Federal Court  Cour fédérale

Date: 20151208

Docket: IMM-5438-15

Citation: 2015 FC 1359

Ottawa, Ontario, December 8, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ANAKI SALETA SASHA BAPTISTE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] The Applicant seeks an Order staying her removal to Grenada, scheduled to take place on December 7, 2015, pending a determination by this Court of her application for leave and for judicial review of the decision of an inland enforcement officer [Officer] dated December 3, 2015 refusing her request for a deferral of her removal.

[2] The stay motion was heard in the morning of December 7, 2015 and the order issued orally with reasons at the completion of the hearing. These are the more fulsome written reasons accompanying the decision to stay the Applicant's removal.

[3] For the reasons that follow, the stay motion is granted.

I. Background

[4] The Applicant came to Canada with her mother at the age of 11. She failed to gain permanent residency status through a number of unsuccessful procedures initiated by her mother, and thereafter by herself. These include an unsuccessful refugee protection claim, two non-bona fide spousal class claims and an unsuccessful Pre-Removal Risk Assessment [PRRA] application.

[5] In May 2009, the Applicant failed to attend a pre-removal interview. A warrant for her arrest issued on June 29, 2009. She was subsequently arrested more than six years later on November 14, 2015.

[6] While remaining illegally in Canada, the Applicant married a Canadian citizen and had a child, who was 2 years old at the time of her arrest on November 15, 2015.

[7] On November 26, 2015 removal arrangements were completed for the Applicant's removal to Grenada on December 7, 2015. On November 27, 2015 the Applicant requested a

deferral of her removal, which was refused by the decision of the Officer dated December 3, 2015. The Applicant thereafter filed a leave application for judicial review of the Officer's decision and initiated this stay motion on Friday, December 4, 2015.

II. Analysis

[8] It is common ground that the conjunctive three prong test of the Applicant having to demonstrate a serious (and heightened) issue, irreparable harm and the balance of convenience in her favour applies to a proceeding in order to stay the officer's decision rejecting her request to defer her removal: *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA); *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 at para 51.

[9] Having entertained the written and oral submissions of the parties, the Court finds that there is a serious issue that the removals officer failed to be "alert, alive and sensitive" to the short-term best interests of child upon the Applicant's removal to Grenada: *Munar v Canada (Minister of Citizenship and Immigration)* [*Munar*], 2005 FC 1180 at para 40:

> [40] This is obviously not the kind of assessment that the removal 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 (Minister of Citizenship and Immigration*) (2004), 2004 FC 1161 (CanLII), 44 Imm. L.R. (3d) 31 (F.C.)).
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> [Emphasis added]

[10] I conclude that inadequate provision for the care of the child when the mother is to be removed extends to a failure in this case to ensure that the parents have had a reasonable opportunity to decide which parent should continue to have the care and custody of the child upon separation on December 7, 2015, and whether adequate coping mechanisms are in place to meet the child's short term needs after the removal of the mother.

[11] Despite the requirement by section 48 of the *Immigration and Refugee Protection Act* [IRPA] that the Applicant be removed as soon as possible, her removal to Grenada within slightly more than three weeks after her arrest raises a serious issue that the two-year-old child faces exceptional circumstances in terms of the hardship and risk of emotional harm by his mother's unexpected and very abrupt removal.

[12] I think it must be obvious to the reasonable person that the mother's removal three weeks after her arrest and incarceration is "jumping the gun" without allowing more time for the parents to make considered decisions on what is best for the child in the circumstances and what measures must be undertaken to provide for the significant change in his care and custody arrangements.

[13] In this regard, I disagree with the Officer's conclusion that there is insufficient evidence to demonstrate that in the short term the Applicant's spouse and child will be unable to cope. A reasonable interpretation of the evidence in the record could not but suggest that the incarcerated Applicant and her husband would not have had an opportunity to adequately and appropriately consider the best interests of the two-year-old child regarding who should be the single caregiver going forward.

[14] The mother appears ready to abandon the child despite being his principal care giver, but this is far from clear as to what is in the child's best interests. Abruptly removing the principal caregiver in the child's life overnight is an act that risks having serious consequences on the child. Who the child should remain with is a decision that obviously requires some degree of investigation and thought, and even professional assistance. By acting with such haste to remove the mother, she was unable to determine what options might exist for her in Grenada to enable her to take the child with her.

[15] On the other hand, if the child remains with the father in Canada, every indication is that he will not have the time or means in the short term at least, to care for the child in what becomes an exceptional hardship to the child and the parents caused by the unnecessary rapidity of the mother's removal.

[16] These are not simple cases, but I think in stating the "bottom line" in respect of the counter-play between the requirement to remove the foreign national as soon as possible and the best interests of a child, particularly perhaps for a child of tender age, is that removals officers

must be alert, alive and sensitive to a removal of the principal caregiver that may be effected with too much haste. For the child's sake, the parents must be provided with a reasonable opportunity to consider how best to respond to the abrupt separation and to ensure that appropriate coping mechanisms are put in place for what the psychologist described in this matter as "the mental equivalent of parental death of that child;".

[17] While I agree with the principle enunciated by the Respondent that the parents ought to have known this day would come, and prepared for its eventuality, the reality is that persons living on hope and love rarely do so. This is confirmed by the well-established failure of increased penalties to reduce crime, because criminals do not think they will be caught. But this debate aside, the important fact remains that whatever the parents ought to have done in preparing for this eventuality, the harmful results are visited on the child who suffers the consequences.

[18] Allowing a mere three weeks, when the child's environment has been markedly destabilized and during which time the mother remains incarcerated, is simply insufficient to allow for the best interests of the child to be considered and implemented in terms, either of his custody and access arrangements, or the appropriate coping mechanisms to deal with the changed world that he now faces.

[19] I therefore conclude that the Officer's failure to be "alert, alive and sensitive" to the effects of a too-rapid removal of the Applicant and her inability to participate with her husband in deciding who should have custody and what coping mechanisms could be put in place to meet

the child's needs in either case, raises a serious issue and meets the first prong towards having the decision set aside as was done in *Munar*.

[20] As in *Munar*, I also conclude that the serious issue concerning the failure to consider the child's best interests in the short term also enables the demonstration of irreparable harm and a finding that the balance of convenience favours an order staying the Applicant's removal.

[21] Accordingly, the Court orders that the Applicant's removal is stayed pending the determination of the leave application to set aside the Officer's decision.

ORDER

THIS COURT ORDERS that the Applicant's removal is stayed pending the determination of the leave application and the Officer's decision is set aside.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5438-15
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