Date: 20060608

Docket: IMM-3978-05

Citation: 2006 FC 711

OTTAWA, Ontario, June 8, 2006

PRESENT: The Honourable Paul U.C. Rouleau

BETWEEN:

MARRIETTE BASTIEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for a judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, 2001 S.C. c. 27 (the IRPA), of the decision of and Expulsion Officer (the "Officer") made June 29, 2005, in which the Officer refused to stay the removal of the applicant from Canada to Dominica.

[2] The applicant is a citizen of Dominica. She came to Canada in 1996 as a visitor and this permit was extended a number of times. She was to be sponsored under the Care-Giver program, but ended up living here illegally. In 2004, her claim for refugee status was denied and a PRRA application which followed was negative. In 2004 she submitted an application for humanitarian

and compassionate consideration, under s. 25 of the IRPA, arguing that she supports her ailing mother, her sister, and her sister's three children, all of whom reside in Dominica. The applicant also argues that the three children of her employer in Canada are dependent on her, as a surrogate parent.

[3] On June 15, 2005, the applicant was advised that she would be deported on July 8, 2005. On July 5, 2005, my colleague Mr. Justice Kelen allowed the applicant's motion for a stay, pending the current judicial review. The applicant now seeks judicial review of the decision of an Expulsions Officer to deport her. Essentially, if the present application is allowed, the remedy would be to return the matter to a different Expulsion Officer, conditional that the Officer's decision should not be rendered until the applicant's humanitarian and compassionate application is processed and the judicial review application is determined. The Applicant seeks a *de facto* extension of the stay of removal. At no time has the validity of the deportation order been challenged.

[4] The Removals Officer did not exercise her discretion to defer the applicant's request for a deferral of Removal. The Officer noted that the Canada Border Services Agency (the "CBSA") has an obligation under s. 48 of the IRPA to carry out removal orders as soon as reasonably practicable. The entire body of the letter that constitutes the decision, reads as follows:

> Re: Request of Deferral of Removal – Mariette Bastien – ID 3418-7926
>
> I am in receipt of yours [sic] facsimilies dated June 21 and June 29, 2005, requesting a deferral of your client's removal from Canada.
>
> Canada Border Services Agency (CBSA) has an obligation under section 48 of the Immigration and Refugee Protection Act to carry out removals as soon as reasonably practicable. Having considered your request, I do not feel that a

> deferral of the execution of removal order is warranted in the circumstances of this case.
>
> Your client is required to appear for removal arrangements as scheduled on July 08 2005. Failure to report for removal may result in enforcement action being taken against her, including a Canada wide warrant for her arrest.

[5] After the expulsion decision was issued, the applicant moved for a stay, which my colleague Justice Kelen granted. In his decision on the stay application he found that the applicant's removal from Canada would prejudice her H&C application. On July 5, 2005, he found as follows:

> **AND UPON** the Applicant having lived in Canada for nine years and having filed an H&C application 16 months ago.
>
> **AND UPON** the Court concluding that the Applicant's H&C application was filed in a timely manner based on the jurisprudence per Mosley J. in *Boniowski v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1161 at para 11:
>
> > … Instead, the jurisprudence instructs that an officer must acknowledge that she has some discretion to defer removal, if it would not be "reasonably practicable" to enforce a removal order at a particular point in time. For example, the existence of a pending H&C application that was filed in a timely manner.
>
> **AND UPON** the Court having concluded that the effect of removing the Applicant will significantly adversely impact the H&C application, thus depriving the Applicant of the benefits of an H&C application, and that this constituted irreparable harm per Pelletier, J.A. in *Owusu v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1976 at paragraph 3:
>
> > As for irreparable harm, I do not believe that it is accurate to say that removal will not affect the applicant's appeal, and, if he is successful, the reconsideration of his H&C application. While the effect of removal on the appeal will be minimal, if he is successful, it will be significant on his H&C application. The basis for the finding of reviewable error is the interests of the applicant's children, an issue raised by the fact that his employment in Canada makes it possible for him to support them. If he is removed, and is no longer supporting them from Canada, his grounds for receiving favourable consideration of this H&C application are significantly undermined. The effect would be to deprive him of

> substantially all of the benefits of his appeal if he is successful. This constitutes irreparable harm. (underlining added)
>
> **AND UPON** considering that the applicant has been in Canada for nine years and waiting for another four to six months for her H&C application to be processed does not prejudice the Respondent so the balance of convenience favours the applicant.
>
> **THIS COURT ORDERS THAT:**
> This motion for a stay of execution of the removal order is allowed pending this application for judicial review.

[6] Mr. Justice Kelen granted the stay, pending the outcome of this application for judicial review. It would be fair to assume that the stay of the removal would remain in effect until a determination of the H&C application since it appears to be the basis for the granting of the stay.

[7] The only issue is whether the Officer erred in rejecting the applicant's request for a deferral of the Removal Order.

[8] The application for H&C has now been processed and a negative decision was returned. She has filed for judicial review of the H&C decision. The respondent argues that the issue being considered is now moot and I agree. Nevertheless, I wish to comment further on submissions before me that the exercise of discretion by a Removal officer should be greater than which the law provides; that they should consider the best interest of children when it is the underlying issue to be determined by an H&C.

[9] Two major factors from my colleague Justice Kelen's stay decision warrant consideration in this application.

[10] The first issue which merits consideration is whether an Expulsion Officer has a duty to acknowledge that he or she has some discretion to defer removal. If the Officer does have some duty and/or discretion, the question of concern is whether the Officer in the present case fulfilled the obligation.

[11] As Justice Mosley pointed out in *Boniowski*, "an Expulsion Officer has a duty to acknowledge that he or she has some discretion to defer removal, if the removal is not reasonably practicable at a particular point in time". In the present matter, I am of the opinion that the Officer did acknowledge discretion and duty, in stating as follows:

> Canada Border Services Agency (CBSA) has an obligation under section 48 of the Immigration and Refugee Protection Act to carry out removals as soon as reasonably practicable. Having considered your request, I do not feel that a deferral of the execution of removal order is warranted in the circumstances of this case.

[12] Given that the Officer did acknowledge duty and discretion, the second factor arises. In my opinion, to how great a scope does the Officer's duty extend. Should he be giving reasons and elaborating a subjective analysis of the matter?

[13] The applicant contends that the Officer's decision is no more than a form letter, issued by the CBSA, which performs no subjective analysis of the applicant's case. Essentially, it is argued that there were insufficient reasons given. The applicant provides a letter from the CBSA, dated September 30, 2005, which clearly confirms no reasons. The letter only provides a decision. An Officer having very limited discretion, his or her decision need not be very extensive, and, in the

present case, the letter sent to the applicant appears to be sufficient and is supported by the jurisprudence. There were no submissions before me that this removal warranted special consideration: i.e. no one was ill, the applicant was able to travel and the country to which she was being deported did not present an imminent danger to the applicant.

[14] The narrow question that must be answered is whether an Expulsion Officer's decision, which appears to be *prima facie* valid, can be overturned by this Court, based on a subsequent grounds referred to in the stay decision. The analysis requires three factors to be examined: 1) the adequacy of the decision, 2) the application of subsequent stay reasons to an application for judicial review, and 3) this Court's deference to the decision of an Expulsion Officer.

[15] As I have already stated, I am satisfied that the Officer acknowledged both her duty, and the discretion allowed in the performance of her duty. The question is whether further reasons are required from the Officer. I am of the view that the Officer is not required to give greater reasons other than the decision itself. An Expulsion Officer has very limited discretion, and should not be required to give extensive reasons for a very limited decision-making process. As Justice Mosley found in *Boniowski*, an Expulsion Officer must acknowledge the limited discretion that he or she has, in issuing a decision. I am satisfied that the Officer acknowledged the discretion and I would not impose greater duty on the Officer.

[16] It should also be pointed out that in the "Notes to file" it is obvious the Officer did consider other factors before making a decision:

> "-H&C application was received at CPCV on 05/3/04, transferred to Etobicoke CIC May 2004. Remarks on FOSS indicate that it will be 4-6 months before file is assigned to an officer and then the time it may take the officer to make a cession. H&C is not an impediment to removal. The process will still continue after removal. If the H&C is positive subject will return to Canada as a permanent resident. Subject has no legal status to work in Canada, therefore it is in her best interest to return to Dominica and wait for the application to be completed.
>
> While I am extremely empathetic that subject has been a financial source and has assisted her mother and siblings, however, she has no legal authorization to work in Canada and will be unable to support herself and her family. If she works without authorization, she may be arrested.
>
> As far as her employment as a nanny that she takes care of 3 Canadian children, I had spoken to subject's employer and had explained the live-in care giver programme which is available if subject decides to explore."

[17] The second issue is whether the issuance of subsequent reasons, referred to in the stay application, is sufficient to overturn an Officer's decision. I have not been convinced that my colleague Justice Kelen's reasons should be relied upon to overturn the Officer's decision, notwithstanding the fact that the stay analysis is more extensive than that which was provided by the Expulsion Officer. The issue of deference must be weighed along with the reasons in any subsequent stay decision.

[18] An Expulsion Officer's decision must meet the requirements under the law. On the other hand, the stay reasons given by my colleague did consider the issues more fully, but cannot be the underlying basis to the present application. There is a clear difference between a stay application and an application for judicial review of an Expulsion Officer's decision. The question that is

before this court today is whether the Expulsion Officer's decision was so unreasonable that it should be reviewed and set aside by this Court. I am of the opinion that, given the Officer's limited discretion and her acknowledgment thereof, as well as the consideration of the facts, the decision should not be overturned.

[19] The remedy sought in this judicial review application is essentially an extension of the stay of removal until the H&C application is processed (suggested in the stay reasons); the applicant's H&C application has now been processed and a negative decision was returned. The issue is now moot.

[20] Further, the applicant's argument that issue of estoppel exists, in respect of Justice Kelen's decision, is not persuasive – the present application is a judicial review of the decision of an Expulsion Officer. This is not a second stay application. The applicant has filed a stay application, pending judicial review of her negative H&C decision, but the Court's function today is to consider the Removal's Officer's decision.

[21] In closing counsel for the applicant suggests that an Expulsion Officer, being aware that "best interest of children" may be at stake and could be the subject of an H&C application, should almost concede that it is his or her duty to exercise his or her discretion and defer removal.

[22] May I say from the outset that this judicial review is not of an H&C or other application, nor is it a stay application. My duty in this instance is to determine whether or not the Expulsion Officer

exercised her discretion and performed her duty in accordance with the law and the jurisprudence in a reasonable manner and I have so determined.

[23] In support of his argument, counsel for the applicant suggested that I follow the jurisprudence as outlined in the two following cases. He suggested that the Court is leaning to granting stays and other remedies as soon as the issue of the best interest of children is raised. I have reviewed *Owusu* [2003] F.C.J. N9. 1976. It should be noted that this was a stay application and though it was granted it has no bearing on the issue before me. May I comment, that the fact that an illegal resident of Canada supporting children in a foreign country should be granted deference does not appear, in my view, to be given any weight. The Supreme Court of Canada in *Baker* suggested, when considering the best interest of children, it was the best interest of children born in Canada, not Ms. Baker's children that resided in Jamaica.

[24] In *Momcilovic* [2005] F.C.J. No. 100, the Court considered allowing a care giver to remain in Canada relying on subsection 25(1) of the *Immigration Act*. It can be distinguished on the facts. In the jurisprudence relied upon the care giver was the only available guardian to a widower whose wife died and he relied solely on the applicant to care for the children, since he travelled extensively for his work. In the case before me, there are two parents available as well as care giver program available as pointed out by the Expulsion Officer.

JUDGMENT

The application for judicial review is dismissed. No question of general importance is certified.

"Paul U.C. Rouleau"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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