Federal Court of Appeal Cour d'appel fédérale

Date: 20170621

Docket: A-17-16

Citation: 2017 FCA 130

CORAM: **STRATAS J.A.**
WEBB J.A.
GLEASON J.A.

BETWEEN:

CURTIS LEWIS

Appellant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

and

JUSTICE FOR CHILDREN AND YOUTH

Intervener

Heard at Toronto, Ontario, on March 7, 2017.

Judgment delivered at Ottawa, Ontario, on June 21, 2017.

REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	STRATAS J.A. WEBB J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] In this appeal, the appellant, Curtis Lewis, seeks to set aside the November 25, 2015 judgment of the Federal Court in *Lewis v. Canada (Public Safety and Emergency Preparedness),* 2015 FC 1309 (available on CanLII) [*Lewis*] in which the Federal Court (*per* Annis, J.) dismissed Mr. Lewis' application for judicial review of the July 28, 2014 decision of a Canada Boarder Services Agency (CBSA) Inland Enforcement Officer. In that decision, the Enforcement Officer refused Mr. Lewis' request under section 48 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA) to defer his deportation from Canada to Guyana pending determination of his application for humanitarian and compassionate (H&C) relief under section 25 of the IRPA and pending a request to re-open an appeal before the Immigration Appeal Division (the IAD) of the Immigration and Refugee Board (the IRB).

[2] The requested deferral was premised largely on the impact Mr. Lewis' removal would have on his daughter, a Canadian citizen of indigenous heritage who, in all likelihood, would accompany her father to Guyana if he is sent back to that country.

[3] In the decision under appeal, the Federal Court certified the following questions under section 74 of the IRPA:

a. Do the principles set out by the Supreme Court of Canada in *R. v Gladue*, *R. v Ipeelee*, and *R. v Anderson* apply, *mutatis mutandis*, to removals under section 48 of the IRPA such that there must be a full consideration of the impact on an Aboriginal child of the removal from Canada of her non-citizen custodial parent prior to the execution of the removal order?

b. Does Section 7 of the *Charter of Rights and Freedoms* mandate *Gladue*-like consideration of the impact of the removal of an Aboriginal child's custodial parent prior to the execution of the removal order?

[4] For the reasons that follow, I would answer these questions in the negative but would allow this appeal as the Enforcement Officer's consideration of the best interests of Mr. Lewis' daughter was unreasonable. I would accordingly set aside the Enforcement Officer's July 28, 2014 decision and remit Mr. Lewis' application under section 48 of the IRPA to another CBSA Enforcement Officer for re-determination in accordance with these reasons.

I. Background

[5] Mr. Lewis is a permanent Canadian resident and a Guyanese citizen. He is nearly 60 years old and came to Canada as a child in 1966, when his family immigrated here. Although his family members are now citizens, he claims that he did not become a Canadian citizen (when he was eligible to apply) essentially because he ignored the importance of making an application for citizenship. He has no family members or connections in Guyana and has not been back to that country since 1966. Mr. Lewis has worked as a drywall lather and plasterer in Canada but was unemployed and on social assistance at the time of his deferral application.

[6] Mr. Lewis has sole custody of his young Canadian daughter who is currently 9 years old. She is a member of the Gwich'in First Nation (Inuvik) by virtue of her maternal lineage and has status as an "Indian" under the *Indian Act*, R.S.C. 1985, c. I-5. The girl's mother is unable to care for the child and lost custody and visitation rights by reason of her substance abuse issues. While there are other members of the mother's family who live in the Northwest Territories and

members of Mr. Lewis' family who live in Toronto, there appears to be no one other than Mr. Lewis who would be willing and in a position to care for the child on a full time basis. Thus, the refusal of the requested deferral may well have resulted in the *de facto* removal of the child from Canada as having her declared a ward of the state appears to be the only other option available to the girl, which Mr. Lewis is not prepared to see occur. The CBSA accepted that the child was to accompany Mr. Lewis to Guyana and was prepared to purchase airline tickets for both Mr. Lewis and the child.

[7] Mr. Lewis has a criminal record in Canada. In 1979, he was convicted of assault causing bodily harm, for which he received a suspended sentence. In 1985, he was again convicted of assault causing bodily harm and of a related Failure to Appear, for which he received fines and a short period of incarceration (possibly because he did not pay the fines). In 2003, Mr. Lewis was convicted of assault causing bodily harm for a third time, and he received a 12-month conditional sentence.

[8] Following his 2003 conviction, Mr. Lewis' immigration status was referred to the IRB for a determination under paragraph 36(1)(*a*) of the IRPA which provided (and still provides) that a permanent resident is inadmissible for serious criminality if convicted of an offence under federal law punishable by a maximum term of imprisonment of at least 10 years or for which a term of imprisonment of more than six months was imposed.

[9] On July 7, 2004, the IRB determined that paragraph 36(1)(*a*) of the IRPA applied and consequently issued a Deportation Order against Mr. Lewis under subsection 45(*d*) of the IRPA.

Mr. Lewis appealed that decision to the IAD under subsections 63(3) and 68(1) of the IRPA. The IAD rendered its decision on November 15, 2005. Citing Mr. Lewis' ties to Canada, the hardship his deportation would cause, his compliance with anger management training, the lack of danger he posed to the public and his limited criminal record, the IAD stayed the Deportation Order for one year, subject to conditions. These included that Mr. Lewis was required to advise Citizenship and Immigration Canada (CIC) of any change in address and to apply for a valid passport or other travel documents.

[10] Mr. Lewis advised CIC on April 12, 2006 that he intended to move from Edmonton to Yellowknife, but did not actually do so. Instead, he remained in Edmonton and became homeless for several months in late 2006 and early 2007. The CIC office in Yellowknife informed the CIC office in Edmonton that Mr. Lewis had not reported his change of address in Yellowknife. In addition, CIC determined that Mr. Lewis had not applied for a passport. CIC advised the IAD of these facts, and on March 5, 2007 the IAD cancelled the stay and dismissed the appeal of the Deportation Order. As Mr. Lewis' whereabouts were then unknown to the IAD and CIC, he was not served with a copy of the IAD's decision dismissing the appeal of the Deportation Order. A warrant for Mr. Lewis' arrest was issued following the reactivation of the Deportation Order.

[11] Mr. Lewis' daughter was born in 2007. He lived for about three years with the child's mother and the child in Edmonton, but, when the child was removed from the home by child welfare officials, Mr. Lewis left the child's mother to establish his own residence so he could be awarded custody of the child. The Edmonton Family Court of the Provincial Court of Alberta awarded Mr. Lewis sole custody of his daughter on October 6, 2011. Its order made no provision

for access or visitation by the child's mother, who did not appear at the custody hearing. Since then, the child has lived with Mr. Lewis and she has had no contact with her mother, who remains incapable of caring for her.

[12] Mr. Lewis came to the attention of the police in October of 2007 in Edmonton when he was identified as a witness to a crime. On November 12, 2007, he was arrested on the strength of the outstanding warrant and was placed briefly in immigration detention. Upon release, Mr. Lewis was subject to conditions, including: (1) to provide an address and notice of any changes to it to officials and (2) to report to a CBSA officer regularly. He has only partially complied with the reporting condition.

[13] Following his arrest, Mr. Lewis was not funnelled into the Pre-Removal Risk Assessment (PRRA) process (the usual next step in removing someone in his situation from Canada) because he had no Guyanese identification that would have allowed for the ready issuance of a passport or travel documents by Guyana. He remained in limbo until late 2013.

[14] In August 2013, with the knowledge of the CBSA, Mr. Lewis moved to Toronto to be closer to his own family. His daughter attends school in Toronto, and Mr. Lewis has a network of family and friends that support him in caring for her. In the affidavit he filed in support of his deferral request, Mr. Lewis deposed that he has done everything in his power to help his daughter preserve her links with her Aboriginal culture. The child's teacher, who is also a member of a First Nation, is supportive, and the child attends an afterschool First Nations Study Program offered by the school board, where she has learned about indigenous cultures and has

met others of indigenous heritage. Mr. Lewis says that he is hoping to bring his daughter to the Northwest Territories to visit her maternal relatives, but has not been permitted by the CBSA to leave Toronto.

[15] On September 26, 2013, Guyanese officials informed the CBSA that travel documents had been approved for Mr. Lewis. He was convened to a PRRA interview on November 12, 2013, and shortly thereafter a Senior Immigration Officer denied the PRRA application because Mr. Lewis could not demonstrate that he fell within the criteria outlined in section 97 of the IRPA. At the time and currently, that section provides in relevant part:

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment […].	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités […].

[16] On July 11, 2014, Mr. Lewis was notified that his removal would occur on August 1, 2014. In response, he retained legal aid counsel and filed three applications in late July 2014: (1) an application to re-open his appeal before the IAD of the Deportation Order, (2) an application for permanent resident status on H&C grounds under section 25 of the IRPA and (3) a request to defer his removal under section 48 of the IRPA.

[17] On July 28, 2014, the CBSA Enforcement Officer dismissed Mr. Lewis' deferral request. This is the decision which gives rise to the present appeal.

[18] On the day of his scheduled removal, Mr. Lewis moved before the Federal Court for a stay of removal pending resolution of three applications (to re-open the IAD appeal, the H&C application and the judicial review of the deferral decision). The Federal Court granted the stay pending the decision of the Federal Court in the judicial review application and pending the decision of the IAD on the request to re-open the appeal of the Deportation Order.

[19] On October 15, 2014, the IAD dismissed the request to re-open the appeal of the Deportation Order, finding there had been no denial of procedural fairness as Mr. Lewis failed to keep the IAD advised of his whereabouts.

[20] As noted, the Federal Court dismissed Mr. Lewis' judicial review application from the Enforcement Officer's deferral decision on November 25, 2015. Consequent with the dismissal of the judicial review application, the Federal Court's stay order ceased to operate. It appears as if the respondent has not yet sought to enforce the Enforcement Officer's decision as the appellant was still in Canada when this appeal was argued. As of that date, Mr. Lewis' H&C application had not yet been determined, and the parties concurred that it may still be some time before the H&C application is decided.

II. The Decisions of the CBSA Enforcement Officer and of the Federal Court

[21] With this background in mind, it is now possible to review in more detail the decisions of the Enforcement Officer and the Federal Court that are the subject of this appeal.

A. *The Enforcement Officer's Decision*

[22] The Enforcement Officer considered the arguments that Mr. Lewis made in support of the request for a deferral in a brief letter decision, the typical form of decision issued in cases such as this due to the short time frame available for consideration of deferral requests.

[23] The Enforcement Officer commenced her analysis by noting that under section 48 of the IRPA, the CBSA is required to enforce removal orders as soon as possible and that her discretion to grant a deferral was therefore very limited. She went on to determine that Mr. Lewis' then pending application to the IAD did not provide the basis for granting the requested deferral because it had not been made in a timely fashion. She also noted that the application would not bar Mr. Lewis' removal as it could still be considered by the IAD even if he were removed from Canada.

[24] The Enforcement Officer then turned to the pending H&C application and noted that it, too, had not been made in a timely fashion and therefore was not a bar to removing Mr. Lewis from Canada. The Enforcement Officer also held that it was beyond her authority to conduct an adjunct H&C evaluation.

[25] In terms of the impact of the removal on Mr. Lewis, the Enforcement Officer noted that separation from family is often the unfortunate consequence of the removals process and therefore was not on its own a basis for granting the requested deferral. The Enforcement Officer also stated that she felt that the separation of Mr. Lewis from his family members might be temporary and was not satisfied that he had demonstrated he would be unable to rely on his work experience in Canada to obtain gainful employment "immediately upon arrival in Guyana".

[26] The Enforcement Officer next considered the impact of the removal on Mr. Lewis' daughter, noting that her authority was limited to considering the short-term impact of removal on the child's best interests. In assessing those interests, the Enforcement Officer accepted that the child would be accompanying her father to Guyana and therefore stated that she was "confident that his care and support will attenuate any period of adjustment [the child] may experience after she has departed Canada".

[27] In terms of the importance of the child's maintaining a connection with her indigenous culture, the Enforcement Officer dismissed this concern in a single paragraph that states as follows:

> I acknowledge that [the child's] aboriginal heritage is of critical importance to her and also to her Father. I am not satisfied, however, that counsel's submissions establish that Mr. Lewis' removal from Canada will prevent [the child] from maintaining a close connection with her Aboriginal community, its culture and traditions. I note, for instance, that [the child] may return to Canada at any time to participate in "*dances, pow wows, speakers and special events, as well as native Aboriginal centres and Native art shows*," referred to by her Father in his affidavit, and also note that she may enter Canada whenever her legal guardian permits it to visit her mother, her mother's family and the Gwich'in band in Yellowknife.

[28] The Enforcement Officer concluded her analysis by noting Mr. Lewis' criminal convictions and immigration history, including his failures in attending at the bond reporting centre following his release from immigration detention. In light of all these considerations, the Enforcement Officer concluded that a further deferral of Mr. Lewis' removal was not appropriate and thus dismissed his application under section 48 of the IRPA.

B. *The Decision of the Federal Court*

[29] Mr. Lewis raised before the Federal Court issues similar to those he raises before us, namely that the Enforcement Officer's decision contravened his child's rights under section 7 of the *Canadian Charter of Rights and Freedoms* (the Charter) and that the Enforcement Officer's treatment of the child's best interests was unreasonable. The Federal Court held that the reasonableness standard applied to its review of both issues.

[30] As concerns the Charter issue, the Federal Court held that there was nothing in the child's aboriginal status that would give rise to a protected interest under section 7, especially since there was no order that she be removed from Canada. The Court also rejected Mr. Lewis' contention that the principles from *R. v. Gladue*, [1999] 1 S.C.R. 688, 171 D.L.R. (4th) 385 [*Gladue*], *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433 [*Ipeelee*] and *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167 [*Anderson*] should be applied, with necessary modifications, to the child's situation.

[31] These cases, which arise in the criminal context, concern subsection 718.2(*e*) of the *Criminal Code*, R.S.C. 1985, c. C-46 (*Criminal Code*). That provision requires a Court in setting

a sentence to consider “all available sanctions, other than imprisonment, that are reasonable in the circumstances […] with particular attention to the circumstances of Aboriginal offenders”. In *Gladue*, *Ipeelee* and *Anderson*, the Supreme Court of Canada undertook a detailed review of the historical disadvantage and discrimination that indigenous people have endured in Canada. The Court held that subsection 718.2(*e*) of the *Criminal Code* requires a sentencing court to give due consideration to the systemic factors that contribute to the over-representation of indigenous offenders in the criminal justice system and, to the extent possible, to craft sentences that are sensitive to the experiences of indigenous offenders in light of these factors, including by considering approaches to correction other than incarceration if they are appropriate and available. In this matter, the Federal Court held that these principles have no application in the immigration context.

[32] As concerns the best interests of the child, the Federal Court found the Enforcement Officer’s treatment of the issue to be reasonable largely because the Court held that it was premature to assume that the child would be leaving Canada with her father when he is removed to Guyana.

[33] The Federal Court therefore dismissed the judicial review application.

III. Preliminary Issue – the Appropriateness of the Certified Questions

[34] The respondent raises a preliminary objection to this Court’s jurisdiction to hear this appeal, asserting that the Federal Court improperly certified questions under section 74 of the

IRPA in the present case. The respondent thus requests that this appeal be dismissed for want of jurisdiction.

[35] Section 74 of the IRPA sets out the conditions necessary for this Court to have jurisdiction to hear an appeal from a decision of the Federal Court in a case such as this and provides in relevant part that an appeal to this Court may only be made if, in rendering judgment, the Federal Court "certifies that a serious question of general importance is involved and states the question".

[36] The case law of this Court establishes that in order for a question to be properly certified under section 74 of the IRPA, and therefore for this Court to have jurisdiction to hear an appeal, the question certified by the Federal Court must be dispositive of the appeal, must transcend the interests of the parties and must raise an issue of broad significance or general importance. In consequence, the question must have been dealt with by the Federal Court and must necessarily arise from the case itself (as opposed to arising out of the way in which the Federal Court may have disposed of the case): *Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168 at para. 9, 446 N.R. 382; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at paras. 28-29, [2010] 1 F.C.R. 129; *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89 at paras. 11-12, 318 N.R. 365 [*Zazai*]; and *Liyanagamage v. Canada (Secretary of State)*, 176 N.R. 4 at para. 4, [1994] F.C.J. No. 1637 (F.C.A.).

[37] The case law further recognizes that once a question has been properly certified, this Court may consider any issue in the appeal and is not limited to considering only the question(s)

certified: *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at para. 12, 174 D.L.R. (4th) 193 [*Baker*]; *Mudrak v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 178 at para. 19, 485 N.R. 186 [*Mudrak*]; and *Zazai* at para. 10.

[38] The respondent says that the two questions certified by the Federal Court in this case are improper as the circumstances of Mr. Lewis and his daughter are very uncommon and it is unlikely that another child of indigenous heritage would ever find him or herself subject to being forced to leave Canada along with an inadmissible custodial parent who is being removed by the CBSA. The respondent therefore submits that the questions certified by the Federal Court do not raise issues of broad significance or general importance. In support of this assertion, the respondent points to the fact that the issues raised in the present appeal have not been the subject of prior consideration in the case law.

[39] In my view, the fact that these issues have not been the subject of prior consideration in the case law does not mean that they arise infrequently or cannot be the subject of a proper question under section 74 of the IRPA. Indeed, for a question to be one of general importance under section 74 of the IRPA, it cannot have been previously settled by the decided case law: *Mudrak* at para. 36; *Canada (Minister of Citizenship and Immigration) v. Amado-Cordeiro*, 2004 FCA 120, 320 N.R. 319. Thus, all properly certified questions lack decided binding authority.

[40] In the absence of any evidence before us as to how frequently situations like that of Mr. Lewis and his daughter might actually arise, I am not prepared to conclude that the Federal

Court improperly certified the questions in this case. Thus, I would dismiss the respondent's preliminary objection.

IV. The Appeal on the Merits

[41] Moving on to consider the appeal on the merits, as this is an appeal from a decision of the Federal Court in a judicial review application, the standard of review we are to apply is prescribed by the Supreme Court of Canada in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559. That standard requires an appellate court to step into the shoes of the trial court, determine whether that court selected the appropriate standard of review and, if so, assess whether it applied that standard correctly. Thus, we are in effect called upon to re-conduct the required judicial review analysis.

A. *The Standard of Review*

[42] In terms of the first portion of the foregoing inquiry - determining whether the Federal Court selected the appropriate standard of review - I agree with the Federal Court that the reasonableness standard applies to the review of the Enforcement Officer's decision in its entirety, including the assessment of whether that decision violates section 7 of the Charter.

[43] It is well-settled that the reasonableness standard applies generally to the review of decisions made by enforcement officers under section 48 of the IRPA: *Canada (Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286 at para. 27, 343 D.L.R. (4th) 128 [*Shpati*]; *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009

FCA 81 at para. 25, [2010] 2 F.C.R. 311 [*Baron*]. As for the Charter issue, where, like here, the issue involves consideration of whether a discretionary decision of an administrative decision-maker respects Charter values, the Supreme Court of Canada has determined that the reasonableness standard likewise applies: *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at paras. 3-4, 32, [2015] 1 S.C.R. 613; *Doré v. Barreau du Québec*, 2012 SCC 12 at paras. 57-58, [2012] 1 S.C.R. 395. Thus, the Enforcement Officer's decision is to be reviewed for reasonableness.

B. *The Arguments on Appeal*

[44] Mr. Lewis and the intervener make three principal arguments in support of the request to set aside the Enforcement Officer's decision.

[45] They first say that the decision of the Supreme Court of Canada in *Kanthasamy v. Canada (Citizenship and Immigration),* 2015 SCC 61, [2015] 3 S.C.R. 909 [*Kanthasamy*] must be understood as having overtaken the decided authority of this Court regarding the depth of consideration that CBSA enforcement officers are required to give to the best interests of children in deciding whether or not to grant a deferral of a removal order under section 48 of the IRPA.

[46] The previous judgments of this Court in *Baron* at paras. 49-51 and *Shpati* at para. 45 stand for the proposition that an enforcement officer considering an application to defer a removal order under section 48 of the IRPA is not entitled to conduct what would amount to a full-blown consideration of an applicant's interests as would occur in an H&C application made

under section 25 of the IRPA. This is equally so where the interests of children are invoked: *Baron* at para. 57; *Langner v. Canada (Minister of Employment & Immigration)*, 184 N.R. 230, 29 C.R.R. (2d) 184 (F.C.A.) [*Langner*].

[47] Mr. Lewis and the intervener say that this case law has been overtaken by *Kanthasamy,* which they submit mandates a much more fulsome consideration of the best interests of children affected by a request to defer the removal of their parent(s) from Canada. In support of this argument, they say that both the reasoning of the Supreme Court in *Kanthasamy* and paragraph 3(3)(*f*) of the IRPA require that all decision-makers under the IRPA comply with the *United Nations Convention on the Rights of the Child* (the Children's Convention). They further submit that this Convention requires that no decision made under the IRPA that impacts children, including rulings on deferral requests under section 48, can be made until the children's best interests are thoroughly examined and given priority consideration. As this did not occur in the present case, they say the Enforcement Officer's decision must be set aside.

[48] Mr. Lewis goes further and submits that the requisite analysis is not one that can actually be undertaken by CBSA enforcement officers given their limited mandate. In other words, because enforcement officers do not have the authority under section 48 to make complex decisions involving children in a manner consistent with *Kanthasamy*, any such decision would be incomplete and therefore unreasonable. As a consequence, Mr. Lewis argues that he was entitled to have his removal deferred until his pending H&C application is decided on the merits. This is because it is only at this point that the requisite analysis of the impact of his removal on his daughter's best interests can be undertaken.

[49] Mr. Lewis secondly submits that the principles in *Gladue*, *Ipeelee* and *Anderson* (which I collectively call the "*Gladue* principles") apply outside the criminal sentencing context, pointing to a number of cases in support of this argument: *United States v. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496; *R. v. Robinson*, 2009 ONCA 205, 95 O.R. (3d) 309; *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534, 295 D.L.R. (4th) 108; *R. v. Sim* (2005), 78 O.R. (3d) 183, 67 W.C.B. (2d) 431 (Ont. C.A.); *Twins v. Canada (Attorney General)*, 2016 FC 537, 130 W.C.B. (2d) 628; and *Law Society of Upper Canada v. Terence John Robinson*, 2013 ONLSAP 18 (available on CanLII) [*Robinson LSUC*]. He asserts that the *Gladue* principles have quasi-constitutional status and under section 7 of the Charter require that a meaningful and substantive consideration of the impact of his removal on his daughter be undertaken before he is removed from Canada. Once again, he asserts that such consideration can only be undertaken by an H&C officer under section 25 of the IRPA and not by enforcement officers, given the limited scope of their authority under section 48 of the IRPA.

[50] Finally, Mr. Lewis and the intervener submit that the Enforcement Officer's consideration of the best interests of Mr. Lewis' daughter was unreasonable as the Enforcement Officer failed to give adequate consideration to the importance of the child being able to maintain a connection with her indigenous roots and heritage, which she could not do if she were in Guyana. They also say that there is no rational basis for the Enforcement Officer's assumption that the child could return to Canada. The intervener further notes that indigenous children are among the most vulnerable in Canada and that, even if the *Gladue* principles do not apply to applications under the IRPA, an appropriate analysis of the best interests of aboriginal children whose custodial parent is being removed from Canada requires recognition of the situation of

such children and of the importance of their maintaining a connection to their culture, community and traditional lands. As none of these points were given adequate consideration by the Enforcement Officer, the intervener submits her decision must be set aside.

C. *Analysis*

(1) Section 48 Generally

[51] It is useful to begin by reviewing section 48 of the IRPA and the role this section plays in the overall context of the IRPA. Section 48 of the IRPA currently provides:

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.
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

The provision was identical at the time of the Enforcement Officer's decision. Previously, subsection 48(2) was arguably more broadly-worded, requiring that removal orders were to be enforced "as soon as is reasonably practicable" (as opposed to the current requirement for enforcement "as soon as possible").

[52] Requests for deferral, like the one made by Mr. Lewis in this case, are typically made after the applicant has either had – or has had the opportunity to have – more than one hearing before other decision-makers under the IRPA. These decision-makers are charged with assessing

a range of issues, including whether applicants would face a risk of torture or risks to their lives or well-being that prevents their removal to their countries of origin under section 97 (or, where applicable, section 96) of the IRPA or whether H&C grounds militate in favour of their being allowed to stay in Canada. Risk determinations are generally made by the Refugee Protection Division of the IRB, in the context of refugee claims, and by PRRA officers, prior to an individual's removal. H&C grounds may be considered by the IAD in the context of a request to stay a removal order, as occurred in Mr. Lewis' case, and may also be considered by ministerial delegates under section 25 of the IRPA.

[53] Several of these processes were open to or utilized by Mr. Lewis. A PRRA officer determined that there would be no risk to Mr. Lewis if he were returned to Guyana that would justify his remaining in Canada under section 97 of the IRPA. The IAD originally granted a stay of the removal order on H&C grounds and cancelled that stay only when Mr. Lewis failed to abide by the condition of keeping CIC advised of his whereabouts. At any point thereafter, Mr. Lewis could have applied under section 25 of the IRPA for H&C consideration and invoked the same arguments he made to the CBSA Enforcement Officer. However, he did not avail himself of this option until he was facing removal.

[54] Deferral requests are typically the last application made by those who are not entitled to remain in Canada. In light of this and of the language used by Parliament in section 48 of the IRPA, directing that removal orders be enforced as soon as possible (or formerly as soon as is reasonably practicable), this Court and the Federal Court have long held that the discretion that an enforcement officer may exercise is very limited: *Shpati* at para. 45; *Baron* at para. 51; *Wang*

v. Canada (Minister of Citizenship and Immigration), [2001] 3 F.C.R. 682 at para. 45, 2001 FCT 148 (F.C.T.D.); and *Simoes v. Canada (Minister of Citizenship and Immigration)*, 187 F.T.R. 219 at para. 12, 7 Imm. L.R. (3d) 141 (F.C.T.D.) [*Simoes*].

[55] As this Court noted in *Baron* at paragraph 49 (citing with approval from the earlier decision of the Federal Court in *Simoes*):

> […] the discretion that [an enforcement] officer may exercise is very limited, and […] is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, [an enforcement] officer may consider various factors such as illness, other impediments to travelling, and pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system.

[56] This Court went on to accept the Federal Court's further holding in *Simoes* that "the mere existence of an H&C application [does] not constitute a bar to the execution of a valid removal order" and that "an enforcement officer [is] not required to undertake a substantive review of the children's best interests before executing a removal order" (*Baron* at para. 50). Nor does the fact that the individual being removed is the parent of a Canadian-born child that may accompany the parent back to the country of origin justify deferral; this was precisely the situation in *Baron* and, indeed, is often the case for those who have remained in Canada while their immigration applications are being processed.

[57] Thus, under this well-established line of authority, the mere fact that an H&C application has been made shortly before the removal date by those subject to being removed or the fact that they might take their Canadian-born children with them when they are removed from Canada

does not mean that a deferral under section 48 of the IRPA is warranted. Nor is an enforcement officer entitled to engage in a full-blown analysis of the best interests of such children as so doing would usurp the function of H&C officers under section 25 of the IRPA.

[58] That said, the case law of the Federal Court recognizes that an enforcement officer, in appropriate cases, may be required to engage in a truncated consideration of the short-term best interests of children who might be affected by their parents' removal.

[59] In *Munar v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180, [2006] 2 F.C.R. 664 [*Munar*], de Montigny J. (as he then was) concluded that the narrow discretion prescribed by the previous version of section 48 of the IRPA was not inconsistent with Canada's obligations under the Children's Convention both because the Supreme Court of Canada in *Baker* (the seminal case dealing with the principles applicable to assessing children's best interests in the immigration context) and the Children's Convention, itself, recognize that the best interests of the child principle is not a trump card that automatically renders any state-driven separation of parent from child unenforceable. Rather, the principle requires consideration be given to the best interests of the children in question, but does not necessarily dictate particular outcomes (*Munar* at paras. 33-34). In the oft-quoted passage at paragraphs 36-40 in *Munar*, Justice de Montigny described the type of assessment required by enforcement officers of the best interests of children whose parent(s) seek to have removal deferred under section 48 of the IRPA:

> 36. [… enforcement] officers cannot be required to undertake a full substantive review of the humanitarian circumstances that are to be considered as part of an H&C assessment. Not only would that result in a "'pre H&C' application" […] but it would also duplicate to some extent the real H&C assessment. More

> importantly, [enforcement] officers have no jurisdiction or delegated authority to determine applications for permanent residence submitted under section 25 of the IRPA. They are employed by the Canada Border Services Agency, an agency under the auspices of the Minister of Public Safety and Emergency Preparedness, and not by the Department of Citizenship and Immigration. They are not trained to perform an H&C assessment.
>
> 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 [enforcement] officers to give any consideration to the situation of a child would equally be unacceptable.
>
> 38. […] 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, […] the obligation of [an enforcement] officer to consider the interests of Canadian-born children must rest at the lower end of the spectrum […].
>
> […]
>
> 40. […] What [an enforcement officer] should be considering […] are the short-term best interests of the child. For example, it is certainly within the [enforcement] 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 [enforcement] 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 […].

[60] Although *Munar* was a decision on a motion to stay a removal pending an H&C application, Justice de Montigny's reasoning was applied by the Federal Court when it determined Ms. Munar's application for judicial review of the section 48 removal order: *Munar v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 761 at paras. 18-19 (available on

CanLII). In addition, the conclusions in *Munar* have been applied by the Federal Court in its judicial review of section 48 decisions involving children: see, e.g. *Nguyen v. Canada (Public Safety and Emergency Preparedness)*, 2017 FC 225 at para. 15 (available on CanLII); *Danyi v. Canada (Public Safety and Emergency Preparedness)*, 2017 FC 112 at para. 30 (available on CanLII) [*Danyi*]; *Baptiste v. Canada (Citizenship and Immigration)*, 2015 FC 1359 at para. 9, 11 Admin. L.R. (6th) 19; *Kampemana v. Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1060 at paras. 33-34 (available on CanLII); *Ezquivel v. Canada (Public Safety and Emergency Preparedness)*, 2014 FC 995 at para. 32 (available on CanLII); *Khamis v. Canada (Citizenship and Immigration)*, 2010 FC 437 at para. 30 (available on CanLII) [*Khamis*]; *Turay v. Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1090 at para. 21 (available on CanLII).

[61] Thus, under the existing case law, enforcement officers may look at the short-term best interests of the children whose parent(s) are being removed from Canada, but cannot engage in a full-blown H&C analysis of such children's long-term best interests.

[62] With this backdrop in mind, I now turn to the arguments advanced by Mr. Lewis and the intervener in this case.

(2) The Charter Argument

[63] It is convenient to first address the Charter argument as it may be disposed of quickly. The starting point for the discussion is what the respondent terms a "foundational principle in the immigration context" (Respondent's Memorandum of Fact and Law at para. 55), namely, that

section 7 of the Charter does not prevent the removal of non-citizens from Canada if those being removed will not upon return to their country of origin face risks of the sort that would qualify for protection under section 97 of the IRPA: *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para. 46, [2005] 2 S.C.R. 539; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras. 5, 78-79, [2002] 1 S.C.R. 3; and *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at p. 733, 90 D.L.R. (4th) 289. As there is no suggestion that Mr. Lewis would face any such risk, his section 7 Charter rights are not impacted by the removal order. In short, his constitutionally-protected rights to life, liberty and security of the person will not be impacted if he is returned to Guyana.

[64] Nor, in my view, are his child's section 7 Charter rights impacted. There is no suggestion that she would face risk of a type that would prevent removal under section 97 of the IRPA if she were to accompany Mr. Lewis when he is returned to Guyana. Further, this Court has held that the removal of the parent(s) of Canadian-born children to their countries of origin when they are inadmissible to remain in Canada does not engage the children's section 7 interests: *Idahosa v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 418 at para. 49, [2009] 4 F.C.R. 293; *Langner* at paras. 7-9. Thus, if Mr. Lewis' child were not of indigenous heritage, there would be no basis for asserting that her rights under section 7 of the Charter might be impacted by Mr. Lewis' removal.

[65] I fail to see how the child's indigenous heritage mandates a different conclusion. While her heritage is very significant to the type of analysis required to adequately address her short-term best interests in the context of the removal process (as is more fully discussed below), her

heritage does not, of itself, give rise to a Charter-protected interest that prevents her father's removal, and this is not changed by Mr. Lewis' invocation of the *Gladue* principles.

[66] As noted, the *Gladue* principles arise out of subsection 718.2(*e*) of the *Criminal Code*, which deals with sentencing and asks courts to consider alternatives to incarceration where possible. Incarceration, by definition, involves the deprivation of liberty, and a carceral sentence must therefore be imposed in accordance with the principles of fundamental justice to be compliant with section 7 of the Charter. Liberty interests are also engaged in the non-sentencing jurisprudence cited by the appellant; a subject faces a risk of pre-trial detention in bail decisions, foreign imprisonment in extradition cases and institutionalisation in not criminally responsible (NCR) disposition cases. Thus, in these types of situations, section 7 of the Charter may well require a *Gladue*-type analysis where the subject of the sanction is of indigenous heritage. Section 7 of the Charter is engaged in such cases because the affected individuals' liberty interests are impacted, not because of their status as indigenous persons.

[67] Here, on the other hand, no section 7 interests are impacted by the removal of Mr. Lewis from Canada to Guyana. Thus, there is no need to inquire whether the removals process accords with fundamental justice as Mr. Lewis' and his daughter's section 7 rights are simply not engaged.

[68] As for the *Robinson LSUC* decision relied upon by Mr. Lewis, the case makes no mention of the Charter, but rather considers the sort of penalty a Law Society disciplinary panel

should impose on a lawyer of indigenous heritage who had been convicted of assault. This case is therefore irrelevant to Mr. Lewis' Charter argument.

[69] I thus conclude that the Charter argument is without merit and that the rights of Mr. Lewis and his daughter under section 7 of the Charter would not be impacted by Mr. Lewis' removal to Guyana. Likewise, section 7 of the Charter did not require that a different type of analysis be undertaken by the Enforcement Officer in this case.

(3) *Kanthasamy* and the Best Interests of the Child Analysis Required of Enforcement Officers

[70] I turn now to the argument that the decision of the Supreme Court of Canada in *Kanthasamy* mandates that either a more fulsome analysis of the best interests of affected children be undertaken by enforcement officers than has previously been required under the jurisprudence of this Court and the Federal Court or that any such analysis must be deferred until an application for H&C consideration is determined.

[71] I begin by noting that *Kanthasamy* did not involve a decision made by an enforcement officer under section 48 of the IRPA but, rather, a decision of a ministerial delegate under section 25 of the IRPA. Section 25 of the IRPA, unlike section 48, specifically requires that the decision-maker consider the best interests of any children that would be directly affected by a decision to refuse H&C relief. Section 25 provides in this regard:

25 (1) […] the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible […] or	25 (1) […] le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est

who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada […] who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	interdit de territoire […], soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada […] qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[72] The majority opinion in *Kanthasamy* turns in large part on the fact that section 25 of the IRPA explicitly requires an H&C officer to consider the affected children's best interests. Writing for the majority at paragraph 40 of *Kanthasamy*, Justice Abella noted:

> Where, as here, the legislation specifically directs that the best interests of a child who is "directly affected" be considered, those interests are a singularly significant focus and perspective […].

[73] Even with the need to give the affected children's best interests "a singularly significant focus and perspective" in the section 25 analysis, it does not follow that the affected children's best interests must outweigh other considerations in the analysis. Immediately prior to paragraph 40 in *Kanthasamy*, Justice Abella quotes at length from *Baker*. In the passage quoted, Justice L'Heureux-Dubé wrote (*Baker* at para. 75):

> […] for the exercise of the discretion [by an H&C decision-maker] to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H&C claim even when children's interests are given this consideration.

> However, where the interests of children are minimized, in a manner inconsistent with Canada’s humanitarian and compassionate tradition and the Minister’s guidelines, the decision will be unreasonable.

[74] In light of the foregoing, I disagree with Mr. Lewis and the intervener that *Kanthasamy* requires that a full-blown best interests of the child analysis be undertaken before a child’s parent(s) may be removed from Canada or that such children’s best interests must outweigh other considerations in the analysis. In my view, the holding in *Kanthasamy* applies only to H&C decisions made under section 25 of the IRPA and, even there, does not mandate that the affected children’s best interests must necessarily be the priority consideration.

[75] As for the requirements of paragraph 3(3)(*f*) of the IRPA and the Children’s Convention more generally, I believe that *Munar* correctly characterizes the impact of these provisions on the type of analysis to be undertaken by an enforcement officer.

[76] Paragraph 3(3)(*f*) of the IRPA sets out a rule of construction, providing that the IRPA is to be “construed and applied in a manner that complies with international human rights instruments to which Canada is signatory”. This Court and the Supreme Court of Canada have held that this provision does not import international instruments to which Canada is a signatory into domestic law, but, rather, provides a contextual foundation for interpretation and gives rise to a presumption that the legislation should be interpreted in a manner consistent with Canada’s international obligations: *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58 at para. 49, [2015] 3 S.C.R. 704; *Okoloubu v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 326 at paras. 34-37, 301 D.L.R. (4th) 591; and *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at paras. 82-89, 262 D.L.R. (4th) 13.

[77] Contrary to what the intervener asserts, the Children's Convention does not prescribe that the best interests of the child is to be the priority consideration for all administrative decision-makers tasked with making decisions that might impact children. Rather, Article 3 of the Convention provides in relevant part that "[i]n all actions concerning children […], the best interests of the child shall be **a** primary consideration" [emphasis added]. Thus, Article 3 of the Children's Convention requires the best interests of the child be a priority, but not the sole priority consideration. This is to be contrasted with the role ascribed to the best interests of the child in adoption proceedings under Article 21 of the Children's Convention, which provides that in such proceedings the best interests of the child shall be "the paramount consideration".

[78] The United Nations Committee on the Rights of the Children recognizes the difference between these two obligations in its *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14 (29 May 2013), stating at paragraphs 38 and 39 as follows:

> In respect of adoption (art. 21), the right of best interests is further strengthened; it is not simply to be "**a primary** consideration" but "**the paramount** consideration" […]. [Emphasis in original.]
>
> However, since article 3 […] covers a wide range of situations, the Committee recognizes the need for a degree of flexibility in its application. […]

[79] Section 25 of the IRPA provides the mechanism under which children's best interests are to be fully assessed in accordance with Canada's obligations under the Children's Convention. In *Kanthasamy* the Supreme Court has detailed what this assessment entails.

[80] It was open to Mr. Lewis to make an application under section 25 of the IRPA at any point after his daughter was born. Had he done so, his daughter's best interests would probably already have been fully evaluated by an H&C officer in the context of such an application. However, he neglected to make an application under section 25 of the IRPA until shortly before his scheduled removal. In my view, this does not entitle him to forestall his removal. Were it otherwise, a large loophole would be opened in the IRPA, resulting in longer stays in Canada for those subject to lawful removal orders. In many cases, such delay is probably not in anyone's best interests.

[81] The impact of the Children's Convention on the type of assessment to be undertaken by enforcement officers was squarely addressed by this Court in *Baron*. There, this Court unequivocally held at paragraph 47 that the Children's Convention does not mandate that a full-blown best interests of the child analysis be undertaken by an enforcement officer or that removal be delayed due to an untimely H&C application. Rather, in adopting the statements in *Simoes*, this Court in *Baron* recognized that it is only where a timely H&C application is still pending due to a backlog in processing that a deferral may be warranted.

[82] Thus, neither *Kanthasamy* nor the Children's Convention required the Enforcement Officer in this case to undertake a full-blown assessment of the best interests of Mr. Lewis' daughter or to grant the requested deferral until Mr. Lewis' last minute H&C application was decided by a ministerial delegate. Rather, the Enforcement Officer was only required to consider the short-term best interests of the child.

[83] In previous cases, such short-term best interests have been found to include matters such as the need for a child to finish a school year during the period of the requested deferral (see, e.g. *Munar* at para. 40; *Khamis* at para. 30) or maintaining the well-being of children who require specialized ongoing medical care in Canada (see, e.g. *Danyi* at paras. 36-40). In addition, as noted in *Munar* at paragraphs 40-42, the short-term needs of a child that an enforcement officer must consider include ensuring that there will be someone to care for the child after his or her parent(s) are removed if the child is to remain in Canada.

[84] In my view, these sorts of considerations continue to be appropriate under the current wording in section 48 of the IRPA as there is no meaningful difference in effecting removal as soon as possible – versus as soon as is reasonably practicable – when a child's vital short-term best interests are concerned.

[85] Here, the Enforcement Officer was faced with the situation of an indigenous child whose sole custodial parent was to be removed from Canada. These facts raise special considerations that impact the child's vital short-term best interests.

[86] More specifically, I agree with the intervener that aboriginal children are doubtless among the most vulnerable in Canada and end up in foster care with far greater frequency than non-indigenous children. For example, in 2011, 48% of children under 14 years of age and 30% of older teenagers in foster care in Canada were indigenous and more than half of these children were fostered by non-indigenous caregivers: see Statistics Canada, *Insights on Canadian Society: Living arrangements of Aboriginal children aged 14 and under* (April 13, 2016), Catalogue

no. 75-006-X at pp. 6-7, 10, as cited by the Truth and Reconciliation Commission of Canada in *Honouring the Truth, Reconciling for the Future* (Truth and Reconciliation Commission of Canada: Winnipeg, 2015) at p. 138. I also agree with the intervener that the well-being of an indigenous child will be enhanced if he or she maintain some connection with his or her culture, heritage and, ideally, territory, to help foster a sense of belonging and pride. The Children's Convention recognizes the importance of such a connection and states in Article 30:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

[87] The importance of giving meaning to this provision in the context of federal policies and programs aimed at ensuring the well-being of indigenous children across Canada was acknowledged by the Standing Senate Committee on Human Rights in an April 2007 Final Report: *Children: The Silenced Citizens – Effective Implementation of Canada's International Obligations with Respect to the Rights of Children* at pp. 169, 176-177, 184-185.

[88] These issues give rise to both short and long-term interests in the present case given the impact that removal for the period of the requested deferral would have on the child's connection to her indigenous roots. Thus, even on a short-term basis, the Enforcement Officer had to be alert, alive and sensitive to these issues and was required to give them brief reasonable consideration.

(4) Was the Enforcement Officer's Decision Reasonable

[89] I therefore turn to the last issue raised by the parties – the reasonableness of the Enforcement Officer's decision in the present case. The Enforcement Officer recognized that it was important to Mr. Lewis' daughter that she maintain "a close connection with her Aboriginal community, its culture and traditions" during the period of the requested deferral. Accepting that the child would go with her father to Guyana, the Enforcement Officer reasoned that the child "may return to Canada at any time to participate in '*dances, pow wows, speakers and special events, as well as native Aboriginal centres and Native art shows*'" and that "she may enter Canada whenever her legal guardian permits it to visit her mother, her mother's family and the Gwich'in band in Yellowknife".

[90] With respect, the assumption that the child could return to Canada is pure speculation and therefore unreasonable. Her father is inadmissible and so likely could not accompany his then 8 year-old daughter on a return trip. The Enforcement Officer does not explain how it would be feasible for the child to make the journey back to Canada on her own, and there is no suggestion that anyone else would be able to accompany her. Perhaps more importantly, given her father's age, economic circumstances, skill set, lack of connections in Guyana and the conditions prevalent in that country, as well as the situation of the child's mother, there is no basis for concluding that anyone would be able to purchase an airline ticket for the child to return to Canada or guarantee that her basic living requirements are met if she were to return to Canada without Mr. Lewis.

[91] Finally, although the Enforcement Officer was quoting from Mr. Lewis' affidavit in mentioning "*dances, pow wows, speakers and special events, as well as native Aboriginal centres and Native art shows*" to characterize the type of connection it was important for the child to maintain with her indigenous roots, this description belittles the profound nature of the degree of connection to culture, heritage and territory that is likely important and desirable for an indigenous person to maintain. Thus, the Enforcement Officer's treatment of these issues was insensitive, which *Baker* instructs is the antithesis of the requisite analysis of the best interests of a child.

[92] In short, having accepted that it was important for the child to maintain a connection with her indigenous roots during the period of the requested deferral, it was incumbent on the Enforcement Officer to realistically and sensitively assess whether this was possible if she were to accompany her father to Guyana. It seems to me that, based on the facts before the Enforcement Officer, there was no realistic basis for concluding that the child could maintain any such connection if she were in Guyana.

[93] As for the Federal Court's suggestion that the Enforcement Officer's decision should be upheld as there was no basis to conclude that the child would be leaving Canada, I find this conclusion to be entirely without merit as the facts indicate precisely the opposite. The CBSA was prepared to purchase a ticket to Guyana for the child and the Enforcement Officer accepted that the child would be accompanying Mr. Lewis when he returned to Guyana.

[94] I thus conclude that the Enforcement Officer's decision was unreasonable.

V. Proposed Disposition

[95] I would therefore answer both certified questions in the negative as follows:

a. Do the principles set out by the Supreme Court of Canada in *R. v Gladue*, *R. v Ipeelee*, and *R. v Anderson* apply, *mutatis mutandis*, to removals under section 48 of the IRPA such that there must be a full consideration of the impact on an Aboriginal child of the removal from Canada of her non-citizen custodial parent prior to the execution of the removal order?

Answer: No.

b. Does Section 7 of the *Charter of Rights and Freedoms* mandate *Gladue*-like consideration of the impact of the removal of an Aboriginal child's custodial parent prior to the execution of the removal order?

Answer: No.

[96] I would, however, allow this appeal and, making the decision that the Federal Court ought to have made, would set aside the decision of the Enforcement Officer and, provided Mr. Lewis' H&C application is still outstanding, would remit Mr. Lewis' deferral application to another CBSA Officer for re-determination in accordance with these reasons. Given the passage of time, Mr. Lewis should be afforded the opportunity to make additional submissions to provide an update on his situation and the situation of his child before a decision is made on the re-determination. There is no basis for an award of costs under section 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22.

"Mary J.L. Gleason"
J.A.

"I agree.
David Stratas J.A."

"I agree.
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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