Federal Court  Cour fédérale

Date: 20110930

Docket: IMM-364-11

Citation: 2011 FC 1123

Ottawa, Ontario, September 30, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

IGOR KOTLER, LYUBOV KOTLER,
ALYONA KOTLER, ROMAN KOTLER

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek to set aside a decision that found that they would not face unusual and undeserved or disproportionate hardship if they were to return to Israel to file an application for permanent residence in Canada. For the reasons that follow, their application is dismissed.

[2] The *Immigration and Refugee Protection Act*, SC 2001, c 27, provides that persons seeking permanent residence status in Canada are to apply before entering Canada: s 11(1). The *Act* provides for an exception "if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected:" s 25(1). It bears repeating that the humanitarian and compassionate (H&C) exemption is an exceptional remedy that is triggered only when it is justified and the applicant bears the onus of providing evidence that establishes that this exceptional exemption is justified. In this case, the officer found that the applicants had failed to meet their burden.

[3] The applicants are citizens of Israel. Igor Kotler and his wife, Lyubov Kotler are 46 years old. They have two children: Alyona Kotler, age 23, and Roman Kotler, age 22.

[4] On February 27, 2001, the Kotler family arrived in Canada. They had not obtained a visa to enter Canada and they made no claim for refugee protection. In February 2002, Mrs. Kotler was issued a study permit valid until August 2002. She later filed an application for permanent residence in the skilled worker category which was approved in principle but was refused on June 26, 2001 after she failed to appear for the interview.

[5] On March 23, 2006, Mr. Kotler was refused a work permit. His subsequent application for permanent residence in the skilled worker category was refused on October 19, 2010.

[6] On September 8, 2006, the applicants filed their application for permanent residence status on H&C grounds. They alleged that that they had establishment in Canada and that there would be hardship for the children in returning to Israel because neither Roman Kotler nor and Alyona Kotler has done their military service in Israel: they were 11 and 12 years old, respectively, when they came to Canada with their parents. It was submitted that upon returning to Israel, they could go to prison and be required to serve in the Army.

[7] At the hearing, the applicants submitted that there were two issues raised in their application: (1) whether the officer failed to observe a principle of natural justice and (2) whether the officer failed to properly consider the best interests of the children. The first is reviewable on the standard of correctness; the second, on the standard of reasonableness.

[8] With respect to the first issue, the applicants submit that "the Officer's rejection of filed evidence in support of the Application means that the Officer ignored evidence and made a negative finding in spite of positive evidence in favour of the Applicants." I am not convinced that the officer rejected or ignored any evidence tendered by the applicants. Rather, the officer assigned less weight to the evidence the applicants say supported their application and assigned more weight to evidence that did not.

[9] The claim that evidence was ignored is without merit. The applicants filed documents in this application by way of affidavit that were not before the officer. One cannot be found to have ignored evidence when that evidence was not before one. The Court is bound to review the

decision and the decision-making process based solely on the material that was before the decision-maker. In this case, I am satisfied that the officer considered all of the evidence that was put before him or her.

[10] The applicants submit that the officer erred and fettered his or her discretion by focusing on their failure to comply with their obligation to file tax returns. They were aware that this was of concern because on August 10, 2010, the officer asked them to provide "Federal and provincial income tax reports and Notices of assessment for the past three (3) years." Despite the officer's explicit request, the applicants did not submit any evidence to demonstrate that they had complied with their personal or corporate tax obligations. The officer said that in his or her view, "not abiding by Canadian immigration and income tax laws constitutes a negative element to which I attach considerable weight." In my assessment, the view the officer took of this evidence cannot be said to have been unreasonable, particularly when the applicants were alerted that this was of concern.

[11] The applicants further submit that the officer failed to consider all of the positive evidence related to their business activities by focusing only on the negative aspects of their claim. Although the applicants did provide some information on their operating company, I.Con Inc., it was incomplete. It failed to show that the incorporation of the business continued to be valid and they provided no evidence to support the claim that it employed 22 people. Moreover, the record shows that none of the applicants were entitled to legally work in Canada but they had done so for ten years. The officer said that he or she "grant[ed] weight to the fact that the

applicants have not abided by Canadian laws." In my view, these were relevant considerations and the officer's assessment of the evidence was not unreasonable.

[12] An applicant who has established a successful business and maintained it for a number of years in accordance with the laws of Canada is deserving of recognition of that fact when considering his or her establishment in Canada. An applicant who points to the same business creation and success but who did so illegally can hardly be said to have shown establishment in Canada of the sort that makes him or her deserving of an exceptional exemption leading ultimately to permanent residency.

[13] In my view, the officer considered all the relevant facts and the conclusion reached regarding the applicants' establishment in Canada was reasonable.

[14] With respect to the second issue, the applicants submit the officer erred in failing to consider the best interests of the children relating to their obligation to perform military service in Israel and the possible consequences for having failed to do it.

[15] It is clear from the decision that the officer carefully examined the children's best interests, despite the fact that they are no longer under the age of 18 but are adults.

[16] The officer noted that the children finished their studies and held jobs. It was noted that what they had learned in Canada was transferable to Israel and that there was no evidence

establishing any language, psychological or physical problems that they would face if they were to return to Israel. It was also noted that the parents had not demonstrated their inability to meet their children's needs in the event that they were to return to Israel.

[17] The officer also closely examined the potential impact of the military service requirement on the children. Based on materials from the Research Directorate of the Immigration and Refugee Board, the officer found that: (1) although avoiding military service is a crime in Israel, those who leave before the age of 16 with their parents, such as these children, are eligible for an exemption or deferment of the service provided they file an application at a diplomatic mission abroad; (2) that neither of the applicant children claim to be conscientious objectors; and (3) the requirement is a law of general application in Israel and does not therefore constitute unusual and undeserved or disproportionate hardship.

[18] Based on these facts, the officer's conclusion that there was no risk to the children that warranted an H&C exemption was reasonable.

[19] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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