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

Donna Krystal **Antonio**, Sheryl Nicole **Antonio** (Through their Litigation Guardian Zenaida Blenza **Antonio**), (Applicants) and The Minister of Citizenship and Immigration, (Respondent)

Ontario Superior Court of Justice

Rivard J.

Heard: November 9, **1999**
Judgment: November 15, **1999**
Docket: 99-CV-173663

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Counsel: None given.

Subject: Civil Practice and Procedure; Immigration

Aliens, immigration and citizenship --- Exclusion and removal — Removal from Canada — Removal after admission — Deportation.

Practice --- Disposition without trial — Stay or dismissal of action — Grounds — Another proceeding pending — Administrative proceeding.

Cases considered by *Rivard J.*:

Baker v. Canada (Minister of Citizenship & Immigration) (1999), 174 D.L.R. (4th) 193, 243 N.R. 22, 1 Imm. L.R. (3d) 1 (S.C.C.) — considered

Francis (Litigation Guardian of) v. Canada (Minister of Citizenship & Immigration) (October 19, 1999), Doc. CA C29900 (Ont. C.A.) — applied

Statutes considered:

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 — considered

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

Generally — referred to

s. 114(2) — considered

MOTION by Minister to stay proceedings on grounds court should decline jurisdiction in favour of Federal Court of Canada.

***Rivard J.*:**

Endorsement

1 The Minister of Citizenship and Immigration moves for a stay of these proceedings, on the grounds that this court should decline jurisdiction in favour of the Federal Court of Canada.

2 The underlying proceeding is an application by the applicants for an order staying the deportation of Zeneida Blenza Antonio, the litigation guardian and the mother of the applicants.

3 The applicants are two children aged 2 and 6 respectively. They are both Canadian citizens. Their parents are citizens of the Philippines who arrived in Canada, as visitors, in 1990.

4 Shortly after arriving to Canada, the applicants' father filed an H. & C. application for landing. In 1991, his application was refused.

5 In 1992, the applicants' parents claimed refugee status. In 1993, the Immigration and Refugee Board found that they were not convention refugees.

6 In 1996, a further H. & C. application for landing filed by Mr. Antonio was refused. He sought judicial review of the decision in the Federal Court but his application was never perfected.

7 An immigration officer conducted a post-claim review of Mr. and Mrs. Antonio's file in 1995 and concluded that they would not face an objectively identifiable risk if returned to the Philippines.

8 In August of 1997, a deportation order was issued to Mr. Antonio. He applied to have that decision reviewed in the Federal Court. Mr. Antonio never perfected this application.

9 In December 1997, Mr. Antonio brought a motion in the Federal Court to stay his removal from Canada. The motion was dismissed.

10 In 1998, a further H. & C. application by Mr. Antonio was refused. Mr. and Mrs. Antonio sought judicial review of this decision in the Federal Court. Their application was dismissed in May of 1999.

11 In July of 1999, Mr. Antonio was arrested and detained pending his removal from Canada. The applicants then commenced this proceeding and, on July 23, 1999, obtained from this court an interim stay of Mr. Antonio's removal for a period of one week.

12 The stay expired on July 30, 1999. The applicants did not seek to extend the stay.

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13 On August 4, 1999, Mr. Antonio was removed from Canada.

14 Mrs. Antonio filed a further H. & C. application for landing on September 9, 1999. This application has not yet been heard.

15 On September 10, 1999, a departure order was issued to Mrs. Antonio. By operation of law, this departure order became a deportation order 30 days later and Mrs. Antonio became subject to forcible removal from Canada.

16 Mrs. Antonio has indicated to the removal officers that she wished to have her children accompany her if she is removed from Canada. This is not surprising. One would expect a mother to want to take her children with her.

17 Immigration points out it is not deporting Mrs. Antonio's children. That is correct, but, in my view, the removal of the mother will result in the children leaving their native country because it cannot reasonably be expected that the mother will consent to a separation of her children from her.

18 The issue before me is whether these proceedings should be stayed on the basis that this court ought to decline jurisdiction in favour of the Federal Court of Canada.

19 The Ontario Court of Appeal dealt with this issue in *Francis (Litigation Guardian of) v. Canada (Minister of Citizenship & Immigration)* (October 19, 1999), Doc. CA C29900 (Ont. C.A.). I have compared the fact situation in the *Francis* case with the facts of this case and I have concluded that the cases cannot be meaningfully distinguished.

20 In *Francis*, the Court of Appeal said that immigration matters are best dealt with under the comprehensive scheme established under the *Immigration Act* and should be left to the Federal Court. It is only where the Federal Court is not an effective or appropriate forum in which to seek the relief claimed that this court should exercise its jurisdiction.

21 Counsel for the applicants submits that the Federal Court is not an effective or appropriate forum because the Federal Court of Appeal has already ruled that separation of children from their parents does not breach the parent or the child's section 7 charter rights. It is submitted that the applicants' claim for relief is based at least in part on section 7 of the Charter; because the Federal Court of Appeal has already ruled that this issue is not justiciable, no realistic alternative or remedy exists in these situations, in the Federal Court.

22 It is my view that the applicants' submission fails to distinguish between the Federal Court's jurisdiction and its jurisprudence. The Federal Court has the jurisdiction to hear the applicants' claim including all charter arguments they wish to raise. In the event the jurisprudence of the Federal Court does not support the applicants' position, this does not mean no realistic alternative or remedy exists in that court. The jurisprudence of the Federal Court is not immutable for all time. In fact, the recent decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship & Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.) now requires that the interests of children must be considered where a parent makes a H. & C. application for landing. This was not previously the case.

23 It is also my view that because a section 7 breach of the Charter may not be considered does not mean no realistic alternative or remedy exists. As a result of the *Baker* decision, the Federal Court will be required to

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look to the children's best interest. This consideration does provide the applicants with access to the remedy they are seeking.

24 I am satisfied that the 'lis' of the application is an immigration matter. The applicants seek to attack a deportation order. Although this court has jurisdiction to hear the matter, it is best that it be dealt with by the Federal Court because that is an effective and appropriate forum in which to seek the relief claimed.

25 Counsel for the respondent informs me that if the motion to stay succeeds, the deportation order will be enforced and Mrs. Antonio will be required to leave the country.

26 There is currently an H. & C. application for landing under s. 114(2) of the *Immigration Act* filed by Mrs. Antonio which has not been heard. In this application, the children's interests will have to be taken into account. In the event the application is successful, Mrs. Antonio will be permitted to remain in Canada with her children.

27 I fear that unless an order is made by this court permitting Mrs. Antonio to remain until her H.C. application is heard, there is a real likelihood that she will be deported before she is able to present her case at the hearing. This would result in the children's departure from the country or in their separation from their mother until the hearing takes place. This is similar to the situation in the *Francis* case where the Court of Appeal permitted the parent to stay in Canada until the hearing of the s. 114(2) application.

28 I am mindful that the Federal Court also has jurisdiction to grant such a stay. However, in light of the diligence of the Minister in enforcing his order, I fear Mrs. Antonio could be removed from Canada before she has an opportunity to apply to the Federal Court for such a stay. In that event, the Federal Court could not be an effective or appropriate forum.

29 It will therefore be ordered that the children's application brought in this court will be stayed. The order of this court will be stayed for a period of 120 days from the release of these reasons to allow Mrs. Antonio and her children to remain in Canada until the s. 114(2) application has been concluded. The order of Molloy, J. dated October 15, 1999 will continue until the final disposition of the s. 114(2) application.

30 Any party to these proceedings may apply to abridge or extend the stay if the circumstances so warrant.

Motion granted.

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