Federal Court  Cour fédérale

Date: 20140515

Docket: IMM-3048-13

Citation: 2014 FC 469

Ottawa, Ontario, May 15, 2014

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

BARKAT ALI, SHAIROZ ALI, AAHIL ALI AND ASHMAL ALI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants' application for permanent residence from within Canada on humanitarian and compassionate grounds [H&C application] was refused. The focus of this judicial review application is the officer's analysis of the best interests of the children. For the reasons that follow, I find that the officer's analysis was deficient. The officer was not "alert, alive and sensitive" to the best interests of the children, specifically, the hardship that they would face if they had to relocate to Pakistan.

Background

[2] Barkat Ali and Shairoz Ali are married and are citizens of Pakistan. Mr. and Mrs. Ali had fled to the USA in 1994 and 1997 respectively, fearing persecution in Pakistan. While there they gave birth to their two sons, Aahil (born July 15, 1999) and Ashmal (born March 28, 2001). They moved to Canada in 2003. Their claim for refugee protection was rejected on December 10, 2003.

[3] On August 14, 2006, the Applicants filed the H&C application. The officer rendered the decision under review more than six years later on November 14, 2012. In the interim, the Applicants updated their information, particularly with respect to their two children, their successful integration into Canadian life and school, and the adverse impact on them if removed to Pakistan.

[4] They submitted a psychological report from Dr. Pezzot-Pearce describing the difficulties that the children would face if returned to Pakistan. The report noted the following, in particular:

1. The children "would need to learn a new language and way of life and some aspects of the culture have the potential to be extremely difficult and likely traumatizing" for the children;
2. The children knew some Urdu words, but did not speak, read, or write the language or any other language required to function capably if removed to Pakistan;
3. Aahil exhibited "considerable anxiety about the potential impact that such a move might have on his schooling and future;"

4. Ashmal exhibited "considerable anxiety about a possible move to Pakistan" and was worried about the "need to restart all of [his] education because he would need to begin with learning to speak and write Urdu;"
5. The children's "strong sense of security that they derive from their lives in Canada would be threatened dramatically were they be [*sic*] required to leave Canada and return to a country in which all aspects of life would be markedly foreign;" and
6. That the children would "likely experience a sense of shock and hardship if they were required to depart Canada."

[5] As a preliminary matter, I reject the Minister's submission that this report ought to be given little or no weight as it was prepared for immigration purposes and is therefore more in the nature of advocacy. I have read the report with care. It reflects the information obtained directly from the children and the psychological tests employed, and it expresses, without exaggeration or embellishment the professional opinion of its author, which is as follows:

> I am of the professional opinion that the children's strong sense of security that they derive from their lives in Canada would be threatened dramatically were they required to leave Canada and return to a country in which all aspects of their lives would be markedly foreign. The children would need to learn a new language and a way of life and some aspects of the culture and living circumstances have the potential to be extremely difficult and likely traumatizing.

The authorities relied on by the Minister arise in different contexts and in each the report provided what was seen to be a biased opinion on the very issue that the Court was required to determine. I agree with the Applicants that when one is assessing harm to a child in the context of an H&C application, an expert opinion may be of particular significance. Because the question the officer must address is not whether there will be harm but what its degree is and

how that is to be weighed against other considerations, the report does not provide an opinion on the very issue the officer must determine.

Decision Under Review

[6] The officer notes the following in considering the best interests of the children:

1. Evidence from the children's principal describing their educational history in Canada;
2. That the boys are Pakistani citizens by birth having been born to Pakistani parents;
3. That the boys, having been born in the USA, are also American citizens, and they have relatives living in the USA;
4. It is in the best interests of most children to remain with their parents;
5. It is in the best interests of every child to gain an education and to have their parents' constant love and support as they journey through life;
6. If the children were to accompany their parents to Pakistan, that:
    a. There is little evidence that the basic amenities would not be available in Pakistan including education and medical care, and specifically, treatment for anxiety and depressive disorders;
    b. There is no evidence that love and support would not be achieved by the family in Pakistan;
    c. Returning the family would not "adversely impact the best interests of the children in this case;"
7. It is reasonable to expect that the children have been exposed to Pakistani culture and the Urdu language by their family; and

8. There are several options to achieve the best interests of the child, but that ultimately, it is a parental decision to do what is best for them.

The officer ultimately determined that the children would not experience hardship if returned to Pakistan that "in and of itself warrants an exemption."

Analysis

[7] The Applicants submitted in their written memorandum that the officer erred in applying the "unusual, undeserved and disproportionate hardship" test in the context of the best interest analysis. Counsel conceded that this was not their strongest argument and the whole of the oral submission was focused on the submission that the officer failed to be "alert, alive and sensitive" to the children's best interests.

[8] Accordingly, I too will not examine this abandoned submission except to observe the following. In the decision under review, the officer states that "the H&C process is designed to provide relief from unusual and undeserved or disproportionate hardship." I agree with Justice Mactavish that the mere use of the words "unusual, undeserved or disproportionate hardship" in a best interests of the child analysis does not automatically render an H&C decision unreasonable, "if it is clear from the decision as a whole that the officer applied the correct test and conducted a proper analysis:" *EB v Canada (Minister of Citizenship and Immigration)*, 2011 FC 110, 383 FTR 157 at para 12.

[9] It is clear that an assessment of a child's best interest does require an examination of the hardship the child will suffer under the scenarios at play. The Court of Appeal made that observation in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555 [*Hawthorne*] at paras 4-6 as follows:

> The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interests of the child.
>
> The officer does not assess the best interests of the child in a vacuum. The officer may be presumed to know that living in Canada can offer a child many opportunities and that, as a general rule, a child living in Canada with her parent is better off than a child living in Canada without her parent. The inquiry of the officer, it seems to me, is predicated on the premise, which need not be stated in the reasons, that the officer will end up finding, absent exceptional circumstances, that the "child's best interests" factor will play in favour of the non-removal of the parent. In addition to what I would describe as this implicit premise, the officer has before her a file wherein specific reasons are alleged by a parent, by a child or, as in this case, by both, as to why non-removal of the parent is in the best interests of the child. These specific reasons must, of course, be carefully examined by the officer.
>
> To simply require that the officer determine whether the child's best interests favour 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 favour of or against the removal of the parent. (emphasis added)

[10] Accordingly, part of the officer's task in determining what is in the best interests of the children is to assess the likely degree of hardship to the child if the child's parents are removed

from Canada. Where the child too is subject to the removal order, the officer must also assess the hardship the child will suffer in being removed with the parents. Where the child has status to remain in Canada, as was the case in *Hawthorne*, but not the case here, the officer is also to consider the hardship if the child leaves with the parents. In any case, the issue for the officer is to assess the degree of hardship to the child and weigh that hardship against the other relevant factors, the ultimate goal being to determine what is in the best interests of that child. At that stage, the interests of the child should be weighed against all of the other factors under consideration to determine if removal constitutes "undue, undeserved, or disproportionate hardship."

[11] In this case, the issue is the quality of the officer's assessment of the harm to the children if the parents are removed to Pakistan. If the harm is significant, then their interest in having their parents remain in Canada with them is also significant. If it is minimal, then their interest in their parents remaining in Canada is only minimally impacted by removal. In assessing the degree of harm the officer must be "alert, alive and sensitive" to the children's best interests. In this case, the officer was not.

[12] The officer reviewed and noted the psychological assessment from Dr. Pezzot-Pearce and particularly referenced its conclusion reproduced above. The assessment also noted the anxiety both boys had and their fears of moving to Pakistan where they would first have to learn the language before they could integrate into the school system. Ashmal said: "I would need to restart all of my education." The psychologist further notes:

> [H]e comments that he only has Canadian clothes and knows only Canadian sports and games and these factors, when combined with

> his inability to speak the language, would "likely make me the odd person out". Although he says that he is "cool" here, he would be "weird" there and he worries that other children would make fun of him and he would be left out. Here, he is immersed in strong relationships with classmates, community friends, and family.

[13] The officer's analysis of the concerns regarding the disruption to the boys' education and their anxiety is directed only to the state of the education system in Pakistan and the availability of medical treatment. The officer fails to address the specific hardships that the boys will face if they are removed to Pakistan, as is captured in the following statements from the decision:

> Objective documentary evidence indicates that primary education, while not compulsory, is free and universal, and a constitutional right.
> …
>
> The World Health organization (WHO) Country Profile for Pakistan indicates that approximately 46% to 66% of women and 15% to 25% of men suffer from anxiety and depressive disorders.
> …
>
> Evidence informs that *"at the national level 80% of the population has access to health services in rural areas and 100% in cities."*
> …
>
> While I note that the children may experience a period of adjustment, the evidence before me does not support that assistance or treatment would not be available to them in Pakistan, or that it would constitute a hardship for the applicants to access such services if needed.

[14] The officer's analysis, the relevant portions of which are reproduced below, of the impact of the removal to Pakistan on the children's personal wellbeing and education completely misses the relevant point. The relevant point is whether and to what extent they will suffer harm in that regard; it is not, as the officer seems to think, whether they can be educated in Pakistan or

guaranteed that they will not be seen as "weird" or ostracized or harmed in Pakistan given their North American upbringing and background.

> No country, including Canada which is built on the value of good governance, can provide a guarantee that poverty and hurtful incidents of a criminal or prejudicial nature will not occur in a child's lifetime. It is in the interest of every child to gain an education and to have their parents' constant love and support as they journey through life; I have not been provided with evidence to support that this cannot be achieved by this family in Pakistan.

[15] Furthermore, the officer completely neglects the impact of the evidence that these boys know only a few words of Urdu and would have to learn the language before they could expect to enter the education system or make friends in the community. The officer, contrary to the evidence, makes an incorrect assumption when he writes that "it is reasonable to expect that the boys will have been exposed to Pakistani culture and the Urdu language by their families while in North America." The officer never addresses the question of the impact on these boys of interrupting their education by having to learn a foreign language and the harm that will inevitably occur if that happens. The officer simply assumes that their exposure to the culture will negate any potential hardship.

[16] Lastly, the officer writes: "I have considered the best interests of these children, along with the personal circumstances of this family, and find that they have not established that the general consequences of relocating and resettling back to their home country would have a negative impact on the children which in and of itself warrants an exemption" (emphasis added). It is not general consequences that are relevant and are to be examined. To be "alert, alive and sensitive" to their best interests, the officer should have focused on the unique and personal consequences to these boys. Further, the officer's talk of them returning to their "home country"

is particularly offensive, as Pakistan is clearly not the home country of either boy, as they have never been there – even for one day.

[17] In summary, I agree with the following submission of the Applicants in their written memorandum:

> This determination is eminently unreasonable as it is directly contradicted by Dr. Pezzot-Pearce's report which makes it abundantly clear that the children do not speak Urdu. In addition to ignoring the evidence that the children do not speak Urdu, the officer failed to consider the evidence that requiring the children to move to a country where they would have to learn a language [would] result in a serious setback in their education. It goes without saying that it would be a hardship for the children to have to learn a new language at this stage of their lives, and the children articulated their own worries that this will negatively impact their education. It was entirely insensitive for the officer to gloss over these concerns by citing the availability of primary education in Pakistan. The officer demonstrated no appreciation of how difficult it would be for the children to go to school in Pakistan. The officer's Reasons thus reflect a lack of understanding of the real life impact that a relocation to Pakistan would have on the children …

[18] For these reasons, the decision on the Applicants' H&C application must be granted. Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the decision refusing the Applicants' application for permanent residence from within Canada on humanitarian and compassionate grounds is set aside, their application is to be determined by another officer in keeping with these reasons, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3048-13
STYLE OF CAUSE:	BARKAT ALI ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	MAY 6, 2014
JUDGMENT AND REASONS:	ZINN J.
DATED:	MAY 15, 2014

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