Date: 20080425

Docket: IMM-4084-07

Citation: 2008 FC 532

Ottawa, Ontario, April 25, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

BAKIR GAZLAT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a Humanitarian and Compassionate (H&C) decision, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), in which Immigration Officer Barriero (the Officer) determined that there was insufficient evidence that applying for permanent residence from outside of Canada would cause the applicant to experience hardships that are undue, undeserved or disproportionate.

ISSUES

[2] The applicant suggests that several issues should be decided in the present case; however, I would simply reframe the issue as follows: did the Officer commit a reviewable error based on the evidence before her?

[3] The respondent raises a second issue: should the application for judicial review be dismissed on the ground that the applicant does not come before the Court with clean hands? I will address both issues, beginning with the latter.

[4] For the following reasons, the application for judicial review shall be dismissed.

FACTS

[5] The applicant is a citizen of Jordan, born February 14, 1978. He entered Canada on December 24, 2000, and made a claim for refugee protection. The claim was denied by the Immigration and Refugee Board on June 24, 2002.

[6] The applicant made a first application for permanent residence on H&C grounds on May 24, 2003, which was denied March 22, 2005. Leave to the Federal Court was denied on April 7, 2005.

[7] The applicant completed the PRRA process in which it was determined that he would not be at risk if returned to Jordan. The applicant applied to the Court for a stay of removal, which was

denied. The applicant ignored the Court order and did not present himself for removal. On September 16, 2005 a warrant was issued for his arrest, which remains open to this day.

[8] The applicant went underground to avoid arrest and removal, and applied for permanent residence on H&C grounds a second time. The decision of the Officer regarding the second H&C application is at issue in the case at bar.

DECISION UNDER REVIEW

[9] The applicant's application for consideration on H&C grounds was rejected by letter, dated September 21, 2007. The letter and Field Operations Support System (FOSS) notes form the decision under review. The Officer provided the following reasons in support of her decision:

a) The Officer found that there was insufficient evidence that the applicant remained in Canada because of circumstances beyond his control. She noted the fact that the applicant ignored the removal order and remained in Canada illegally.

b) The Officer determined that the conditions in Jordan alleged by the applicant, namely that it is a "war prone environment" with "widespread terrorist activities", are faced by the general population. Because the applicant did not present any elements of personalized risk, the Officer declined to forward the case for a risk opinion.

c) The Officer considered several factors relating to the applicant's establishment in Canada. She considered the applicant's employment as a cook in a Middle Eastern

restaurant, as well as his savings, salary, investment in a Canadian corporation, volunteer work, relatives, language skills and letters of support.

d) The Officer noted the applicant remained in Canada in violation of the immigration laws of the country, and that he purchased shares in the business in January 2005, when he knew his status in Canada was tenuous. She noted the absence of sufficient evidence supporting his allegation that his departure from Canada would negatively affect his investment.

e) The Officer found that the applicant's skill as a cook was transferable, and that he was employed in Jordan for 11 years prior to his departure. The Officer credited the applicant for his volunteer work. She noted that she was not satisfied that the loss of employment or volunteering opportunities in Canada would cause the applicant undue, undeserved or disproportionate hardship.

f) The Officer acknowledged the presence of the applicant's aunts and cousins in Canada, but determined that there was insufficient evidence to support the applicant's claim that his parents and seven siblings were no longer living in Jordan. She found it reasonable that the applicant would be able to locate some of his family members if he returned.

g) The Officer noted that the applicant had significant savings and would be able to secure accommodation in Jordan.

h) The Officer considered a medical letter from a Dr. H. Obaji attesting to the applicant's complaints of vomiting, heart burn, epigastric pain and insomnia for which the letter stated there was "no specific diagnosis". The letter further stated that

the applicant was scheduled to attend an appointment for psychological counselling for anxiety and depression. The Officer wrote that there was insufficient evidence to support the fact that the applicant attended the appointment, or whether a specific diagnosis resulted from the process of psychological counselling. The Officer further rejected the submission from applicant's counsel stating that the applicant is "psychologically disturbed" and that his "mental condition is highly vulnerable", on the ground that counsel is not qualified to arrive at such a conclusion.

i) The Officer concluded by restating the fact that insufficient evidence was presented to demonstrate that the applicant remained in Canada because of circumstances beyond his control. She found that the applicant did not demonstrate that sufficient H&C grounds exist to warrant an exemption from the requirements of the Act, and that he provided insufficient evidence that he would experience undue, unusual or disproportionate hardships.

ANALYSIS

Standard of Review

[10] This Court has previously held that the review of H&C decisions should be afforded considerable deference, and that the applicable standard was reasonableness *simpliciter* (*Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817).

[11] Following the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, review of H&C decisions should continue to be subject to deference by the Court, and are

reviewable on the newly articulated standard of reasonableness (*Dunsmuir*, at paragraphs 47, 55, 57, 62, and 64).

[12] For a decision to be reasonable there must be justification, transparency and intelligibility within the decision making process. The decision must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at paragraph 47).

Applicant does not come to the Court with clean hands

[13] The respondent submits that the application for judicial review should be dismissed without entertainment of the merits because the applicant has not come to this Court with clean hands. The respondent submits that the applicant has sworn a false affidavit. The respondent argues that the omission from the applicant's affidavit of his failure to appear for his removal, while claiming to be a law abiding individual during his time in Canada, constitutes a misrepresentation. The respondent notes that a warrant was issued for the applicant's arrest on September 16, 2005, which remains active.

[14] The respondent refers the Court to the decision of the Supreme Court of Canada in *Homex Realty and Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011, in which Justice Estey, writing for the majority stated:

> … The principles upon which *certiorari*, and now the modern order in judicial review, have been issued have long included the principle of disentitlement where a court, because of the conduct of the applicant, will decline the grant of the discretionary remedy.

[15] The principle that the Court may exercise its discretion to dismiss an application because the applicant does not have clean hands has been applied in recent cases, specifically where an applicant evaded immigration authorities or an arrest warrant in order to delay or avoid removal (*E.L.D. v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1475, [2005] F.C.J. No. 1812 at paragraphs 48 to 57; *Lima v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 383, [2007] F.C.J. No. 530) at paragraphs 16 and 17).

[16] I agree with the respondent's submission that the applicant's disregard for Canadian immigrations and law enforcement authorities, as well as for the order of this Court dismissing the stay of removal, demonstrate that the applicant does not come to the Court with clean hands.

[17] However, the Federal Court of Appeal determined in *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 14, [2006] F.C.J. No. 20, that though an applicant does not have clean hands, an application for judicial review may not be dismissed automatically on that ground. Rather the Court must assess certain factors in order to strike a balance between the need to prevent abuse of the judicial process and the need to protect an applicant's rights. Writing for the Federal Court of Appeal, Justice Evans opined:

> [9] In my view, the jurisprudence cited by the Minister does not support the proposition advanced in paragraph 23 of counsel's memorandum of fact and law that, "where it appears that an applicant has not come to the Court with clean hands, the Court must initially determine whether in fact the party has unclean hands, and if that is proven, the Court must refuse to hear or grant the application on its merits." Rather, the case law suggests that, if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing

> court may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief.
>
> [10] In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[18] It is my opinion that the balance of the above mentioned factors supports the exercise of discretion to dismiss the application in this case; however, in case I am wrong, I will examine the application on its merits.

No reviewable error

[19] The applicant’s argument raises only general grounds upon which he alleges the decision should be reviewed. It should be noted that the applicant submits that the Officer fettered her discretion and breached principles of procedural fairness; however, these allegations are made without reference to the decision, and are therefore without merit.

[20] The applicant argues that the Officer erred in her assessment of hardship, and by her failure to make further inquiries to obtain more evidence from the applicant.

[21] I find that the Officer's assessment of hardship was reasonable. She correctly ascertained that the hardship which the applicant might experience upon removal will not result from circumstances beyond his control. The Officer's conclusion rested upon a thorough evaluation of the applicant's circumstances, as well as the fact that his presence in Canada is a result of his disregard for Canadian laws.

[22] The respondent contends that for hardship to be undue, undeserved or disproportionate, it must be fore than mere inconvenience or predictable costs associated with leaving the country; that he must sell assets, leave a job or his family is a consequence of the risk the applicant took by remaining in Canada without legal status (see *Irimie v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1906, at paragraphs 12 and 17, cited with approval in *Akinbowale v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1221, [2007] F.C.J. No. 1613).

[23] The applicant also argues that the Officer had a duty to make further inquiries for additional evidence.

[24] The applicant's argument is unfounded. The duty of the Officer is to consider the evidence before her, which she did in a justified, transparent and intelligible manner. It is trite law that the onus lies on the applicant to bring forward sufficient evidence to establish his claim (*Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] F.C.J. No. 158 (F.C.A.)). Paragraph 5.26 of the Immigration Manual IP 5 further supports the duty of the applicant to present any evidence that might support his claim:

> 5.26 Onus on applicant
>
> Officers do not have to elicit information on H&C factors and are not required to satisfy applicants that such grounds do not exist. The onus is on applicants to put forth any H&C factors that they feel exist in their case.
>
> Although officers are not expected to delve into areas that are not presented, officers should attempt to clarify possible H&C grounds if these are not well articulated by the applicants.

[25] It is my opinion that the Officer's decision is eminently reasonable. The arguments submitted by the applicant seek to have this Court reweigh the evidence before the decision maker. This is not the role of the Court.

[26] The parties did not submit questions for certification and none arise.

JUDGMENT

THIS COURT ORDERS that the application is dismissed. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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