Date: 20080213

Docket: IMM-5405-06

Citation: 2008 FC 173

Ottawa, Ontario, February 13, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

MORDECHAI BETESH; LIAT BETESH;
IDAN SHMUEL BETESH and YUVAL MARY BETESH
By their litigation guardian MORDECHAI BETESH

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Mordechai Betesh, along with his wife, Liat, and their twin children, Yuval and Idan, arrived in Canada from Israel in 2003 as visitors. After their six-month visas expired, they applied unsuccessfully for refugee protection. They also requested a pre-removal risk assessment, which found them not to be at risk of serious harm if they returned to Israel. Finally, they requested permission to apply for permanent residence from within Canada on humanitarian and compassionate grounds. The officer who evaluated their request found no unusual, undeserved or disproportionate circumstances supporting their application and dismissed it.

[2] The applicants argue that the officer who evaluated their humanitarian and compassionate (H&C) application failed adequately to consider the best interests of the children, or to explain his conclusion. Further, they submit that the consultant representing them at the time was incompetent; she failed to submit to the officer important evidence supporting their application. They ask me to order a reconsideration of their H&C application by a different officer.

[3] I can find no basis for overturning the officer's decision and must, therefore, dismiss this application for judicial review.

I. Issues

1. Did the officer fail to give due consideration to the best interests of the children?

2. Were the officer's reasons adequate?

3. Have the applicants shown a breach of natural justice resulting from the incompetence of their counsel?

II. Analysis

A. *Did the officer fail to give due consideration to the best interests of the children?*

[4] The officer considered the following circumstances relating to the children (who were almost four years old at the time):

- they are enrolled in daycare and have made friends;
- they speak English and are developing well;
- if required to leave Canada, they would likely find new friends in Israel;
- they would have the comfort and support of their parents at all times;
- they have been in Canada for a relatively short period of time; and
- while Mrs. Betesh is expecting another child, there is no medical evidence suggesting that the prospect of returning to Israel will cause her any serious difficulties.

[5] From these circumstances, the officer concluded that the applicants had failed to demonstrate that leaving Canada would seriously compromise the children's best interests.

[6] The applicants argue that the officer's conclusion was unreasonable because he failed to explain why leaving Canada would be in the children's best interests. In particular, they submit that the officer did not take adequate account of the fact that the children will be uprooted from their stable environment in Canada and will have to learn a new language in Israel. As a result, the officer failed to weigh the benefits of staying in Canada against the hardships of leaving.

[7] In my view, the officer's analysis was adequate. He did consider the relative benefits and hardships facing the children. The officer was "alert, alive and sensitive" to the children's best interests and considered the "pros and cons" of staying in Canada versus returning to Israel. The officer's task is to determine the likely degree of hardship to the child and to weigh it along with the other factors (*Hawthorne* v. *Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, at para. 6). The officer did so in this case.

B. *Were the officer's reasons adequate?*

[8] The officer considered the degree to which the applicants had established themselves in Canada. They had set up a profitable dental supply company, purchased a home, leased a car, opened bank accounts, conducted volunteer work and made charitable donations. They had numerous letters of support from business colleagues and friends. However, the officer also noted that the applicants had established their business and purchased their home at a point when their immigration status was uncertain. They must have realized the possibility that they would have to shut down their business and sell their home it they could not remain in Canada. Accordingly, having to do so should not be regarded as a disproportionate hardship.

[9] The officer also considered the fact that the applicants had not been away from Israel for very long (three years). They had operated a successful business there before they left and could presumably find a good source of income on their return. They had business and family contacts there, and spoke the language.

[10] The applicants submit that the officer failed to explain why leaving Canada would not amount to an undue hardship. In effect, the officer discounted their efforts to establish themselves in Canada. The applicants suggest that H&C applications will never be granted if applicants are not given credit for the connections they make with Canada while their immigration status is tenuous.

[11] In my view, the officer's reasons were adequate. They serve the purposes for which reasons are required of decision-makers. They informed the applicants why their application was being turned down and provided an adequate foundation for their application for judicial review: *R.* v. *Sheppard*, [2002] 1 S.C.R. 869; 2002 SCC 26; *Via Rail* v. *Lemonde*, [2000] F.C.J. No. 1685 (F.C.A.) (QL).

[12] Regarding the officer's treatment of the applicant's business and home, I am of the view that the officer's position was reasonable in the circumstances. The applicants had not been in Canada for long. They decided to set up their business when they were subject to a departure order. They bought their home after that order became effective. In these circumstances, the officer's conclusion that the applicants would not suffer undue hardship was not unreasonable and was adequately explained.

C. *Have the applicants shown a breach of natural justice resulting from the incompetence of their counsel?*

[13] The applicants argue that their consultant failed to submit important documents supporting their application to the officer who evaluated it. In particular, they had compiled updated financial information about their company which showed increased profits, an expanded client base, three new employees, and a lease for new premises. In addition, they had given their consultant police reports showing that they had been threatened in Canada by persons from Israel to whom the applicants owed money after their previous business had gone bankrupt. Mr. Betesh's father, in Israel, had also been threatened. Later, the applicants notified police that their tires had been slashed. The police thoroughly investigated these incidents. Mr. Betesh felt that the involvement of the police had brought about an end to the threats.

[14] The financial documents and police reports were provided to the applicants' consultant in May 2006. She informed them that she would submit them to the H&C officer when the officer asked for supplementary information and called them for an interview. As the officer never requested further documents or an interview, the officer never received or considered the new information. The applicants suggest that the incompetence of their consultant resulted in a breach of natural justice.

[15] The applicants acknowledge that they must meet a very strict test in order to be granted a new hearing based on the incompetence of their advisor. Justice Marshall Rothstein stated that a new hearing should be granted only in the most exceptional cases: *Huynh* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 642 (T.D.) (QL). Further, they must show that there is a reasonable probability that the result would have been different: *Shirvan* v. *Canada*

(Minister of Citizenship and Immigration), 2005 FC 1509. Generally speaking, they must also show that the advisor was given notice of the allegation of incompetence and a chance to respond: *Shirvan*, above; *Nunez* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 555.

[16] Here, the applicants submit that the general principle to be derived from these cases is that there must be very clear proof of incompetence before the Court will order a new hearing. They argue that they do, in fact, have convincing evidence of their consultant's negligence in the form of an e-mail in which she clearly indicated her intention to provide the additional documents to the officer. The fact that she did not do so shows that, in effect, she was "asleep" on the file. The applicants point to the circumstances in *Sheikh* v. *Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238 (C.A.), in which counsel fell asleep at least three times during a hearing, as being analogous. However, I note that, even in that case, the Court did not find sufficient evidence of incompetence to justify ordering a new hearing.

[17] I am not satisfied that the applicants have presented sufficient evidence to warrant a new hearing. First, they have not shown that the result might have been different if the officer had considered the additional documents. The officer was already aware of the applicants' successful business, and the police reports indicated that the applicants themselves did not believe that they would be subjected to further threats. Second, they have not provided evidence that their consultant was informed of their allegations or that any complaint was made to the Canadian Society of Immigration Consultants.

[18] Therefore, I must dismiss this application for judicial review. The parties requested an opportunity to make submissions regarding a certified question. I will consider any submissions received within ten days of this judgment.

JUDGMENT

THIS COURT'S ORDER IS that

1. The application for judicial review is dismissed.

2. The parties have ten days from the date of this judgment to make submissions regarding a certified question.

"James W. O'Reilly"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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