Federal Court  Cour fédérale

Date: 20101022

Docket: IMM-1408-10

Citation: 2010 FC 1036

Ottawa, Ontario, October 22, 2010

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

TAREQ MUGHRABI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Tareq Mughrabi is a citizen of Jordan who arrived in Canada in 2003. He claims that his aunt, his uncle and their children, who live together in Winnipeg, would experience hardship if he were required to return to Jordan. On the basis of this claim, he submitted an application for permanent residence on humanitarian and compassionate (H&C) grounds under section 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[2] In March 2010, Immigration Officer Irene Craig rejected Mr. Mughrabi's application.

[3] Mr. Mughrabi seeks to have the decision set aside on the basis that the Officer erred by failing to properly analyze the best interests of the children, in particular, by failing to provide a basis for disagreeing with three psychological assessments.

[4] He also seeks specific directions and costs.

[5] For the reasons that follow, this application is dismissed.

I. Background

[6] Mr. Mughrabi and his brother Mohamad fled Jordan and went to the United States in 1998 and 1996, respectively. They remained there until May 2003, when they came to Canada and submitted refugee claims. They claimed to fear persecution at the hands of Jordanian authorities based on their Palestinian ethnicity. Their refugee claims were denied in June 2004. Mr. Mughrabi and his brother then made similar claims in their respective applications for a pre-removal risk assessment, which were denied in June 2005.

[7] Mr. Mughrabi and his brother then submitted H&C applications. Those applications were based primarily on the hardship that would be experienced by their aunt, their uncle and their cousins, particularly their aunt and their youngest cousin, who was approximately three years old at the time. In support of those applications, psychological assessment reports prepared in 2005 and 2007 by Pamela Holens, under the direction of two different clinical psychologists, were submitted.

[8] In September 2007, those H&C applications were rejected by Immigration Officer S. del Rosario. In the course of discussing Mr. Mughrabi's claims regarding the hardship that his cousins would suffer if he were removed from Canada, Officer del Rosario observed:

> Children are resilient by nature, and it is not unreasonable to believe that they would be able to adjust and adapt to the loss of the applicant, similar to many children who have lost a parent through divorce or death. I do not accept the applicant's argument, as it must also be pointed out that the applicant's cousins would still have the support of both biological parents available to them. I am not satisfied that the applicant has established that severing ties with his family would constitute as [sic] unusual and undeserved or disproportionate impact.

[9] With respect to Mr. Mughrabi's aunt, Officer del Rosario simply observed that "there is insufficient evidence to suggest that her condition would be irreparable if she sought medical treatment."

[10] Later in September 2007, after Mr. Mughrabi and his brother received removal notices, my colleague Justice Russell granted motions that they each brought for a stay of removal from Canada. In July 2008, Justice Russell granted their underlying applications for judicial review of Officer del Rosario's adverse H&C decisions.

[11] With respect to Officer del Rosario's rejection of Mr. Mughrabi's H&C application, Justice Russell concluded that it was unreasonable for her to have failed to provide a material basis for disagreeing with the psychological assessments regarding the impact that Mr. Mughrabi's removal

would likely have upon his cousins. Stated alternatively, he found that the Officer's decision lacked substance and failed to provide any real basis for the Officer's disagreement with the advice and conclusions contained in the psychological assessments, particularly as they related to the specific trauma identified in the reports (*Mughrabi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 898, at paras. 15, 23 and 27).

[12] On redetermination in March of this year, Officer Craig again rejected Mr. Mughrabi's H&C application, after he made additional submissions, provided a further updated psychological assessment (dated November 19, 2008), and after he was interviewed by Officer Craig earlier in March.

II. The Decision under Review

[13] In discussing the factors that were considered in reaching her decision, the Officer began by identifying Mr. Mughrabi's claim that his cousins, aunt and uncle would suffer emotional and psychological trauma if he were forced to leave Canada and to apply for a visa from outside the country. The Officer then briefly identified certain other factors, including (i) whether Mr. Mughrabi would face any hardship or sanctions if he were required to return to Jordan, (ii) his degree of establishment in Canada, and (iii) the fact that he has a wife who lives in Chicago.

[14] The Officer then identified a number of positive and countervailing factors that she had considered. The positive factors were an undated letter from a previous employer and a number of letters of support from friends. The factors not supporting a positive decision included the following facts:

i. Mr. Mughrabi has a spouse in the U.S.;

ii. Mr. Mughrabi feels he would qualify under the Provincial Nominee Program, and therefore it would not be a hardship to leave Canada and apply under that stream, as processing times are usually approximately one year;

iii. Insufficient evidence had been provided regarding the amount of time Mr. Mughrabi spends with his cousins;

iv. Recent and current employment would make it hard to spend evenings and weekends with his cousins;

v. Since coming to Canada, Mr. Mughrabi has lived with his cousins for only 6 months;

vi. His plan to live with his cousins and their parents in their new home had not materialized and may not materialize now that he has accepted the position of caretaker of an apartment building, which usually requires “24/7 attention”;

vii. His inability to get help at a hospital due to not being eligible for Manitoba Health and not having the financial means to pay for the services he required contradicted his aunt’s statement that she and her husband support him as if he were their own child;

viii. He was found guilty and convicted of possessing cocaine in 2008; and

ix. His degree of establishment in Canada appears slight and was made with the knowledge that he may not be permitted to remain in Canada.

[15] With respect to his cousins, the Officer stated that she had given substantial weight to their interests and to the 2008 psychological assessment. She also noted that the 2007 assessment had mentioned the possibility that the children had been coached by their parents. In addition, she observed that although the children may have been close to Mr. Mughrabi when he lived with them for six months in 2003, there was little evidence to suggest that they have not adjusted to him living on his own and being unavailable a lot of the time because of the various jobs that he has had in the intervening period.

[16] The Officer further noted that during his interview, Mr. Mughrabi stated that he tried to visit his cousins as much as possible and that he would sleep there on weekends. However, she remarked that his ability to see the children when they are awake is restricted by his work hours.

[17] The Officer also noted that Mr. Mughrabi's uncle owns a company and should be able to set his own hours, to enable him to assist with the children when the need arises. She further observed that the family is in a financial position to seek help from a caregiver if needed.

[18] The Officer then considered the ages of the children (13, 12, 10, 9 and 7), and found that children at that age are likely busy with their own friends and activities. She further noted that Mr. Mughrabi was not able to state how much time he actually spends with the children. She observed that, if he were removed from Canada, he would be able to communicate with the family by telephone, e-mail, webcams, letters, and other methods. She also remarked that the issues that had

been raised were not unlike those faced by many people who must juggle work, children and an ailing spouse.

[19] Regarding Mr. Mughrabi's aunt, the Officer noted that the 2007 psychological assessment (i) strongly recommended that she seek assistance in managing her depression and possible anxiety disorder, and (ii) noted that such assistance was important not only for her own well-being, but also because of the impact that her impaired functioning has upon her children, who had come to depend on the uncles to fulfill many of the roles and functions normally fulfilled by a healthy mother. The Officer found that there was no evidence indicating that his aunt had followed through with that advice and that it appeared that she had simply assumed it would be better for her if Mr. Mughrabi remained in Canada.

[20] In addition to the foregoing, the Officer's decision mentioned that Mr. Mughrabi's conviction for possession of cocaine in 2008 reflected a disrespect for Canadian law. It then briefly referred to the statement in Mr. Mughrabi's application that he would probably be successful if he were to apply under the Provincial Nominee Program. It was noted that if he were in fact successful, his separation from his family would only be for a short period of time and that the children are old enough to understand this situation.

[21] That said, it was then noted that, as Mr. Mughrabi has a wife in the United States, lives on his own and is gainfully employed, it would be unreasonable to devote his whole life to his cousins.

[22] Based on the foregoing, and after concluding that Mr. Mughrabi's removal would not constitute unusual and undeserved or disproportionate hardship, the Officer rejected his application for an exemption on H&C grounds, under section 25 of the IRPA.

III. Standard of review

[23] The parties agree that the issue raised by Mr. Mughrabi is reviewable on a standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 51-56; *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, at para. 18). In short, the decision rejecting his H&C application will stand unless it is not within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). In this regard, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59).

IV. Analysis

A. *Did the Officer fail to properly analyze the best interests of the children?*

[24] Mr. Mughrabi submits that Officer Craig failed to consider the best interests of his cousins. He asserts that Officer Craig's reasons are essentially the same as those provided by Officer del Rosario, which were found to be inadequate by Justice Russell. He maintains that Officer Craig once again failed to provide a basis for disagreeing with the psychological assessments. He further submits that where this Court has previously made a finding of irreparable harm in granting a motion to stay an applicant's removal from Canada, the Officer who considers a subsequent H&C

application must provide clear and specific reasons, including references to the evidence, to reach an inconsistent decision.

[25] I am unable to conclude that Officer Craig erred in any of the ways alleged by Mr. Mughrabi.

[26] It is common ground that in reviewing an H&C application, an immigration officer must be "alert, alive and sensitive" to the interests of any children who may be impacted by the officer's decision (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 75). However, once that has been done, it is up to the officer to determine what weight those interests should be given in the circumstances (*Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] FCA 125, at para. 12). Those interests are important, but may not be determinative. Stated alternatively, "an applicant is not entitled to an affirmative result on an H&C application simply because the best interests of a child favour that result" (*Kisana*, above, at paras. 24 and 37). This is especially true in a case such as this where the children in question will remain in Canada with their biological parents, both of whom appear to be supportive and loving, and the person to be removed is a secondary caregiver.

[27] The weight accorded to a child's interests should be a function of the nature and significance of, and the probability accorded to, (i) the demonstrated potential adverse impact of the removal in question on the child, (ii) the other factors that are considered to support a positive decision, and (iii) the factors that are determined to support a negative decision. Given the "highly discretionary and fact-based nature" of the balancing process (*Baker*, above, at para. 61), the ultimate decision of an Immigration Officer should be accorded "considerable deference" (*Baker*, at para. 62).

[28] An implication of the recognized principle that a child's interests may not be determinative in an H&C assessment is that there is no logical or legal inconsistency between a finding of likely irreparable harm to a child, in the context of a motion to stay an applicant's removal, and a subsequent rejection of an H&C application in which the same interests of the child were at issue. In short, a finding of irreparable harm to a child in the context of such a motion does not mandate a positive determination on a subsequent H&C application.

[29] Moreover, while the decision on the H&C application needs to be "alert, alive and sensitive" to the interests of any children who may be impacted by the decision, it does not necessarily need to specifically address any prior finding of irreparable harm made in the context of a stay application. In short, there is no "magic formula to be used by immigration officers in the exercise of their discretion" (*Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, at para. 7; *Kisana*, above, at para. 32).

[30] In the case at bar, Officer Craig correctly identified the nature of the harm that Mr. Mughrabi claimed would be suffered by his cousins and their parents if he were removed from Canada. Contrary to Mr. Mughrabi's assertions, Officer Craig then went beyond the assessment that Officer del Rosario had conducted in respect of the children, in a number of important respects.

[31] In particular, Officer Craig:

i. explicitly stated that she had given substantial weight to the best interests of Mr. Mughrabi's cousins and the most recent psychological report;

ii. referred on four separate occasions to the evidence, or the insufficiency of evidence, regarding the amount of time Mr. Mughrabi is now able to spend with his cousins. In this regard, she added that previous and current employment would make it hard for him to spend evenings and weekends with his cousins, and that plans for him to live with his cousins in a new family home may not materialize now that he has accepted a job as a caretaker of an apartment building, where he may be required to work “24/7”;

iii. observed that while the cousins may have been very close to their uncle when they lived in the same house for six months approximately, that was seven years ago, when they were younger. She added that there is little evidence that the cousins have not eventually adjusted to their uncle living on his own and being unavailable a lot of the time due to his work;

iv. noted that the cousins are now 13, 12, 10, 9 and 7, and are likely busy with their own friends and activities. In my view, based on common experience, this was not an unreasonable observation to make, particularly given the nature of the support that Mr. Mughrabi claimed to have provided to the cousins and their parents when the children were much younger;

v. noted that Mr. Mughrabi will be able to communicate with the children by telephone, webcam, email, letters or other means if he is removed from Canada. Given that the country to which Mr. Mughrabi would be removed is Jordan, I do

not believe that this was an unreasonable observation to make. In any event, this was only one of many factors taken into account by Officer Craig;

vi. observed that there was no evidence that his aunt had followed up on the strong recommendation in the 2007 psychologists' report that she seek assistance in managing her depression and possible anxiety disorder. It was entirely appropriate for Officer Craig to mention this fact for two reasons. First, she was entitled to take into consideration the fact that the aunt's own actions impacted upon the H&C grounds claimed by Mr. Mughrabi (*Legault*, above, at para. 19). Second, as Officer Craig proceeded to note, the same psychologists' report stated that such assistance would be important not only for the aunt's own well being, but also because of the impact that her impaired functioning has upon her children, who have come to depend on the uncles to fulfill many of the roles and functions normally fulfilled by a healthy mother" (emphasis added); and

vii. noted that since Mr. Mughrabi's uncle owns his own business, he should be able to set his own hours and assist with the children when the need arises.

[32] Several of the foregoing factors considered by Officer Craig represented changes from the situation that prevailed at the time that Officer del Rosario made her decision and at the time when the two psychologists' reports that were before Officer del Rosario were prepared.

[33] It is also significant that the third psychological assessment did not identify the same potential trauma to the children that had been identified in the earlier assessment. In particular, the

2007 assessment stated that two of the children, Mona and Jenan, "both appear to be in more fragile states currently, and as such it would potentially be much more difficult for each to adjust to the loss of their uncles". That assessment added that Jenan "is showing signs of psychological distress which are either directly or indirectly (via her mother's depression) related to the ever-present potential loss of her uncles." It further noted that Mr. Mughrabi's aunt "appeared to still be suffering from a Major Depressive Disorder, which had, at best, improved only minimally since the initial assessment."

[34] The conclusions in the most recent updated psychological assessment did not identify any similar current states of distress or fragility for Mona or Jenan. On the contrary, they stated that the children "currently appear well adjusted, healthy, and by all reports are doing well in school." The assessment then proceeded to state that the children would nevertheless be vulnerable to the devastating effects of attachment disorder.

[35] In the context of all of the foregoing, it was not necessary for Officer Craig to give that psychological assessment the exceptional attention that Justice Russell stated should have been given by Officer del Rosario to the prior psychological assessments, based on the circumstances that existed at the time of Officer del Rosario's decision. Given the change in circumstances and evidence, I am satisfied that it was not unreasonable for Officer Craig to have failed to discuss the most recent updated psychological assessment in greater detail.

[36] In contrast to Officer del Rosario's decision, Officer Craig's decision did reflect that she was "alert, alive and sensitive" to the best interests of Mr. Mughrabi's cousins, as well as to the interests of his aunt and his uncle, as described at paragraph 31 above. In the course of doing so, Officer

Craig also reasonably addressed, directly and indirectly, the most recent updated psychological assessment. In addition, she identified various reasons why Mr. Mughrabi's removal likely would not have the same impact upon the children as it may have had on them when they were younger and he spent much more time with them. In doing so, she implicitly provided her basis for disagreeing with the conclusions contained in the most recent psychological assessment.

[37] Had Officer Craig addressed the most recent psychological assessment in greater detail, she would have given the Applicant a greater sense that the findings of that assessment had been appropriately considered. She also may have saved Canadian taxpayers the not insignificant expense that has been associated with this proceeding. However, her failure to address that assessment in greater detail did not render her decision unreasonable.

[38] After considering the hardships claimed by Mr. Mughrabi and other factors related to the best interests of his cousins, Officer Craig then identified the various factors mentioned at paragraph 14 above, which in her view weighed against making a favourable decision on Mr. Mughrabi's application. Officer Craig then implicitly balanced the positive and negative considerations and concluded that Mr. Mughrabi's removal from Canada would not constitute unusual and undeserved, or disproportionate hardship, to justify granting an exemption under section 25 of the IRPA.

[39] In my view, Officer Craig's decision was certainly well within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47), particularly given the "highly discretionary and fact-based nature" of the decision (*Baker*, above, at para. 61). For the reasons I have explained, that decision was transparent, intelligible and appropriately justified.

B. *Directions and costs*

[40] Given my conclusion that Officer Craig did not err in the manner alleged by the Applicant, it is not necessary to address in detail the Applicant's submissions regarding directions and costs.

[41] In short, given that I will not be issuing an order to quash Officer Craig's decision and remit the matter to a different Immigration Officer, this is not a case in which directions should be issued.

[42] However, I will note in passing that given the "highly discretionary and fact-based nature" of H&C determinations (*Baker*, above, at para. 61), it will rarely be appropriate to give specific directions (*Canada (Minister of Human Resources Development) v. Rafuse*, 2002 FCA 31, at para. 14) in such cases.

[43] As to costs, the Applicant asserts that the exceptional circumstances of this matter support an order of costs in his favour. Specifically, the Applicant submits that Officer Craig ignored Justice Russell's findings and made the same errors as Officer del Rosario. Given that I rejected the latter submission, I am also rejecting the former submission. In my view, there are no "special reasons," as contemplated by Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, in this case that would justify the issuance of such an order.

V. Conclusion

[44] The application for judicial review is dismissed.

[45] There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT this application for judicial review is dismissed.

"Paul S. Crampton"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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