reversing 232 D.L.R. (4th) 75, and then applying the pragmatic and functional test, Justice Mosley adopted a standard of patent unreasonableness, at least with respect to those aspects of the decision which were fact based. I adopt Justice Mosley's analysis, and accept that the appropriate standard of review for the issues arising in this case is that of patent unreasonableness.

[14] The decision not to defer the Applicant's removal which is under review in this proceeding is now more than one (1) year old, and the exercise of considering its validity seems to me to be somewhat artificial. The Applicant is not presently under a pending removal order, although she

could be made removal-ready once the interim stay is lifted. Undoubtedly the circumstances of the children are different now than they were a year ago so that, even if this application was denied, a fresh consideration of their interests would be required if it was requested in the face of a new order for removal of their mother. Nevertheless, there could be some practical consequences arising out of a decision in this proceeding and I will resolve the matter accordingly.

[15] The Removal Officer's concluding file notes do focus on the children but are almost entirely based upon their leaving Canada with the Applicant. That is not entirely surprising because that was the stated wish of the Applicant. The other issue which is reflected strongly in the notes is the concern about the Applicant's obstructive behaviour and her apparent use of the children to avoid removal. Indeed, the Removal Officer's final recorded rationale for refusing the deferral request was limited to a consideration of these two issues. None of the file notes clearly reflect concern for the short-term welfare of the children, or consider whether the removal of the Applicant without them could leave them in an adverse custodial situation.

[16] While the temporary protection of the CAS was almost certainly a last-resort option, it still may not have been in the interests of these children to have been left in such a position of vulnerability.

[17] It is easy to understand the frustration of the Removal Officer when faced with a situation such as this one. However, the law is clear that when a deferral of removal of a parent is requested and where the interests of affected children are raised, a Removal Officer must consider their short-term interests. In particular, the Removal Officer must consider the adequacy of the care and

custodial arrangements for any children left behind. All of these concerns could be rendered moot if a thorough and recent H & C determination has been made but, of course, that was not the situation here. In this case, the interests of the children had received only a passing consideration and mostly in the context of their leaving Canada with the Applicant. The consequences arising from the other possibility of the children remaining behind (at least as reflected in the case file notes) received insufficient attention and were substantially over-ridden by concerns about the Applicant's behaviour.

[18] The legal principles that apply to this situation were thoroughly addressed by Justice de Montigny in his earlier decision to stay the removal order in question. I accept his statement of this obligation as set out at paragraphs 37 to 40 of that decision:

> 37 Having said all of this, if the best interest of the child is to be taken seriously, some consideration must be given to their fate when one or both of their parents are to be removed from this country. As is often the case, I believe that the solution lies somewhere in between the two extreme positions espoused by the parties. While an absolute bar on the removal of the parent would not be warranted, an approach precluding the removals officers to give any consideration to the situation of a child would equally be unacceptable.
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> 38 I tend to agree with my colleague Justice Snider that the consideration of the best interests of the child is not an all or nothing exercise, but should be seen as a continuum. While a full-fledged analysis is required in the context of an H & C application, a less thorough examination may be sufficient when other types of decisions are made. Because of section 48 of the Act and of its overall structure, I would also agree with her that the obligation of a removals officer to consider the interests of Canadian-born children must rest at the lower end of the spectrum (John v. Canada (M.C.I.), [2003] F.C.J. No. 583).
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> 39 When assessing an H & C application, the immigration officer must weigh the long term best interests of the child. A useful guide as to the factors that can be taken into consideration is provided in Chapter IP 5 (Immigrant Applications in Canada Made on

> humanitarian or Compassionate Grounds) of the Immigration Manual, published by Immigration and Citizenship Canada. Factors related to the emotional, social, cultural and physical well-being of the child are to be taken into consideration. Examples of factors that can be taken into account include the age of the child, the level of dependency between the child and the H & C applicant, the degree of the child's establishment in Canada, the child's links to the country in relation to which the H & C decision is being considered, the medical issues or special needs the child may have, the impact to the child's education, and matters related to the child's gender. In a nutshell, to quote from Décary. J.A. in Hawthorne v. Canada (M.C.I.) ([2003] 2 F.C. 555, at par. 6), "...the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent".
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> 40 This is obviously not the kind of assessment that the removals officer is expected to undertake when deciding whether the enforcement of the removal order is "reasonably practicable". What he should be considering, however, are the short term best interests of the child. For example, it is certainly within the removal officer's discretion to defer removal until a child has terminated his or her school year, if he or she is going with his or her parent. Similarly, I cannot bring myself to the conclusion that the removal officer should not satisfy himself that provisions have been made for leaving a child in the care of others in Canada when parents are to be removed. This is clearly within his mandate, if section 48 of the IRPA is to be read consistently with the Convention on the Rights of the Child. To make enquiries as to whether a child will be adequately looked after does not amount to a fulsome H & C assessment and in no way duplicates the role of the immigration officer who will eventually deal with such an application (see Boniowski v. Canada (M.C.I), (2004) F.C.J. No. 1397).

[19] It is clear from this decision, and from others like it, that a Removal Officer does have a duty to be alive and sensitive to the short-term interests of children facing the removal of a primary caregiver from Canada: also see *John v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 583, 2003 FCT 420. If it is expected that children will remain in Canada, it is imperative

to consider the adequacy of the arrangements that have been put in place for their care once the parent has left.

[20] Although the Respondent correctly observed in this case that the Removal Officer can only be expected to consider the information submitted in support of a deferral request, the letters submitted here on behalf of the Applicant do squarely put in issue the short-term custodial problems which would be faced by these children if the Applicant is deported to the Philippines. That issue was squarely before the Removal Officer and was of sufficient concern that it had led to some earlier consultations with CAS.

[21] If, in the end, it was apparent that the Applicant was leaving Canada without her children, the Removal Officer would know (and did know) that a child care plan would be required. She had a duty to consider the adequacy of that plan. Her failure to fully consider the short-term interests of the children renders the resulting decision not to defer removal of the Applicant patently unreasonable. It is, therefore, necessary that this matter be remitted for a re-determination on the merits unless, of course, in the meantime, the issue has been fully addressed in the context of the pending H & C review.

[22] Neither party proposed a certified question and no question will be certified.

JUDGMENT

THIS COURT ADJUDGES that this matter be remitted for a re-determination on the merits by a different Removal Officer.

"R. L. Barnes"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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