Date: 20080526

Docket: IMM-4351-07

Citation: 2008 FC 661

Ottawa, Ontario, May 26, 2008

PRESENT: The Honourable Mr. Orville Frenette

BETWEEN:

HISHAM SAID ABU LABAN
GULDRAN MARDAN
ALA ABU LABAN
MUAYYAD ABU LABAN
MOHAMMAD ABU LABAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review made pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") of a decision of Citizenship and Immigration Officer J. Wagner (the "Officer") dated July 18, 2007. In that decision, it was found that there were insufficient humanitarian and compassionate (H&C) grounds for the processing of the applicants' application for permanent residence from within Canada. Leave was granted by Justice James O'Reilly on March 3, 2008.

I. Facts

[2] The applicants are citizens of Jordan who are of Palestinian descent. They have applied to have their application for permanent residence processed within Canada on H&C grounds. The applicants include the principal applicant, his ex-wife and now common-law spouse, and their three children (one adult daughter, one adult son and one minor son).

[3] The applicants arrived in Canada in 2004 after having spent some time in the United States attempting to immigrate there. The principal applicant divorced his now common-law wife after they arrived in the United States so that he could marry an American citizen to assist in his immigration to that country. When his attempt to immigrate to the United States failed, the principal applicant divorced his American wife. The applicants then headed to Canada in June 2004, and made a refugee claim here. Ultimately, their refugee claim and their subsequent Pre-Removal Risk Assessment (PRRA) were rejected. In 2006, they made an application for permanent residence based upon H & C grounds.

[4] Since they arrived in Canada, the applicants have worked to establish themselves in the community. For example, the principal applicant's spouse opened a business where both she and the principal applicant work. The adult children have also taken on jobs and participated in the community, while the minor applicant attends school and partakes in a number of extra-curricular activities.

II. Decision of the Officer

[5] The Officer who reviewed the applicants H&C application took into account their establishment in Canada, the best interest of the minor applicant, and the risk the family claimed they would face if they were returned to Jordan.

[6] First, the Officer reviewed the applicants' degree of establishment in Canada.

[7] The Officer noted that the adult applicants were both working, and that the principal applicant's spouse operated a sole proprietorship in which the principal applicant was employed. However, the Officer also noted that it had only been open since July 2006, and therefore the level of dependence on them by their clients would not be great. The Officer also noted that she could not enter into speculative consideration on the impact of any future plans to hire more employees. The Officer also noted that the minor son was doing well in school, that the principal applicant's spouse attended ESL classes, that there was evidence of volunteer work by the adult daughter, and that all of the children participated in some sort of physical activity (such as adult son who played soccer). The Officer also noted the letters of support the family had received, but made references to two federal court cases to apparently suggest that there is a difference between a deserving individual and one who requires relief from unusual, undeserved or disproportionate hardship.

[8] The Officer also took into consideration the family's financial success. The Officer noted that their financial success was to their credit, but that it "is not unusual that they would have

achieved this during their time here". Further, any hardship caused by being forced to sell their business could not have been foreseen given that the applicants opened it while they knew they potentially faced removal.

[9] Ultimately, the Officer concluded on the above that there was nothing in the applicant's degree of establishment to show hardship that would make it unusual or undeserved or disproportionate in nature for them to apply for permanent residence from outside of Canada.

[10] Second, the Officer considered the best interests of the principal applicant's minor son. The Officer noted that there was no psychological or other assessment to demonstrate that changing school systems would have a negative impact that may lead to psychological trauma, and that the minor son and the principal applicant's affidavits indicate that the son has difficulty speaking Arabic and cannot read nor write it. The Officer also noted that the minor applicant did not leave Jordan until he was seven and suggested that his initial schooling would have been in Arabic. The Officer surmised that while he may have lost some language abilities over time, the minor applicant integrated into both the American and Canadian systems in a language foreign to him without much difficulty. Therefore, the minor son could presumably reintegrate into the Jordanian school system and Arab language. The Officer acknowledged that the minor applicant may face some difficulties (such as leaving his friends and readjusting to the Jordanian school system and Arabic) the Officer noted he had the support of his family. The Officer concluded that this was the strongest H&C factor in support of the application but that it was not determinative and did not amount to unusual or undeserved or disproportionate hardship.

[11] Third, the Officer also considered the applicants' family ties, and the risk faced by the applicants due to their Palestinian ethnicity.

[12] On this final point, the Officer noted that there was some discrimination against those of Palestinian heritage in Jordan (especially those without Jordanian citizenship). However, the Officer also noted that the applicant and his wife held down white collar jobs when they were previously there, that there was little evidence that the applicants had lived in - or would have to return to - a refugee camp, and that there was no evidence that the fact that they were returning from the west would result in some risk to them. The application was refused by decision dated July 18, 2007.

III. Issues

1. What is the standard of review?;
2. Did the officer err in law with respect to her assessment of the best interest of the child?;
3. Are the officer's reasons deficient as they do not explain why the applicants should not be given positive consideration for excellent establishment? ; and
4. Did the officer err in law by finding that it was "not unusual" that the applicants would have achieved financial success during their time in Canada?

IV. Standard of review

[13] The previous standard of review for an H&C application was reasonableness *simpliciter* (See: *Baker v. Canada (MCI)*, [1999] 2 S.C.R. 817 at paras. 57-62, 174 D.L.R. (4th) 193). With the recent release of *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada has made it clear that there are only two standards of review: correctness and reasonableness. Neither of the parties made submissions on what is the proper post-Dunsmuir standard of review.

[14] However, this issue has been considered by this court, and it has been determined that the appropriate standard of review in H&C applications is reasonableness (*Zambrano v. Canada (MCI)*, 2008 FC 481 at para. 31, [2008] F.C.J. No. 601 (QL)).

[15] As to the standard of review on the issue of the adequacy of reasons, it is an issue of procedural fairness (*Thomas v. Canada (MCI)*, 2007 FC 838 at para. 14, 62 Imm. L.R. (3d) 291; *Adu v. Canada (MCI)*, 2005 FC 565 at para. 9, 139 A.C.W.S. (3d) 164) and the standard is correctness pursuant to *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 100).

V. Analysis

a.) *Best Interests of the Child*

[16] The applicants have suggested that the Officer confused an assessment of the best interests of the child with an assessment as to whether the removal of the child would cause disproportionate hardship. The applicants also suggest that there is no need for a psychological report to determine the best interests of the child, that the officer minimized the hardship and emotional impact of removal on the minor applicant, and that the officer failed to factor in the evidence regarding discrimination against Palestinians and that the best interests of the child mitigate in favour of acceptance.

[17] In return, the respondent has suggested that the Officer considered all the appropriate factors, and that the applicants are merely seeking a re-weighing of the evidence. Further, the respondent submits that the Officer considered the risk the child faced in Jordan in the section of her decision that dealt with risk generally. The respondent suggests that the applicant is merely criticising the form, rather than the substance, of the decision.

[18] In *Legault v. Canada (MCI)*, 2002 FCA 125 at paras. 11-12, the Federal Court of Appeal made it clear that weighing of relevant factors remains the domain of the Minister or his delegate, and that the court's role is not to re-examine the weight given to them by the officer. While the officer must be "alert, alive and sensitive" (*Baker*, para. 75) to the interests of the children, once those interests are well identified and defined, the weight given to them in the circumstances is the

officer's determination to make. At the same time, it is not sufficient to merely state that the best interests of the child have been considered. Finally, it is not determinative of the application but merely one factor to be considered.

VI. The central question

[19] The important question to be assessed in the present case is the right of the applicants to attack a decision refusing their H&C applications while inside Canada.

VII. The applicable legislation

a.) Immigration and Refugee Protection Act, S.C. 2001, c. 27 (*IRPA)*

Sole provincial responsibility — permanent residents	**Responsabilité provinciale exclusive : résidents permanents**
9. (1) Where a province has, under a federal-provincial agreement, sole responsibility for the selection of a foreign national who intends to reside in that province as a permanent resident, the following provisions apply to that foreign national, unless the agreement provides otherwise:	9. (1) Lorsqu'une province a, sous le régime d'un accord, la responsabilité exclusive de sélection de l'étranger qui cherche à s'y établir comme résident permanent, les règles suivantes s'appliquent à celui-ci sauf stipulation contraire de l'accord :
(a) the foreign national, unless inadmissible under this Act, shall be granted permanent resident status if the foreign national meets the	a) le statut de résident permanent est octroyé à l'étranger qui répond aux critères de sélection de la province et n'est pas interdit

province's selection criteria;

(b) the foreign national shall not be granted permanent resident status if the foreign national does not meet the province's selection criteria;

(c) the foreign national shall not be granted permanent resident status contrary to the provisions of the law of the province governing the number of foreign nationals who may settle in the province as permanent residents, whether that number is an estimate or a maximum, or governing the distribution of that number among classes of foreign nationals; and

(d) conditions imposed in accordance with the law of the province have the same force and effect as if they were made under this Act, if they are imposed on a foreign national on or before the grant of permanent resident status.

de territoire;

b) le statut de résident permanent ne peut être octroyé à l'étranger qui ne répond pas aux critères de sélection de la province;

c) le statut de résident permanent ne peut être octroyé contrairement aux dispositions de la législation de la province régissant le nombre — qu'il s'agisse d'estimations ou de plafonds — des étrangers qui peuvent s'y établir comme résidents permanents, ainsi que leur répartition par catégorie;

d) les conditions imposées à l'étranger, avant ou à l'octroi du statut de résident permanent, en vertu de la législation de la province ont le même effet que celles prévues sous le régime de la présente loi.

Sole provincial responsibility — appeals

(2) If a federal-provincial agreement gives a province sole responsibility to establish and apply financial criteria with respect to undertakings that sponsors living in that province may make in respect of a foreign national who applies to

Responsabilité provinciale exclusive : droit d'appel

(2) L'accord qui confère à une province la responsabilité exclusive de l'établissement et de la mise en oeuvre des normes financières applicables à l'engagement qu'un répondant qui y réside peut prendre quant à l'étranger qui

become a permanent resident, then, unless the agreement provides otherwise, the existence of a right of appeal under the law of that province respecting rejections by provincial officials of applications for sponsorship, for reasons of failing to meet financial criteria or failing to comply with a prior undertaking, prevents the sponsor, except on humanitarian and compassionate grounds, from appealing under this Act against a refusal, based on those reasons, of a visa or permanent resident status.

demande à devenir résident permanent a notamment, sauf stipulation contraire, pour effet que le droit d'appel prévu par la législation de la province quant au rejet par le fonctionnaire provincial compétent d'une demande d'engagement, pour non-conformité à ces normes, ou manquement à un engagement antérieur, prive le répondant, sauf sur des motifs d'ordre humanitaire, du droit d'en appeler au titre de la présente loi du refus, pour ces mêmes raisons, du visa ou du statut de résident permanent.

Application before entering Canada

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

Visa et documents

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.

If sponsor does not meet requirements

(2) The officer may not issue a visa or other document to a foreign national whose sponsor does not meet the sponsorship requirements of this Act.

Cas de la demande parrainée

(2) Ils ne peuvent être délivrés à l'étranger dont le répondant ne se conforme pas aux exigences applicables au parrainage.

Humanitarian and compassionate considerations

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

Séjour pour motif d'ordre humanitaire

25. (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

Provincial criteria

(2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.

Critères provinciaux

(2) Le statut ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables.

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social

opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

Personne à protéger

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Prosecution of designated offences

Procedure

(2) An officer may commence a proceeding by

(a) completing a ticket that consists of a summons portion and an information portion;

(b) delivering the summons

Poursuite des infractions désignées

Formulaire de contravention

(2) L'agent :

a) remplit les deux parties — sommation et dénonciation — du formulaire de contravention;

b) remet la sommation à l'accusé ou la lui envoie par

portion of the ticket to the accused or mailing it to the accused at the accused's latest known address; and	la poste à sa dernière adresse connue;
(c) filing the information portion of the ticket with a court of competent jurisdiction before or as soon as practicable after the summons portion has been delivered or mailed.	c) dépose la dénonciation auprès du tribunal compétent avant, ou dès que possible après, la remise ou l'envoi par la poste de la sommation.

[20] Pursuant to section 25 of the *IRPA*, the Minister is authorized to facilitate the entry of persons to Canada by exempting them from the criteria or conditions required by the *IRPA*. The Minister can exercise a highly discretionary right to permit an H&C process from inside Canada after exempting the application for obtaining an entry document from outside Canada as required by sections 11 and 25 of the *IRPA*.

[21] The Federal Court of Appeal in *Hawthorne v. Canada (MCI)*, 2002 FCA 475, [2003] F.C. 555, reviewed the conditions for applications requesting processing in Canada due to H&C considerations. The definitions it suggested were not meant to be hard and fast rules but solely to provide guidance to decisions makers exercising their discretion in this matter. The conditions are:

1. Unusual and underserved hardship;
2. Disproportionate hardship

Separation of parents and dependant children and the best interest of children are also important considerations (*Baker v. Canada (MCI)*, (1999) 2 S.C.R. 817

[22] The decision makers must be “alert, alive and sensitive” to the best interest of children. (*Hawthorne*, above, at paras. 44 and 52 and *Ahmad v. Canada (MCI)*, 2003 FCT 592, 30 Imm. L.R. (3d) 4.

VIII. Factors to be taken into account in assessing children’s best interests

[23] These are the factors suggested by Justice Douglas Campbell in *Kolosovs v. (MCI)*, 2008 FC 165, para. 9:

1. The age of the child;
2. The level of dependency between the child and the H&C applicants;
3. The degree of child establishment in Canada;
4. The child’s link to the country in relations to which the H&C decision is being made;
5. Medical issues or special needs the child might have;
6. Matters relating to the child’s gender

IX. The best interests of the children in this case

[24] Of the applicants’ children, two are adults and one is a minor, now 16 years old, attending school; he has integrated well in school activities. The two adults are employed. The minor child attended school in the United States and in Canada (since three years). He left Jordan when he was 7

years old and can no longer read or write Arabic; if returned to Jordan he would have to re-learn the Arabic language and re-adapt to a different school system and a different culture.

[25] All applicants could be arrested if returned to Jordan because they have no legal status there and possess no documents of residency. They could, according to the applicants' claims supported by international documentation, be subject to expulsion and to persecution.

[26] The officer considered the best interests of the minor applicant but dismissed its consequences. To me he was not sufficiently "alert, alive and sensitive" to his needs. This constitutes a reviewable error (*Raudales v. Canada (MCI)*, 2003 FCT 385, 121 A.C.W.S. (3d) 932; *Jamrich v. Canada (MCI)*, 2003 FCT 804, 29 Imm. L.R. (3d) 253).

X. The best interest of the children is but one factor to be considered

[27] My reading of the Federal Court of Appeal decision in *Legault v. MCI*, 2002 FCA 125, [2002] 4 F.C. 358, is that the factors of "best interests of children", in determining a decision involving the interpretation of section 114(2) of the *IRPA*, is only one of the factors to examine and to be weighed by the deciding officer but it does not prevail per se over the other factors. All must be considered together in the particular circumstances of each case. It does not prevail over the other factors in the determination of what constitutes "unusual and underserved hardship" and "disproportionate hardship". Each individual factor must be considered but in the context of the

while (see also *Kim v. Canada (MCI)*, 2004 FC 1461, 259 F.T.R. 259; *Owusu v. Canada (MCI)*, 2004 FCA 38, [2004] 2 F.C.R. 635; *Thiara v. Canada (MCI)*, 2007 FC 387, 61 Imm. L.R. (3d) 75).

XI. Family ties

[28] The officer considered family ties as neutral, yet the applicants' evidence showed that his close family, i.e. his wife and his children, had resided illegally in Jordan and wished to be with him in Canada.

XII. The degree of establishment in Canada

[29] It was shown that the applicants has established well in Canada in Windsor, Ontario, where they resided for three years. They were employed and since 2006; the principal applicant, an accountant, has operated a business in accountant/tax services in Windsor in which his wife is employed.

[30] Letters from former employees indicate that the principal applicant and his wife were good employees, reliable and hardworking. The officer concluded that he could not speculate what the consequences would be if the accounting office was closed but that the yellow pages in the telephone book showed numerous other such businesses in the area.

[31] He considered this a negative factor because financial success during an illegal stay in Canada cannot be invoked to support an H&C application (*Tartchinska v. Canada (MCI)*, 2000 FCJ No. 373, 185 F.T.R. 161).

[32] However, I consider that that is an important factor to be considered in determining the degree of establishment in Canada.

XIII. Community involvement

[33] Letters on file reveal that the adult daughter has done volunteer work in the community, both at child care facility and a laser clinic. The two older children have active gym memberships and the adult son participates actively in various sports. Letters from friends, former employees and community members attest to the good relationship on the community exhibited by the applicants.

XIV. Financial success

[34] The file shows that the principal applicants have achieved economic independence and success in their new business since they have been in Canada.

[35] The officer concludes that the difficulties the applicants would suffer if returned to Jordan will not present a hardship that is unusual, underserved or disproportionate.

[36] The principal question remains: does the officer's decision fall within the parameters of reasonableness and within the range of outcomes that are justifiable in fact and in law (see *Dunsmuir*, above). As mentioned previously, I believe the officer was not sufficiently attentive to the best interests of the children.

XV. Establishment

[37] The applicant suggests that the reasons given for the Officer's determination on the applicants' degree of establishment are not sufficient, in that they fail to explain how the Officer reached her conclusion that undue hardship would not result if their application was rejected.

[38] Read as a whole, I am satisfied that two pages of reasons on the issue of the applicants' establishment are sufficiently clear, precise and intelligible such that the applicants could identify why their application has failed (see *Ogunfowora v. Canada (MCI)*, 2007 FC 471 at para. 58, 63 Imm. L.R. (3d) 157 in reference to *Mendoza v. Canada (MCI)*, 2004 FC 687, 131 A.C.W.S. (3d) 323; see also Adu v. *v. Canada (MCI)*, 2005 FC 565 at paras. 10-11, 139 A.C.W.S. (3d) 164). It is clear that the Officer considered, in detail, all the relevant factors and the extent to which they demonstrated establishment.

[39] The applicants also briefly make the argument that the Officer erred by mentioning that the principal applicant's spouse started a business knowing that there was a possibility that they would be removed from Canada. The applicant submits that threat of removal is not a basis for negating

the applicant's establishment in an H&C application. However, this is simply not material to the decision. It was merely mentioned in regard to one part of the analysis on the applicant's degree of establishment.

XVI. "Not Unusual"

[40] The applicants also note that the Officer found that it was "not unusual" that the applicants' achieved financial success during their time in Canada. The applicant suggests that this is an unreasonable assessment.

[41] The applicants point to *Raudales*, above, *Jamrich*, above to suggest that it is unreasonable to conclude that an individual's establishment is no more than is expected from another refugee given similar opportunities, and that therefore their establishment is not so different or significant from others in the refugee process. Both cases relate to decisions that were quashed because they were considered unreasonable given the evidence before the decision-maker. For example, in *Raudales*, at paras. 18 and 19, Justice Eleanor R. Dawson pointed to specific evidence that was before the decision-maker and which dramatically contradicted the decision-makers ultimate finding that the applicant's establishment was not unusual.

[42] I believe that in the present case, the applicants have established that they achieved financial success which to me is "unusual" for the period of time they were in Canada.

[43] The Officer made a reviewable error which requires a new examination.

JUDGMENT

THIS COURT ORDERS that this application be granted. No question is certified.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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