Date: 20081103

Docket: IMM-1142-08

Citation: 2008 FC 1218

BETWEEN:

RENATA ARINA MAKIAS
OR MAKIAS
SHANY MAKIAS

Applicants

and

THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS and
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondents

REASONS FOR JUDGMENT

BLANCHARD J.

I. Introduction

[1] The Applicants, Renata Arina Makias, and her two children, Or Makias and Shany Makias, seek judicial review of a negative humanitarian and compassionate (H&C) decision rendered by a Pre-Removal Risk Assessment Officer (the Officer) on March 5, 2008 pursuant to s. 25 of the *Immigration and Refugee Protection Act* (the Act).

II. Facts

[2] The principal Applicant, Renata Arina Makias, her husband, Mr. Yossef Makias, and their children, all citizens of Israel, arrived at Dorval Airport on January 29, 2003, as visitors. They subsequently claimed refugee status. A negative decision denying their refugee claims was rendered on November 24, 2003. An application for leave and judicial review of this decision was denied on June 17, 2004.

[3] The principal Applicant claims that her husband became physically abusive towards her soon after their marriage. She had hoped this situation would improve when they came to Canada. However, the principal Applicant claims that her husband became violent again upon moving to Vancouver, British Columbia, in 2004.

[4] The couple separated following a violent incident in June 2004. Mr. Makias had threatened to kill the principal Applicant and his daughter. As a result, the principal Applicant called the police and Mr. Makias was arrested and charged with uttering threats to cause death or bodily harm to his wife. He was subsequently released on conditions which included a restraining order forbidding him from having any contact with his wife or his children. Mr. Makias did not respect those conditions and was convicted before the Provincial Court of British Columbia of “breach of recognizance”.

[5] On October 14, 2004, the principal Applicant filed a Pre-removal risk assessment (PRRA), which application was denied on December 6, 2004. An application for leave and judicial review of this decision was denied on April 27, 2005, at the leave stage.

[6] The principal Applicant failed to appear for two interviews in British Columbia with the Canada Border Services Agency (CBSA) to plan her removal to Israel. These meetings were scheduled for July 7, 2005 and July 11, 2005 respectively.

[7] On February 9, 2005, the principal Applicant filed a first application for an exemption from filing an application for permanent residence from outside Canada for humanitarian and compassionate reasons (the H&C application). The application was denied on November 23, 2005. The decision denying the application was not challenged before this Court.

[8] In July 2005, the principal Applicant learned that Mr. Makias had returned to Israel. She moved to Montréal with her children and on August 5, 2005, commenced divorce proceeding against her husband.

[9] On July 13, 2005, the principal Applicant presented herself at the CBSA in Montréal and was advised that her departure was scheduled for July 23, 2005. She failed to appear for removal on July 23, 2005 and a warrant of arrest was issued against her on July 25, 2005.

[10] The principal Applicant's divorce petition was granted by the Superior Court of Québec on March 8, 2006 and the Court granted custody of the children to the principal Applicant.

[11] On November 16, 2006, Mr. Makias obtained an Israeli court order granting him custody of the children. On October 18, 2007, he appealed the decision of the Superior Court of Québec, granting the principal Applicant's application for divorce and custody of the children. The principal

Applicant was arrested on January 24, 2008, and detained at the Immigration Prevention Centre in Laval, Quebec. At that time, she refused to divulge the location of her children.

[12] On May 8, 2008, the Québec Court of Appeal quashed the divorce judgment and the custody order. The Court held that the allegations against Mr. Makias by the principal Applicant and the children under her control must be treated with great circumspection. At paragraph 88 of its reasons, the Court wrote:

> […] Sous l'éclairage de l'ensemble de la preuve, la Cour estime que toute allégation de violence à l'endroit de l'intimée et des enfants doit être reçue avec grande circonspection dans la mesure où, sans être autrement corroborée, elle provient de l'intimée ou de personnes soumises à son influence […].

[13] The Officer did not have before him the decision of the Québec Court of Appeal since it was rendered after the March 8, 2008 decision under review.

III. Decision Under Review

[14] In his decision, the Officer considered the Applicants' risk of return to Israel by reason of the Israeli-Palestinian conflict and the consequence of potential domestic abuse by Mr. Makias on the Applicants; the degree of establishment in Canada of the Applicants; and the best interest of the Applicant children.

[15] With respect to the risk associated with the Israeli-Palestinian conflict, the Officer found that:

(a) evidence shows that the Palestinian terrorist cells rarely target precise individuals, but rather the Jewish population at large;

(b) given that the Jewish population comprises 76% of the Israeli population, it can not be concluded that the Applicants face a personalized risk; and

(c) all the reports consulted indicate that the Jewish state is actively working to protect its citizens from such attacks.

[16] Regarding the risk associated with potential domestic abuse by Mr.Makias, the Officer determined that:

(a) sources indicate that legal recourse for victims of conjugal violence exists in Israel;

(b) the Israeli State understands the serious nature of the problem and established a ministerial committee whose mandate is to combat violence in all its forms;

(c) many Israeli cities have safe houses for battered women and many safe houses for children at risk of abuse;

(d) Israel has in place laws forbidding psychological, physical and sexual abuse of children; and

(e) as a result, the Applicants could seek the protection of the state.

[17] In respect to establishment in Canada, the Officer found that the Applicants had failed to show they were significantly established in Canada and would be subject to unusual and undeserved, or disproportionate hardship if they were to apply for permanent resident status from abroad.

[18] On the best interest of the Applicant children, the Officer found that:

(a) the documentary evidence suggests that the principal Applicant would have recourse to the civil courts in Israel to challenge the custody order granted to her husband; and

(b) the principal Applicant and her children have access to state protection and safe house protection should the husband continue to be abusive upon their return.

IV. Issues

[19] The principal Applicant raises the following issues:

1. the Officer failed to be alert, alive and sensitive to the best interests of the children by failing to define the benefits and hardships that the children would experience. In particular:
    (a) the Officer failed to examine the impact on the children when they are in the hands of their violent father for the period of time it would take their mother to (hopefully) regain their custody in the Israeli courts;
    (b) the Officer ignored some of the key evidence pertaining to the best interests of the children such as the letter from the principal of the Jewish Day School in Richmond, BC;
    (c) the Officer erred in law by acting contrary to the decisions of the two Canadian provincial courts;
    (d) the Officer ignored and misapprehended the evidence pertaining to the Applicant's alleged ability to regain custody of her children from the Israeli civil courts.

2. The Officer ignored and misapprehended the evidence of personalized risk pertaining to the Applicants' fear of physical violence from Mr. Makias, by restricting himself to a general analysis of the issue of state protection in Israel.

V. Standard of Review

[20] Issues raised by the Applicants concerning determinations of fact and the weighing of evidence are to be reviewed on a standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, 1 S.C.R. 190 at para. 51).

[21] A reasonable decision is one that upon weighing of the factors falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, *supra* para. 47).

VI. Preliminary Objection

[22] The Respondents raise the following preliminary matter. It is submitted that the principal Applicant does not have clean hands and that the seriousness of her misconduct is such that the merits of her application should not be determined and that relief should not be granted. The Respondents state that the principal Applicant failed to report for removal and as a result was subsequently arrested. She also failed to cooperate with the CBSA and consistently refused to reveal the whereabouts of her children, the co-Applicants in this application, until two months after her arrest. Further, the Respondents point to the recent Court of Appeal of Québec decision which

raises very serious doubts as to the truthfulness and reliability of the allegations of domestic violence made, in that proceeding, against Mr. Makias by his wife.

[23] When the clean hands doctrine is invoked, the Federal Court of Appeal teaches that "…the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection for fundamental human rights." See *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)* 2006 FCA 14 at paragraph 10. The factors to be considered in balancing these interests include the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question.

[24] Here, the evidence of the most serious misconduct by the principal Applicant stems from observations and findings by the Court of Appeal of Québec in its decision quashing the principal Applicant's divorce decree and order granting her custody of her children. While these findings bring into question the reliability of the principal Applicant's evidence against Mr. Makias, in my view, they cannot be used to deny the Applicants' access to the prerogative relief sought. The alleged misconduct pertains to the very issue that forms the basis for the principal Applicant's claim in this application, that is Mr. Makias' conduct vis-à-vis his children. However, the alleged misconduct has not been established before this Court. The record which supported the Court of Appeal of Québec decision is not before this Court for consideration. Without such an evidentiary record, a proper balancing of the interests to determine to what extent the alleged misconduct would undermine proceedings before this Court cannot be conducted in the circumstances. Further, the alleged misconduct of the principal Applicant, if established, cannot be imputed to the principal

Applicant's children, the co-Applicants in this case. Their interest must be considered in the balance. In the exercise of my discretion, I will therefore proceed to consider the application on its merits.

VII. Analysis

[25] At the outset, I note that the Applicants do not challenge the Officer's conclusion regarding their degree of establishment in Canada. Nor do they challenge the Officer's determination concerning their risk of return to Israel by reason of the Israeli-Palestinian conflict. The principal Applicant essentially challenges the Officer's finding relating to the best interest of the children. In particular the principal Applicant argues that since the Israeli court order provides for the "immediate" transfer of the children to Mr. Makias, it is likely that he would take the children into custody upon their arrival in Israel. The principal Applicant does not dispute the fact that the state of Israel has the institutional means to protect the interest of the children, but this would require the principal Applicant to pursue legal recourse to obtain custody. In the meantime the children would be with Mr. Makias, and given his past record of violence, the principal Applicant argues that they would suffer irreparable harm at the hands of their father.

[26] In his decision, the Officer reasoned that there was state protection to address the principal Applicant's concerns in Israel. The Officer wrote:

> Devant ces informations, je suis satisfait que la demanderesse pourrait se prévaloir de la protection des autorités israéliennes si elle et les enfants étaient à nouveau victime de son ex-conjoint et père des enfants.

[27] The Officer appears to be suggesting that state protection would be available to the children should they again be victimized by Mr. Makias. The Officer does not address the principal Applicant's main argument, that is to say what happens before the Israeli authorities have an opportunity to review the custody order. The Officer had before him evidence of Mr. Makias' past violent behaviour including: a restraining order issued against Mr. Makias by the Provincial Court of Bristish Columbia as a result of an incident involving threats to the principal Applicant and his daughter; a conviction for breaching certain conditions of that order by Mr. Makias; and a letter from school authorities in British Columbia evidencing the negative reaction of the children when they were approached by Mr. Makias at school. On its face, the Israeli Custody Order does not appear to indicate that these factors were considered. This is difficult to know as I do not have the record of that proceeding before me. However, the Israeli Order does emphasize that the principal Applicant was in Canada illegally and that an arrest warrant had issued against her.

[28] Given the record before the Officer, I am of the view that he was required to expressly deal with and provide reasons for rejecting the principal Applicant's argument and evidence in respect to this issue. In the circumstances, it was insufficient to simply state that state protection was available if the children were again victimized or placed in jeopardy. Risk of harm to the children had to be weighed in light of Mr. Makias' prior history of violence in Canada in the event their physical custody was to be "immediately" assumed by him upon their return to Israel. Given its importance, by failing to consider this evidence, I am left to conclude that the Officer

made his decision without regard to the material before him in respect to the best interest of the children. In so doing, the Officer committed a reviewable error. In the circumstances, it cannot be said that the Officer was alive and alert to the best interest of the children.

VIII. Conclusion

[29] As a consequence of the reviewable error by the Officer, discussed above, the application will be allowed.

[30] On judicial review, absent exceptional circumstances, the reasonableness of the decision under review is considered on the basis of the record that was before the decision maker. In this case, developments which occurred since the Officer's decision have been brought to my attention. Of particular concern is the decision of the Court of Appeal of Québec allowing Mr. Makias' appeal of the principal Applicant's petition for divorce and custody order. As indicated above, the findings of the Court of Appeal of Québec bring into question the reliability of the principal Applicant's evidence against Mr. Makias concerning alleged incidents of violence involving the children. In the particular circumstances of this case, the interest of justice requires that the evidentiary basis for these findings of the Court of Appeal of Québec be explored. To that end, I will be directing that the matter be returned for re-consideration by a different immigration officer in accordance with these reasons. At the re-consideration hearing, the parties may adduce evidence to deal directly with the findings of the Court of Appeal of Québec regarding the alleged incidents of violence by Mr. Makias against his children and the principal Applicant. Further, additional evidence of country conditions may also be adduced by either party.

IX. Certified Question

[31] Counsel are requested to serve and file any submission with respect to certification of a question of general importance, if any, within fifteen (15) days of receipt of these reasons. Each party will have a further four (4) days to serve and file any reply to the submission of the opposite party. Following consideration of those submissions, an order will issue allowing the application for judicial review and disposing of the issue of a serious question of general importance as contemplated by section 74(*d*) of the IRPA.

"Edmond P. Blanchard"
Judge

Ottawa, Ontario
November 3, 2008

FEDERAL COURT

SOLICITORS OF RECORD

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