Date: 20080723

Docket: IMM-3881-07

Citation: 2008 FC 900

Toronto, Ontario, July 23, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MOHAMAD MUGHRABI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of an immigration officer (Officer) dated September 17, 2007 (Decision) refusing the Applicant's application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds.

BACKGROUND

[2] The Applicant is a citizen of Jordan of Palestinian ethnicity. He left Jordan and entered the United States in June 1996. He entered Canada on May 6, 2003 at which time he made a claim for refugee status. The Refugee Protection Division of the Immigration and Refugee Board denied his claim for refugee protection on June 15, 2004. The Applicant's Pre-removal Risk Assessment (PRRA) was denied on June 16, 2005. The Applicant sought leave and judicial review of the negative PRRA decision. On October 6, 2005, the application for leave was dismissed by this Court and on September 17, 2007, a removal order was issued against the Applicant requiring the Applicant to leave Canada on September 27, 2007.

[3] In the meantime, on November 24, 2006, the Applicant submitted an application for permanent residence in Canada on H&C grounds. This application was refused on September 17, 2007. This is the Decision subject to judicial review in the present application. A stay of the removal order has been granted pending the outcome of this application for judicial review.

DECISION UNDER REVIEW

[4] In her Decision, the Officer set out the factors for and against the Applicant's H&C application and concluded that there were insufficient H&C grounds to warrant waiving the requirement that the Applicant apply for a visa outside Canada. The Officer noted that the Applicant's H&C application was based on the emotional and physical dependency placed upon the

Applicant by his extended Canadian family, including his aunt, uncle, and their five children. The Officer acknowledged that the Applicant's cousins depended on the Applicant for physical care and emotional support, but noted that the children would be cared for by their biological parents in Canada if the Applicant applied for permanent residency outside of Canada.

[5] The Officer also considered the hardships caused to the family if the Applicant was required to make his application from outside Canada and concluded that they would not be "more unusual and undeserved or disproportionate then [*sic*] other family members in Canada face who are separated from their relatives outside of Canada."

[6] The Officer then noted that the Applicant could return to the United States to join his wife, a U.S. citizen, who may be able to provide emotional and financial support to the Applicant, and that such a return would support the interests of family re-unification. The Officer also acknowledged that if the Applicant returned to Jordan, the country conditions would be less appealing than those in Canada, but held that the conditions he would face were no more unusual or undeserved with respect to hardships than those faced by other persons in Jordan and in other countries. The Officer thus concluded that there were insufficient H&C grounds to warrant waiving the visa requirement and refused the Applicant's application for permanent residence within Canada.

ISSUES

[7] The issues on this application for judicial review are:

1. Did the Officer ignore the two psychological reports submitted in support of the Applicant's H&C application when making her Decision?

2. Did the Officer fail to consider the best interests of the children?

3. Is the Officer's Decision unreasonable?

STATUTORY FRAMEWORK

[8] The following provisions of the Act are applicable in the case at bar:

Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11. (1)** L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.
Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and	**25. (1)** Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou

compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	l'intérêt public le justifient.

STANDARD OF REVIEW

[9] Recently, in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada decided upon a single form of "reasonableness" review after recognizing that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (*Dunsmuir* at para. 44).

[10] The Supreme Court of Canada in *Dunsmuir* also held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake an analysis of the four factors comprising the standard of review analysis.

[11] Prior to *Dunsmuir*, it was well-settled that the standard of review applicable to an officer's decision of whether or not to grant an exemption based on humanitarian and compassionate considerations was reasonableness *simpliciter* (*Baker v. Canada (Minister of Citizenship and*

Immigration), [1999] 2 S.C.R. 817 at para. 61. In light of the Supreme Court of Canada's decisions in *Baker* and *Dunsmuir* and the previous jurisprudence of this Court, I find the applicable standard of review is reasonableness. When reviewing a decision on this standard, the Court may only intervene if the Officer's Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47).

ANALYSIS

1. *Did the Officer ignore the two psychological reports submitted in support of the Applicant's H&C application when making her Decision?*

[12] The Applicant argues that the Officer failed to properly consider the two psychological reports submitted in support of his H&C application and so committed a reviewable error. He submits that the Officer made only a summary mention of the psychological reports and failed to engage in an in-depth explanation as to why the Officer rejected the findings contained in the reports. This fleeting mention of such key evidence, argues the Applicant, does not meet the requirement that an Officer must consider all the evidence provided by the Applicant.

[13] The Respondent argues that the Officer's reasons for her Decision demonstrate that she had regard to all the evidence, including the two psychological reports. The Respondent submits that the Officer acknowledged what the reports said about the possibility of the family suffering psychologically. However, the Officer found that the biological parents would still be able to care for the children, that there were social and medical systems in place in Canada to assist the family

members if they did experience psychological trauma, and that any hardships the family might suffer are no more unusual and undeserved or disproportionate than other families who undergo such separation. The Respondent submits that it is clear from the Officer's decision that the psychological reports were considered and the Applicant is really taking issue with the weight given to the reports. The Respondent argues that it is not the role of the Court to undertake a re-weighing of the evidence, nor is it open to the Court to substitute its opinion for that of the Officer.

[14] After reviewing the Decision, I am not convinced that the Officer ignored the psychological reports submitted in support of the Applicant's permanent residence application. The Officer made specific reference to the reports as part of the list of documents she considered. She also made reference to information contained in the reports, such as the close relationship between the Applicant and his aunt, that his aunt and uncle have had health issues, and that the Applicant has spent time caring for his cousins, and the "close and loving bond" the Applicant has developed with his cousins, especially the youngest cousin, Jenan. The Officer also noted as follows:

> [a]lthough the psychological reports dated 14Oct2005 and 17Jan2007 state that Mr. Mughrabi's family members will suffer psychologically if he leaves Canada, especially the youngest cousin, Jenan, age four, his five young cousins have their biological parents in Canada who are still able to provide financial support and physical and emotional care to them.

[15] Based on these references, and although I agree that the Officer only made a summary mention of the evidence contained in the psychological reports, the Applicant has failed to establish that the Officer ignored the psychological reports when assessing the Applicant's application and the H&C factors in his case.

2. *Did the Officer fail to consider the best interests of the children?*

[16] The Applicant submits that the Officer was not alert, alive and sensitive to the best interests of the children affected by the Decision when she rejected the Applicant's H&C application. The Applicant relies on the Federal Court of Appeal's decision in *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para. 32, wherein the Court provided the following summary of the applicable jurisprudence:

> **32** It was also common ground that an officer cannot demonstrate that she has been "alert, alive and sensitive" to the best interests of an affected child simply by stating in the reasons for decision that she has taken into account the interests of a child of an H & C applicant (Legault, at para. 13). Rather, the interests of the child must be "well identified and defined" (Legault, at para. 12) and "examined ... with a great deal of attention" (Legault, at para. 31). For, as the Supreme Court has made clear, the best interests of the child are "an important factor" and must be given "substantial weight" (Baker, at para. 75) in the exercise of discretion under subsection 114(2).

[17] The Applicant also relies on Justice Campbell's recent decision in *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165, wherein the Court considered the terms "alert, alive and sensitive." In that case, the Court held that being "alert" required that an Officer demonstrate awareness of the child's best interests by noting the ways in which those interests were implicated. To be "alive," the Officer must consider the best interest factors in their full context, and the relationship between those factors and other elements of the fact situation must be fully understood. To demonstrate sensitivity, the Officer must be able to clearly articulate the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants H&C relief.

[18] In support of his argument that the Officer was not alert, alive and sensitive to the best interests of the child, the Applicant argues that the Decision only contains the statement that "the hardships that [the Applicant's] cousins would face are not more unusual and undeserved or disproportionate then [*sic*] any other family members in Canada face who are separated from their relatives outside of Canada." This statement, argues the Applicant, does not meet the standard for an alive, alert and sensitive assessment of the best interests of the children in this case.

[19] The Applicant argues that it was incumbent upon the Officer to consider the effect that his removal, as evidenced in the psychological reports, would have on his cousins. The Applicant submits that the Officer failed to fully consider the effect and merely restated the grounds upon which the Applicant made his H&C application, and gave a fleeting review of the impact the removal would have on the children. In the Applicant's view, the Officer failed to properly identify and define the best interests of the children or examine these interests with due attention, as required by the *Hawthorne* decision.

[20] Finally, the Applicant notes that the child affected need not be the Applicant's child. The applicant relies upon this Court's decision in *Momcilovic v. Canada (Minister of Citizenship and Immigration)* (2005), 268 F.T.R. 150, 2005 FC 79, wherein Justice O'Keefe held at paragraph 45:

> **45** A plain reading of subsection 25(1) indicates that subsection 25(1) is broader than the best interests of a parent's own child. The section does not use wording such as "child of the marriage" or "the applicant's child". It refers to the best interests of a "child directly affected".

[21] The Respondent argues that although the best interests of the children are important, they are not determinative (*Hawthorne*, *supra*). Instead, they must be balanced against other factors. The Respondent submits that the Officer engaged in the balancing test and considered the Applicant's failed refugee claim, the failed PRRA application, and the psychological reports. The Respondent submits that the Officer's reasons demonstrate that the Officer had regard to the specific factors of the case, the context of hardship and the suffering that would result from a negative decision, and was thus alert, alive and sensitive to the children's best interests.

[22] The Respondent notes that this case is distinguishable from *Kolosovs*. In that case, the grandfather was present at the birth of all the children, he emotionally and financially supported the children, and he was the only father figure the children knew. Further, in *Kolosovs*, the Officer did not have regard to the best interest of the children in that he failed to take into account a key factor: one of the children had juvenile diabetes and was in a diabetic coma. The Respondent submits that, in the present case, the Decision captures the substance of the reports and does not omit any key factors. The Officer considered the full context, recognizing that the children would still have their biological parents and siblings to rely on and that the Applicant was not the children's parent or primary caregiver. According to the Respondent, the Applicant is once again asking this court to reweigh the evidence that was before the Officer.

[23] The Applicant and his Canadian family went to a great deal of trouble in this case to provide detailed reports from qualified professionals that specified the problems and the trauma that would

be faced by this family, and the children in particular, if the Applicant had to leave the country. The Officer deals with the reports by acknowledging the trauma but then discounting it by saying that:

a. The biological parents in Canada will be "able to provide financial support and physical and emotional care to them";

b. "There are numerous social and medical systems in place in Canada to assist with these issues"; and

c. The "hardships that his aunt, uncle, and cousins would face are not more unusual (*sic*) and undeserved or disproportionate then (*sic*) other family members in Canada face who are separated from their relatives outside of Canada."

[24] In other words, the Officer says she had considered the reports but the conclusion is that this is no more than the usual case of separation and does not meet the required standard.

[25] The problem with these conclusions is that they are little more than disagreement with the psychological reports themselves which, after a very thorough investigation of this particular family, conclude that the separation could have some very serious and unusual consequences indeed, particularly as regards young Jenan.

[26] The Officer is perfectly entitled to reject the reports or to conclude that there are other factors besides the interests of the children that outweigh the findings in the reports, but there must be some evidentiary and/or rationale basis for doing so that is fully explained in the reasons.

[27] The reports paint a picture that is so fraught with trauma that the Officer was obligated to make perfectly clear why that trauma could be discounted as being no more than the usual hardship resulting from separation. In Jenan's case, for instance, it is not possible to tell why the Officer should consider "attachment disorder" and possible "Oppositional Defiant Disorder" as just part of the usual consequences of separation.

[28] Without an adequate explanation, and the reliance upon generalities that do not address the specifics of this case, it cannot be said that the Officer was really alert, alive and sensitive to the interests of these particular children and, for that reason, I have to conclude that the Decision is unreasonable.

3. *Is the Officer's Decision unreasonable?*

[29] The Applicant argues that the Officer had no grounds for rejecting the psychological reports or for substituting her opinion over those of the psychologists. The Applicant argues that the Officer held that the Applicant's family would not suffer more unusual hardship than other Canadian families who are separated from their relatives outside Canada, yet the psychological reports clearly demonstrated that the Applicant's family would suffer serious and irreparable harm. The reports also make specific reference to each family member and the long-lasting and possible psychological damage that they may suffer if the Applicant is removed from Canada. The Applicant argues that the Officer did not provide any supporting evidence for rejecting the findings of the psychological reports. There was no reference to possible errors in the reports, nor any reference to competing

reports or expert opinions. Thus, according to the Applicant, the Officer erred by substituting her opinion for those contained in the two expert reports. The Officer’s opinions on psychological impact, suggests the Applicant, were not supported by the evidence and were therefore unreasonable.

[30] The Respondent submits that it was open to the Officer to reject the psychological reports or substitute her opinion for that of the reports. This is precisely the Officer’s job, argues the Respondent, and to do otherwise would amount to a fettering of her discretion. The Respondent submits that the psychological reports were but one factor to consider in deciding whether to grant the H&C application and argues that the Decision is supported by the reasons and withstands a probing examination.

[31] I agree with the Respondent that the reports were but one factor to consider and that it was open to the Officer to reject the reports. But for reasons I have already given, I do not think the Applicant is simply asking the Court to re-weigh the evidence and to come to a different conclusion. The Officer does not address the specifics of the reports, relies upon unsupported generalizations to discount them, and, without any real basis or explanation, treats as “usual” what the reports say is extremely serious and more than usual. For these reasons, I think the Decision is unreasonable and the matter needs to be reconsidered.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Application is allowed and the matter is returned for reconsideration by a different officer;
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3881-07
STYLE OF CAUSE:	*Mohamad Mughrabi v. Minister of Citizenship and Immigration*
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	July 10, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	RUSSELL J.
DATED:	July 23, 2008

APPEARANCES:

Hafeez Khan	FOR THE APPLICANT
Aliyah Rahaman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Booth Dennehy LLP Barristers & Solicitors Winnipeg, Manitobe	FOR THE APPLICANT
John H. Sims, QC Deputy Attorney General of Canada	FOR THE RESPONDENT