Date: 20080523

Docket: IMM-4793-07

Citation: 2008 FC 650

Ottawa, Ontario, May 23, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

FUAD AL MANSURI
NURIA BEN AMER

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27, (the Act) of the decision of Immigration Officer, K. Good (the Officer), dated October 12, 2007, finding that there were insufficient humanitarian and compassionate (H&C) grounds to warrant an exemption from the requirements under the Act for applying for permanent residence.

ISSUES

[2] Two issues are raised in the present application:

a) Did the Officer err by failing to explain why the best interests of the children were insufficient to outweigh the other factors?

b) Did the Officer err in failing to assess the female applicant, who was not complicit in crimes against humanity, and consider the possibility of her being allowed to remain in Canada, independently of the male applicant who was excluded?

FACTUAL BACKGROUND

[3] The applicants, Mr. Fuad Al Mansuri and Ms. Nuria Ben Amer, are citizens of Libya. They arrived in Canada in January 1999 and made a claim for refugee protection. The applicants had four children after arriving in Canada: Zaid born June 2000, Aisam born November 2002, Adam born July 2006, and Hisham, who died in November 2005.

[4] The refugee protection claim initiated in 1999 was refused on the ground that the male applicant was excluded because of his membership in the Libyan Intelligence Service. The Immigration and Refugee Board (the Board) found that he shared a common purpose with the Libyan Intelligence Service, and had personal knowledge of their acts, and was therefore complicit in crimes against humanity in Libya. Leave for judicial review was denied by the Court in May 2001.

[5] The applicants made an application for permanent residence on H&C grounds in 2001, which was refused in 2003. The applicants sought leave for judicial review, and the decision was remitted to Citizenship and Immigration Canada in 2004. The Court found that the Officer failed to consider the medical circumstances and failing health of the applicants' son, Hisham.

[6] An application for a Pre-Removal Risk Assessment (PRRA) was made in March 2004, and was subsequently rejected in October 2005. An application for judicial review of the PRRA was dismissed in January 2007.

[7] The present application is the judicial review of the second H&C determination, following the reconsideration ordered by this Court in 2004.

DECISION UNDER REVIEW

[8] The Officer considered five factors in her assessment of the applicants' H&C: establishment, risk to life and security, the best interests of the children, the emotional difficulty of Hisham's death, and the exclusion of the male applicant.

[9] First, the Officer considered the applicants' degree of establishment in Canada:

a) The Officer noted that the applicants had resided in Canada for nearly eight years, and had had four children here. She concluded that the applicants were significantly established in their community.

b) The Officer considered that the male applicant was employed since March 2001, where he worked as a welder and earned $15.50 an hour. She noted that he had been a member of the union, paid taxes and taken ESL classes. However, she found that there was insufficient evidence that the applicants would be unable to find employment and support their family if they returned to Libya.

c) The Officer noted that the applicants own and have equity in their home. She also noted that their mortgage had increased, which she found to balance against the establishment generally shown by the purchase of a home. She noted $14,218.11 US in savings, as well as the applicants' explanation that they are paying lawyer's fees remaining from previous applications. Finally, she noted that the male applicant's 2005 tax return showed a net income of $30,476. She concluded that the applicants were not significantly established financially.

[10] The Officer provided a thorough analysis of risk, and found that the applicants would not face risk amounting to unusual, undeserved or disproportionate hardship if returned to Libya:

a) She reviewed the risk-related findings of the PRRA Officer, with regard to the PRRA Officer's findings of credibility. She accepted the PRRA Officer's conclusions that the evidence did not demonstrate that the applicants would be targeted upon their return.

b) The Officer stated that she was cognizant of the difference between the assessment of risk required of the PRRA Officer and that required in an H&C application. She specifically noted that she relied on the findings of the PRRA Officer, who in turn

relied on the reasons of the Board, as they related to the strength of the allegations that form the basis of the risk allegation.

c) The Officer noted that her review of the documentary evidence did show a poor human rights record for Libya, but that the evidence did not present a situation where the applicants would be likely to personally suffer unusual, undeserved or disproportionate hardship. In particular, she noted positive developments in Libya, and the removal of UN sanctions in 2003.

d) The Officer noted that the applicants' most recent submissions indicated that their primary concern was not risk, but difficulties in relocating their family, finding employment and housing, and the adjustment of the children to the new environment.

[11] The Officer examined the question of the best interests of the children:

a) First, she mentioned that the applicants' children were not subject to removal, since they are Canadian citizens. She noted that the same risk analysis that applied to the applicants would also apply to the children; however, she nonetheless found that the risk specific to the children should be examined. The Officer conducted a thorough review of the documentary evidence and found that nothing in the evidence revealed that the children would suffer undue, undeserved or disproportionate hardship. She found significant the fact that the applicants have two older, Libyan-born children living in Libya, and no evidence was adduced of hardship they had experienced.

b) The Officer attributed significant weight to the overall human rights situation in Libya in the assessment of the best interests of the children. She determined that the Canadian-born children would have a long adjustment, as they do not speak Arabic. She concluded that it would be in the best interests of the children to stay in Canada.

[12] The Officer noted the difficulty and stress that their removal would cause, particularly when compounded with the death of their son, Hisham. However, she did not find that it amounted to unusual, undeserved or disproportionate hardship.

[13] Finally, the Officer considered the male applicant's exclusion due to his complicity in crimes against humanity. She included a lengthy excerpt from the reasons of the Board, and accepted its finding that the male applicant was a member of the Libyan Intelligence Service, which is an organization principally directed to a limited brutal purpose. The Officer noted that she gave significant weight to this fact in her analysis of the H&C application.

[14] The Officer concluded by reviewing the factors considered. She stated that the applicants' establishment in the community for eight years, the trauma of the death of their son, and the best interests of the children, all weighed in favour of granting the H&C application. She noted that the applicants' risk situation, as well as their employment and financial establishment were not significant factors. Finally, she stated that she gave higher weight to the factor of the male applicant's exclusion than to the other factors. She therefore determined that the applicants would not suffer undue, undeserved or disproportionate hardships if returned to Libya, and there were

insufficient H&C considerations to warrant an exemption from the requirement of applying for permanent residence from outside of Canada.

ANALYSIS

Standard of Review

[15] 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).

[16] Following the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 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 55, 57, 62, and 64).

[17] 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).

Did the Officer err by failing to explain why the best interests of the children were insufficient to outweigh the other factors?

[18] The applicants submit that, though it is not determinative, the best interests of the child is an important factor. They argue that the male applicant's exclusion is not a sufficient factor to outweigh all of the other factors, particularly the best interests of the children.

[19] The applicants cite *Malekzai v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1571, at paragraph 25, [2005] F.C.J. No. 1956:

> [25] There is no doubt that the Officer intended to be "alert and alive" to the interests of the child(ren) but appears to have been insensitive. The Officer expressly refused to consider "psychological and emotional factors." In reality, the Office ignored what truly would happen. The father would be removed from Canada, never to return and likely killed or at least tortured. The mother would be left with limited means of support. Is it necessary to create another welfare situation and broken home!

[20] The applicants argue that the Officer should have considered the effect on the children of living in Libya without a father because of the risk factor. I do not accept this argument for two reasons. The case at bar is distinguishable from *Malekzai*, above. In the case at bar, the Officer accepted the findings of the PRRA Officer and the Board, as they relate to the strength of the allegations that form the basis of the risk allegation. One such allegation, which was clearly rejected, was the probability that the male applicant would be killed or detained if removed from Canada. Because the Officer accepted the PRRA Officer and Board's determination that the allegation was unsubstantiated, there can be no question that this was, in fact, considered by the Officer. In *Malekzai* at paragraph 12, it was determined that the applicant would be at risk to life or at risk to cruel and unusual treatment or punishment if returned to Afghanistan.

[21] By this argument, the applicants are asking the Court to reweigh the factors considered by the H&C Officer. This is not the role of the Court, and I decline to do so in the absence of the

reviewable error (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, at paragraph 11, [2002] 4 F.C. 358).

Did the Officer err in failing to assess the female applicant, who was not complicit in crimes against humanity, and consider the possibility of her being allowed to remain in Canada, independently of the male applicant who was excluded?

[22] The applicants also submit that the Officer erred in failing to assess the weight of the exclusion factor as it relates to the case of the female applicant. It is argued that no negative factors were cited by the Officer in relation to the female applicant's claim, and that the Officer was obliged to consider whether the conduct of the male applicant was sufficient to warrant the refusal of the female applicant. Has such proper consideration been given to the female applicant's circumstances, it would have been open to the Officer to grant an H&C exemption for her and not her husband.

[23] I agree with the applicants' submission. The Officer's decision to refuse an exemption to both applicants, without explanation of why the male applicant's exclusion should impact the female applicant's application, is arbitrary; it clearly falls outside the range of acceptable outcomes which are defensible in respect of facts and law.

[24] The respondent submits that the Officer sufficiently assessed the female applicant's claim by referring to her in the analysis of the other factors. I cannot accept this. The Officer clearly articulated in her reasons that the male applicant's exclusion is the determinative factor, as well as the only negative factor. Nothing in the evidence before the Officer links the female applicant to the exclusion. It is contrary to reason that the conduct of the male applicant would be sufficient to

outweigh the positive factors attributable to the female applicant, in the absence of reasons. It has to be remembered that the female applicant had filed for a separate H&C claim.

[25] No questions for certification were proposed and none arise.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be allowed only for the female applicant. The matter is remitted for reconsideration by a different Officer. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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