Date: 20080403

Docket: IMM-3811-07

Citation: 2008 FC 428

Montréal, Quebec, April 3, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

MOHAMAD KHALIL MARKIS
&
AMAL HUSSEIN HACHEM

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision by a Pre-Removal Risk Assessment Officer (the officer), dated July 17, 2007, whereby the applicants' request to be exempted from the requirement to obtain an immigration visa prior to coming to Canada on the basis of humanitarian and compassionate grounds pursuant to section 25 of the Act (the H & C application) was refused.

Facts

[2] The applicants are a married couple of Lebanese origin who came to Canada in July 2001 and sought asylum in February 2002.

[3] On January 9, 2003, their claim was rejected by the Refugee Board Tribunal (the Tribunal) and on April 30, 2003, they addressed the Federal Court for leave to apply for Judicial Review and this request was also refused.

[4] The applicants decided on April 7, 2004, to submit an H & C application that they updated on February 22, 2007.

The H & C Decision

[5] In a decision dated July 17, 2007, an officer determined that considering the applicants' personal circumstances and the current situation in Lebanon, she was not satisfied that the applicants would experience unusual and undeserved or disproportionate hardship if they applied for permanent residence status at a Citizenship and Immigration Canada mission abroad as prescribed by the Act.

[6] First, the officer notes that the male applicant supports his family alone, and considers being positive factors in his integration in Canada the fact that he has a stable address and stable employment. However, the officer feels that this factor carries little weight and cannot justify an

exemption. Further, the officer indicates that the male applicant has paid his taxes, has been renting a 4 ½ apartment for a year, purchased furniture, has a bank account, and owns a car.

[7] The officer notes that while the updated H & C application states that the male applicant lives with his sister, he does not however answer the question regarding the people with whom he lives. He states that he has a sister and sister-in-law in Canada, however, the officer considers that the evidence on file does not allow her to evaluate the relationship with them. Consequently, it does not appear that the male applicant would suffer particular hardship if he had to leave his sister and sister-in-law behind to return to Lebanon, where the majority of his siblings live.

[8] The officer therefore concludes that, if they had to return to Lebanon for the time required to comply with the Act, the applicants would be able to obtain moral and logistical support while waiting for a response to their visa application. Further, the male applicant did not present evidence of his integration into the community through involvement in community or religious organizations, volunteer work, study or other similar activities.

[9] The officer is of the view that the applicants have developed only weak ties to Canadian society.

[10] With respect to the best interests of the three Canadian-born children, the officer indicates that there is no evidence on file indicating whether the children go to school or daycare or whether they participate in any social, sporting, or cultural activities. From this, the officer concluded that

they stay with their parents. The officer feels that their return to Lebanon with their parents to a milieu where they would be in contact with other members of their family (grandparents, aunts, and uncles) would not cause them unusual, undeserved or disproportionate hardship. The evidence on file does not allow the officer to determine whether the applicants' children have Lebanese citizenship or whether they could obtain it. The officer indicates that there is no evidence on file that the children are sick or in need of special treatments and that they would have access to existing Lebanese health care services and could attend school should they return to Lebanon.

[11] With respect to the issue of personalized risk, the officer cites the Tribunal's decision of January 9, 2003, in which the applicants are found to be neither Convention refugees nor persons in need of protection, and also refers to the fact that in that decision the male applicant's allegations as to his problems with Hezbollah are found to be not credible due to omissions and contradictions in his explanations.

[12] While a letter is submitted from the mayor of Shebaa, signed March, 17, 2007, and stating that the applicant is being threatened by "partisan forces who were looking for him and that his life and the lives or his family were in danger", the officer indicates that this letter adds nothing new and does not contain any details regarding how the mayor learned about the threats to the male applicant. Thus, the officer gives little weight to this letter.

[13] The officer concludes that the applicants did not provide any further evidence to allow her to come to a different conclusion than that of the Tribunal. And that although the risk assessment of

an H & C application is more general than that carried out for a claim for refugee protection or an application for a PRRA, the fact remains that the applicants did not present any credible or reliable evidence of risk should they have to return to their country to apply for immigrant visas as required by the Act.

[14] Further, the officer states that while the situation in the country was worrying, documentary sources indicate that the situation in Lebanon has stabilized since the ceasefire and that the nature of the political tensions still existing are no longer a threat to the life or security of the applicants.

[15] In light of this information, and the fact that the officer gives little weight to the male applicant's alleged problems with Hezbollah, it is the officer's opinion that he failed to demonstrate that he would face a personalized risk to his life or security if returned to Lebanon.

ISSUES

[16] This application raises the following issues:

a. Did the officer apply the wrong standard when assessing risk and unusual, undeserved or disproportionate hardship?
b. Did the officer err in her analysis of the best interests of the children?
c. Did the officer provide sufficient reasons?

STANDARD OF REVIEW

[17] In the recent Supreme Court of Canada decision of *Dunsmuir v. New Brunswick*, 2008 SCC 9, the standard of review analysis was altered, from three to two standards of review: reasonableness and correctness. The Court states in *Dunsmuir* at para. 51, that:

> […] questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

[18] Further, at para. 62, the Court emphasizes the two-stage character of the process of judicial review:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[19] With respect to the first issue, the question of whether the officer applied the correct legal test is one of law and has previously been found to be reviewable on the standard of correctness (*Mooker v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 779, [2007] F.C.J. No. 1029 (QL), at para. 16; *Pinter v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 296, [2005] F.C.J. No. 366 (QL)). In light of *Dunsmuir*, above, and the Court's prior jurisprudence, the Court finds correctness to be the appropriate standard.

[20] Regarding the second issue, the question of whether the decision maker has been alert, alive and sensitive to the best interests of the child, involves a question of mixed fact and law within the context of a highly discretionary H & C determination. In light of the *Dunsmuir* decision and the prior jurisprudence, the Court finds the applicable standard of review to be that of reasonableness.

[21] Accordingly, pursuant to this standard, the analysis of the Board's decision will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] […] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir*, above, at para. 47).

[22] Finally, the applicants challenge the sufficiency of the reasons provided in the H & C decision. A question relating to the sufficiency of reasons raises an issue of procedural fairness (*Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565, [2005] F.C.J. No. 693 (QL), at para. 9). Pursuant to *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, [2003] S.C.J. No. 28 (QL), at para. 100, "[i]t is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Thus, questions of procedural fairness are not subject to the standard of review.

ANALYSIS

Did the officer apply the wrong standard when assessing risk and unusual, undeserved or disproportionate hardship?

[23] The applicants submit that the officer applied the incorrect legal test in the evaluation of hardship. Instructively, this Court asserts in *Sahota v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 651, [2007] F.C.J. No. 882 (QL), at para. 1:

> Although the distinction in fact may not always be apparent, there is a clear distinction in law between a pre-removal risk assessment and an application for permanent residence from within Canada on humanitarian and compassionate grounds.

[24] Indeed, while both applications take risk into account, in the context of a PRRA, the consideration of the ""risk" as per section 97 of IRPA involves assessing whether the applicant would be personally subjected to a danger of torture or to a risk to life or to cruel and unusual treatment or punishment" (*Sahota*, above, at para. 7) while in the context of an H & C application, "risk should be addressed as but one of the factors relevant to determining whether the applicant would face unusual, and undeserved or disproportionate hardship. Thus the focus is on hardship, which has a risk component, not on risk as such." (Emphasis added.) (*Sahota*, above, at para. 8).

[25] Similarly, this Court notes in *Pinter*, above, at para. 5, that "[t]here may well be risk considerations which are relevant to an application for permanent residence from within Canada which fall well below the higher threshold of risk to life or cruel and unusual punishment." Thus, the concepts of "hardship" in an H & C application and "risk" in a PRRA application must be assessed according to a different standard (*Akinbowale v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1221, [2007] F.C.J. No. 1613 (QL), at para. 20; *Ramirez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404, [2006] F.C.J. No. 1763 (QL), at para. 42).

[26] An H & C application must be evaluated with a view of determining whether the "risk factors" amount to unusual, undeserved or disproportionate hardship (*Gallardo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 554, [2007] F.C.J. No. 749 (QL), at para.12). The expression of the standard as "unusual, undeserved or disproportionate hardship," is instructive: "[t]he H & C process is not designed to eliminate hardship; it is designed to provide relief from

unusual, undeserved or disproportionate hardship." (*Irimie v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1906 (QL), at para. 26). Indeed, it has been held repeatedly by this Court that the "[h]ardship that is inherent in having to leave Canada is not enough" to ground an H & C claim (*Doumbouya v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1186, [2007] F.C.J. No. 1552 (QL), para. 10; *Kawtharani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 162, [2006] F.C.J. No. 220 (QL), at para. 16).

[27] With respect to the present case, in the sections of the H & C decision entitled "Humanitarian and compassionate grounds and ties to Canada" and the "The best interests of children", the officer evaluates whether removing the applicants and their children from Canada would constitute unusual, undeserved or disproportionate hardship. This is the correct expression of the test, which was carried out with reference to the separation from relatives in Canada, location of relatives in Lebanon, and the children's access to education and health services.

[28] In the section of the H & C decision entitled "Personalized Risk", the officer refers repeatedly to risk to the life and security of the applicant which is an incorrect formulation of the hardship test in the context of an H & C. However, the officer does state that "[a]lthough the risk assessment of this application is more general that that carried out for a claim for refugee protection or an application for a PRRA, the fact remains that the applicant did not present any credible or reliable evidence of risk". Subsequently, the officer briefly reviews the general security situation in Lebanon but concludes that the natures of the political tensions that do exist are not a threat to the life or security of the applicants. The officer concludes her reasons by stating that she is not satisfied

that the applicants would experience unusual, undeserved or disproportionate hardship if they applied for permanent residence abroad.

[29] The Court is aware that the applicants themselves raised the issue of personalized risk in their H & C submissions, both in the April 7, 2004 application, and the February 22, 2007 update. For example, in the April 7th submissions, on the supplementary information form, in answer to the question "Explain why there might be special reasons to exempt you from this requirement and allow you to apply from within Canada for permanent residence", the male applicant indicates:

> I fear for my safety and that of the safety of my two Canadian children. It is not safe for me to be in Lebanon. It is a very dangerous place. My Canadian children would be deprived of proper healthcare and education which they would have in Canada. The Hezbollah terrorists are still after me, as I refused to spy for them. [Emphasis added.]

[30] Further, in response to the question "What excessive hardship will you suffer if you have to submit your application at a visa office outside Canada as required by law?", the applicant writes:

> As mentioned above, my life would be in danger and so would my Canadian children. They would be too young to leave behind and my children who are Canadians would not have the benefits of medicine and education that they have in Canada. [Emphasis added.]

[31] Thus, overall, the officer employs in her decision language that is indicative both of the proper H & C hardship analysis and of the PRRA risk analysis. In the present case, given that the applicants raised the issue of risk to life, it is not fatal to the decision that the officer responds to the applicants' fear by evaluating this risk (*El Doukhi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1464, [2006] F.C.J. No. 1843 (QL), at para. 26).

[32] However, the officer not only carries out a PRRA-type risk to life analysis in the context of the Hezbollah allegations, but also employs the same terminology when focusing on the general country conditions. Given this inconsistency, The Court is unable to determine which standard was in fact employed. The hardship evaluation must include whether the country conditions may expose an applicant to unusual, undeserved or disproportionate hardship. As the exact test employed by the officer for this evaluation remains unclear, this Court finds that this constitutes a reviewable error sufficient to grant the application.

Did the officer err in her analysis of the best interests of the children?

[33] The best interests of the child are an important factor to be considered in the analysis of an H & C application. Accordingly, the officer must be "alert, alive and sensitive" to these interests, however "once she has well identified and defined this factor, it is up to her to determine what weight, in her view, it must be given in the circumstances" (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] F.C.J. No. 457 (F.C.A.) (QL), at para. 12). Further, the best interests of affected children are not determinative and will not always outweigh other factors involved (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 75).

[34] Indeed, the Federal Court of Appeal indicated in *Hawthorne v. Canada (Minister of Citizenship and Immigration*), 2002 FCA 475, [2002] F.C.J. No. 1687 (F.C.A.) (QL), at para. 6, that:

> To simply require that the officer determine whether the child's best interests favor non-removal is somewhat artificial – such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favor of or against the removal of the parent.

[35] In the present case, the Court finds that the officer was alert, alive, and sensitive to the best interests of the children. The officer took into consideration their ages, activities, location of wider family circle, and cognizant that no medical problems or special treatments had been alleged by the applicants. No evidence was submitted before the officer describing the children's involvement in any activities outside of the household. The Court is satisfied that the officer sufficiently analyzed the material before her and that the applicants cannot now fault the officer for failing to consider factors or information that was not before her (*Potikha c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2008 CF 136, [2008] A.C.F. n^{o} 167 (QL), at para. 40; *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] F.C.J. No. 158 (F.C.A.) (QL), at para. 8).

Did the officer provide sufficient reasons*?*

[36] With respect to the sufficiency of reasons, it is well established that a simple review of factors considered followed by a conclusion will be insufficient to constitute a valid assessment of the application (*Bajraktarevic v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 123, [2006] F.C.J. No. 178 (QL), at para. 18; *Adu*, above, at para. 14). However, while an H & C decision must be supported by reasons, it is "inappropriate to require […] administrative officers to give as detailed reasons for their decisions as may be expected of an administrative tribunal that

renders its decisions after an adjudicative hearing" (*Ozdemir v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331, [2001] F.C.J. No. 1646 (F.C.A.) (QL), at para. 11).

[37] Finally, when reviewing administrative decisions, the reasons provided are not to be read microscopically (*Boulis v. Minister of Manpower and Immigration*, [1974] S.C.R. 875 at 885). The decision must be assessed as a whole and within the context of the evidence (*Miranda v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 81, para. 3).

[38] In spite of the applicants' contention that the reasons reveal no link between the factors considered and the conclusion reached, the Court disagrees. The officer recognizes the fact that the male applicant has stable employment and a stable address as being a positive factor relating to integration in Canada, yet indicates that it carries little weight and cannot justify a visa exemption. Further, the officer highlights that the applicant had not provided evidence of community integration through involvement in community or religious organizations, volunteer work, study, or other similar activities and that only weak ties to Canadian society are proven to exist.

[39] While the Court may not necessarily agree with the officer's assessment of establishment, it was certainly one opened to her to make, and taken in the context of the decision as a whole, the finding is substantiated. The Court also notes that the degree of establishment is only one factor to be considered in an H & C application and is not determinative (*Mooker*, above, at para 15; *Klais v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 785, [2004] F.C.J. No. 965 (QL), at para. 11).

[40] The officer is also of the view that the evidence on file does not allow her to evaluate the applicant's relationship with his sister and sister-in-law, and that it did not appear he would suffer particular hardship if he had to return to Lebanon where the majority of his siblings live and they could provide moral and logistical support while he relocates to wait for a response to his visa application.

[41] Further, as indicated above, the best interests of the Canadian-born children were examined and it was determined that given their young ages, the fact that there was no evidence provided indicating that they participated in any activities outside of the sphere of their parents, and they should they return to Lebanon they would be in contact with other members of their family, it appeared that they would not experience undue and undeserved or disproportionate hardship. The evidence did not allow the officer to determine whether the children have Lebanese citizenship or whether they could obtain it, but there was reason to believe that they would have access to Lebanese health care services and schools.

[42] Thus, the decision read as a whole, the Court is unable to conclude on this issue that the reasons provided are insufficient since the relevant factors were identified and analyzed.

[43] However, in view of the Court's conclusion on the first issue concerning the exact test employed by the officer for her evaluation of the risk, which allowed her to conclude that the applicants would not experience unusual, undeserved or disproportionate hardship if they were to

apply for permanent residence at a Citizenship and Immigration Canada mission in their country as prescribed by the Act, the application will be allowed.

[44] Neither party recommended certification of a question. This Court is satisfied that no serious question of general importance not already decided arises in this affair that would be determinative of an appeal herein.

JUDGMENT

FOR THE FOREGOING REASONS THIS COURT:

GRANTS the application for judicial review,

SETS aside the H & C decision, and

REFERS the matter back for re-determination by a different officer.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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