1998 CarswellOnt 2288

John (Litigation Guardian of) v. **Canada** (Minister of Citizenship & Immigration)

Fashion **John**, Tushon **John** and Loshon **John**, through their Litigation Guardian Cartusha Skyers, Applicants and The Minister of Citizenship and Immigration, Respondent

Ontario Court of **Justice**, General Division

Dambrot J.

Judgment: May 29, **1998**
Docket: 97-CV-147372

Counsel: *Roger Rowe*, for the Applicants.

Jeremiah A. Eastman, for the Respondent.

Subject: Immigration; Constitutional; Civil Practice and Procedure

Aliens, immigration and citizenship --- Exclusion and removal — Removal from Canada — General

Mother of three Canadian children, aged 5, 4 and 2, was deported from Canada after Federal Court judge dismissed mother's application for stay on basis that effect of separation on family did not constitute irreparable harm — Children commenced application for declaration that deportation of mother contravened children's rights under ss. 7, 12 and 15 of Charter of Rights and Freedoms, and for other related relief — Children brought motion for interim order directing Minister to forthwith facilitate and pay for return of mother pending determination of application — Motion was dismissed — Federal Court was better positioned to consider how any Charter mandated consideration of rights of children should be integrated into scheme of Immigration Act — Taking of jurisdiction by court would encourage forum-shopping, inconsistency and multiplicity of proceedings — Federal Court of Appeal was appropriate forum to review judge's dismissal of stay.

Aliens, immigration and citizenship --- Constitutional issues — Charter of Rights and Freedoms — General

Mother of three Canadian children, aged 5, 4 and 2, was deported from Canada after Federal Court judge dismissed mother's application for stay on basis that effect of separation on family did not constitute irreparable harm — Children commenced application for declaration that deportation of mother contravened children's rights under ss. 7, 12 and 15 of Charter of Rights and Freedoms, and for other related relief — Children brought motion for interim order directing Minister to forthwith facilitate and pay for return of mother pending determination of application — Motion was dismissed on basis that Federal Court of Appeal was appropriate forum to re-

view judge's decision — Difficult to understand what else was necessary by way of notice to infant children because they were in custody of mother prior to her removal, mother had notice of all proceedings against her, and mother was well aware of effect that deportation would have on her children — No evidence that interests of children were not considered in deportation proceedings — No prima facie showing of Charter or Bill of Rights violation was made out, and there was no serious issue to be tried — No evidence of quality of mother's parenting, of past relationship of children to grandmother, and of grandmother's strengths of parenting — Impossible to say that irreparable harm would be suffered by children if order requested were not made — Canadian Charter of Rights and Freedoms, ss. 7, 12, 15 — Canadian Bill of Rights, S.C. 1960, c. 44, Pt. I, reprinted R.S.C. 1985, App. III.

Cases considered by *Dambrot J.*:

Acosta v. Gaffney (1976), 413 F. Supp. 827 (U.S. D. N.J.) — considered

Acosta v. Gaffney (1977), 558 F.2d 1153, 42 A.L.R. Fed. 915 (U.S. 3rd Cir. N.J.) — considered

Francis (Litigation Guardian of) v. Canada (Minister of Citizenship & Immigration) (1998), 160 D.L.R. (4th) 557, 40 O.R. (3d) 74 (Ont. Gen. Div.) — not followed

Reza v. Canada, 24 Imm. L.R. (2d) 117, 21 C.R.R. (2d) 236, 116 D.L.R. (4th) 61, *(*sub nom. *Reza v. Canada (Minister of Employment & Immigration))* 72 O.A.C. 348, 22 Admin. L.R. (2d) 79, [1994] 2 S.C.R. 394, *(*sub nom. *Reza v. Canada (Minister of Employment & Immigration))* 167 N.R. 282, 18 O.R. (3d) 640 (note) (S.C.C.) — considered

Statutes considered:

Canadian Bill of Rights, S.C. 1960, c. 44, Pt. I, reprinted R.S.C. 1985, App. III

s. 2(a) — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 7 — referred to

s. 12 — referred to

s. 15 — referred to

Immigration Act, R.S.C. 1985, c. I-2

Generally — referred to

Treaties considered:

Convention on the Rights of the Child, 1989, G.A. Res. 44/25; 28 I.L.M. 1456

Generally — referred to

MOTION for interim order directing Minister to forthwith facilitate and pay for return of mother pending determination of application.

***Dambrot J.*:**

The Nature of this Motion

1 Nicole Mahalia John was ordered deported from Canada by the Minister of Citizenship and Immigration, and removed from Canada on May 8, 1998. Her three children, who are five, four and two years of age respectively, are Canadian citizens. They remain in Canada, by virtue of a declaration signed by Ms. John, in the care of their grandmother. They have commenced an application in this court for a declaration that the deportation of their mother contravenes their rights under sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms*, and other related relief. They bring this motion for an interim order directing the Respondent to forthwith facilitate and pay for the return of their mother, who is not a party to these proceedings, to the jurisdiction of this court pending the determination of their application. The Minister asks me to deny the motion, and stay the application.

Background

2 Nicole John was born in Trinidad in 1977. Her mother moved to Canada from Trinidad in 1980, leaving her children behind. Ms John arrived in Canada with her two sisters in 1986, as a visitor, when she was nine years of age. On January 15, 1989, she was issued a Minister's Permit and permitted to remain in Canada until April 15, 1992. She was ordered deported on May 12, 1995, but on May 23, 1995 she made a refugee claim. In June of 1996 she was found not to be a convention refugee. After failing to appear for a removal interview, she was arrested and released on terms in May of 1997. After again failing to appear for a removal interview, a warrant was issued for her removal in August of 1997. She was arrested and released again in November of 1997. A departure order was made against Ms John on February 3, 1998. She did not depart from Canada in accordance with that order, and it became a deemed deportation order on March 5, 1998. On March 18, 1998, Ms John made a humanitarian and compassionate application to the Minister. An earlier application apparently made in late 1997 or early 1998 had been refused. On March 31, 1998, she was detained by immigration officials to arrange her removal from Canada. On April 14, 1998, she filed an application for leave and judicial review from the refusal of her earlier humanitarian and compassionate application in the Federal Court. On May 1, 1998, she was informed that she was scheduled to be removed to Trinidad on May 4, 1998. That same day, she brought an application in the Federal Court to stay the deportation order.

3 In her argument on the application to stay the deportation order, in an effort to establish that irreparable harm would result if the deportation order were executed, Ms John relied on the Convention on the Rights of the Child and the effect that her separation from her family would have on them. In dismissing the application, Richard J. concluded that these considerations did not constitute irreparable harm.

4 On May 8, 1998, at 4:10 P.M., counsel for the applicants attended before MacPherson J. of this court on an ex parte basis seeking an interim order enjoining the Respondent from deporting Ms John. Removal was scheduled for that evening. MacPherson J. refused to hear the matter on an ex parte basis, and Ms John was removed from Canada. The relief sought in the motion was amended to reflect the fact that Ms. John had been removed from Canada, and brought on before me with notice to the Respondent.

The Applicants' Argument

5 The Applicants argue that state action that has the effect of interrupting a child's entitlement to be raised by the parents of that child invites scrutiny under section 7 of the *Charter*. They argue further that where a deportation decision may result in the separation of a parent from its infant child or may force the infant child to leave the country of which it is a citizen, it violates section 15 of the *Charter* unless the child has the right to be heard and have its interests considered before the decision is made. The forcing of the child to leave Canada in such circumstances, where that occurs, is said also to violate the right of a Canadian citizen not to be exiled, contrary to section 2(a) of the *Canadian Bill of Rights*. They contend that they will suffer irreparable harm if their separation from their mother continues until the argument of their application.

Analysis

6 The Applicants place considerable reliance on the recent judgment of McNeely J. in *Francis (Litigation Guardian of) v. Canada (Minister of Citizenship& Immigration)* (unreported, Ont. Ct. (Gen. Div.), May 6, 1998.) [reported (1998), 160 D.L.R. (4th) 557 (Ont. Gen. Div.)] In that case, the mother of three Canadian born infant children had also been ordered deported. The mother and one of the children were apparently refused leave to apply for judicial review of the deportation order in the Federal Court because they had failed to file an application record. The mother was described as having exhausted her remedies in that court. No other proceedings were pending. McNeely J. (1) heard the application over the objection of the Minister, who argued that he should defer to the Federal Court; (2) concluded that the forced removal of the children flowing from the deportation of their mother interfered with their liberty rights protected by section 7 of the *Charter*, and could only be effected upon notice of the proceedings to the children, and with some method of seeing that their interests are considered; (3) declared that it would be in the best interests of the children to remain in Canada; and (4) quashed the deportation order and directed that no further deportation order should issue except after proceedings of which the children have notice and in which their best interests are considered.

7 I intend to consider three questions, namely: (1) should I hear this motion; (2) is there a serious issue to be tried; and (3) would the children suffer irreparable harm if the order is not made. In doing so, the applicants argue that I should be guided by the judgment in *Francis*. Accordingly, in the course of my analysis of these questions, I intend to examine some of the issues raised in that judgment, and consider whether they have application here, and if so, whether I should adopt them.

1. Should I Hear This Motion?

8 In *Reza v. Canada*, [1994] 2 S.C.R. 394 (S.C.C.), the Supreme Court concluded that Ferrier J. made no error in staying an application for a declaration brought in the Ontario Court (General Division) that a decision of a credible basis tribunal considering a refugee claim, and certain sections of the *Immigration Act*, violated the applicant's rights under the *Charter*. Ferrier J. exercised his discretion on the basis that although the Ontario Court and the Federal Court had concurrent jurisdiction, the Federal Court was the effective and appropriate forum because Parliament had created a comprehensive scheme of review of immigration matters in that Court. The Supreme Court also endorsed much of the dissenting judgment of Abella J.A. in the Court of Appeal, who noted that the Federal Court was the preferred forum because it had expertise and experience in immigration law, administrative law and Federal Court procedures, and had an exclusive mandate over immigration matters. She also took into consideration concerns over forum-shopping, inconsistency and multiplicity of proceedings.

9 McNeely J. distinguished *Reza* on the basis that this court has *parens patria* jurisdiction which is exercised to protect children from harm, and on the basis that the issues in the case are more human rights issues than immig-

ration issues. While I share the concerns which informed the exercise of discretion by McNeely J. in taking jurisdiction, I respectfully disagree with him. In my view, these cases involve a close consideration of both the complex scheme of our immigration law, and section 7 of the *Charter*. The effect of his judgment is to "add" consideration of the interests of children in some as yet undefined way to the scheme in the *Immigration Act*. It is not surprising that this Court would refrain from directing how the interests of children should be integrated into the scheme in view of our lack of expertise and experience respecting the workings of that scheme. I do not view this court's *parens patria* jurisdiction as giving it any greater expertise than that reposed in the Federal Court in developing the appropriate approach to this ground-breaking *Charter* claim, despite the fact that it involves the rights of children; and I do think that the Federal Court is better positioned to consider how any Charter mandated consideration of the rights of children should be integrated into the scheme of the *Immigration Act*. In reaching this conclusion, I am persuaded by the view of Abella J.A. and Ferrier J., that the Federal Court is the preferred court to deal with immigration issues since it has a legislative mandate to review deportation orders, and has expertise and experience in this area of the law.

10 I also view the taking of jurisdiction by this court in this case as a decision which would encourage forum-shopping, inconsistency and multiplicity of proceedings. Indeed this case is distinguishable from *Francis* because unlike in that case, here the Federal Court has already refused to stay the deportation order in issue, taking into account the very considerations sought to be raised in this court, including the dictates of the Convention on the Rights of the Child, and the effect that separation would have on the children. Again unlike the situation in *Francis*, if this court were effectively to sit in review of the decision of Richard J., it would be participating in the multiplication of proceedings, and risking judicial inconsistency in this very case. The appropriate forum to review the decision of Richard J. is the Federal Court of Appeal. I was told in oral argument that its jurisdiction can still be invoked.

11 I should add that I am not unmindful of the fact that Ms. John is not a party to this application, and that the applicants were not parties to the application before Richard J. This does not concern me, at least in this case, because the children and the mother have an identity of interest in the issue at hand (indeed both Ms. John and her children have raised the same argument in their respective applications) and in the outcome. The children could never obtain the relief they seek here, the return of their mother, without her concurrence. In any event I am confident that the Federal Court can fashion a mechanism to hear and consider the interests of the children separately if it deems it to be necessary or appropriate.

2. Is There a Serious Issue to Be Tried?

12 In answering this question, I must examine the conclusion of McNeely J. that Section 7 of the Charter requires notice to and a consideration of the interests of children, which is at the heart of the underlying application here. (The reference to other Charter sections here appears to add nothing of substance to the claim.)

13 While it would not be appropriate for me to reach conclusions respecting the *Charter* rights of children on this motion for an interim order, some comment on the substance of the argument does seem necessary. I must say, first of all, and with respect, that I have some difficulty with the first half of this proposition from *Francis* to which I have just referred. I do not understand how it could be said that the children in a case such as this one did not receive notice of the proceedings. The children in this case were all under the age of six. They were in the custody of their mother prior to her removal from Canada. She had notice of all of the proceedings against her, and was well aware of the effect that deportation would have on her children. It is hard for me to imagine what else was necessary by way of notice to the infant children.

14 The second part of this proposition, that the interests of the infant children must be taken into consideration before a decision to deport a parent is made, is obviously a serious question. I note, however, that in the *Francis* case, there was evidence before the court that the interests of the children were not considered in the deportation proceedings. No such evidence is before me, and I am not prepared to transpose the evidence from that case into this one. All that is before me is the fact that the interests of the children were in fact raised before Richard J. when he decided to stay the deportation order. In addition the *Bill of Rights* argument raised by the applicants does not arise because the children remain in Canada at present. Accordingly, no *prima facie* showing of a *Charter* or *Bill of Rights* violation has been made out before me, and I am unable to conclude that there is a serious issue to be tried.

15 I will say nothing further about the merits of the constitutional issue except for this. In support of his conclusion that it is self evident that to deport the sole parent of young children is to deport or exile the children themselves, and that this engages constitutional concerns, McNeely J. relied on the decision of the United States District Court in *Acosta v. Gaffney*, 413 F. Supp. 827 (U.S. D. N.J. 1976). It obviously was not brought to his attention that this case was reversed by the Third Circuit Court of Appeals at 558 F.2d 1153 (U.S. 3rd Cir. N.J. 1977). The Court of Appeals was of the view that the approach of the District Court "would open a loophole in the immigration laws for the benefit of those deportable aliens who have had a child born while they were here." I mention this only to point out that judicial pronouncements on this issue are not uniform.

3. Would the Children Suffer Irreparable Harm If the Order Is Not Made?

16 I do not propose to consider this issue in detail. There is literature before me which stresses the importance, for optimal child development, of growing up in a caring family which is able to provide both high quality and continuity of parenting. An infant's first need, it is said, is for a secure attachment to a primary care giver, usually, but not necessarily the mother. I am prepared to accept these propositions as proven for the purpose of this argument. Indeed, they seem rather self-evident. The difficulty here, however, is that I know nothing of the quality of the parenting of Ms John, nothing of the past relationship of the children to their grandmother, and nothing of her strengths at parenting. I accept that separation from the primary caregiver is generally deterimental to a child, but I am unable to assess at all the existence or extent of the harm in this case. I note as well that, unlike in *Francis*, the separation here has already taken place. Accordingly, on this record, I find it impossible to say that irreparable harm will be suffered by the children if the order requested is not made.

Conclusion

17 Having regard to the foregoing, I decline to hear this motion, and stay the application which underlies it. Even if I were to exercise my discretion to hear the motion, I would refuse it on the basis that I am not satisfied either that there is a serious issue to be tried, or that the Applicants will suffer irreparable harm without the order sought.

18 The motion is dismissed and the application stayed.

Motion dismissed.

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