Federal Court  Cour fédérale

Date: 20230323

Docket: IMM-8895-21

Citation: 2023 FC 403

Ottawa, Ontario, March 23, 2023

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SARA HAMDY NASSEF HASSAN FOUDA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Fouda [Sara] seeks judicial review of the decision refusing her application for permanent residence in Canada on humanitarian and compassionate [H&C] grounds. As noted by both counsel at the hearing, Sara and her family have a lengthy relationship with the Immigration authorities in Canada. Aspects of that relationship are relevant when considering this application.

Background

[2] Sara was the principal applicant in an application for permanent residence on H&C grounds. Her spouse, Haitham Fathalla [Haitham], and the couple's eldest son, Yahia Fathalla [Yahia] were included in that application as accompanying dependents. They are all citizens of Egypt. The couple's younger son, Yousef Fathalla [Yousef] is a Canadian citizen by birth.

[3] Sara and her family previously had permanent resident status in Canada.

[4] Haitham had applied for permanent residence as a skilled worker in 2004. In August 2006, while that application was still in process, he and Sara were married. Yahia was born in October 2007. The permanent residence application was updated to include his wife and son as accompanying dependents and the application was approved in June 2008. The family travelled to Canada in July 2008 and landed as permanent residents.

[5] The family had been living in the United Arab Emirates [UAE] since January 2008 and they returned to the UAE shortly after landing as permanent residents of Canada.

[6] In September 2009, Sara returned to Canada and gave birth to Yousef. She and her young son returned to the UAE shortly after his birth.

[7] Sara and Haitham are both pharmacists with credentials from the University of Alexandria in Egypt. They travelled separately to Canada in 2011 to write evaluating

examinations – the first step to have their foreign credentials recognized to enable them to practice their profession in Canada. After the examinations, they returned to the UAE.

[8] Sara returned to Canada with the children in August 2013 to settle permanently. Yahia was six years old and Yousef was three. They have not left Canada since arriving nearly nine years ago.

[9] Prior to Sara and the children settling in Canada in August 2013, the family had applied to renew their permanent residence cards in April 2013. The applications, prepared by Haitham, included false information with respect to the family's residency in Canada. Because of that misrepresentation, Haitham and Sara were each charged with misrepresentation under section 127 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The charges against Sara were subsequently withdrawn.

[10] Haitham pled guilty to the offence. He paid a fine of $20,000.00.

[11] Because the family was not present in Canada for at least 730 days during their initial five-year assessment period, Sara, Haitham, and Yahia were issued Departure Orders in June 2014 for failing to comply with the residency obligation. Importantly, they were not issued Exclusion Orders for misrepresentation as that would have rendered the family inadmissible for a period of five years and would have precluded any appeal. As it was, failing to comply with the residency requirement allowed the family to initiate an appeal to the Immigration Appeal Division [IAD], which they did in June 2014. The family did not contest the legal validity of the

Departure Orders – they acknowledged that they did not meet the residency obligation – but they argued there were sufficient H&C grounds to justify the appeal.

[12] The family's appeal was heard by the IAD on May 11, 2017, and was refused in a decision dated May 31, 2017. As a result, Sara, Haitham, and Yahia lost their permanent resident status and were subject to removal.

[13] With the Departure Orders in force, the family were issued a Pre-Removal Risk Assessment [PRRA] in October 2017. The PRRA application was refused on May 31, 2018.

[14] Sara, Haitham, and Yahia submitted an H&C application in June 2018 asking to be able to apply for permanent residence from within Canada. They based their application on their establishment in Canada, ties to Canada, the best interests of the children, and their risk of return to Egypt. The family fully disclosed the fact that their permanent resident status had been revoked because of misrepresentation and that Haitham had pled guilty to the offence and been fined. In the H&C application the family sought exemptions to subsection 36(2) and sections 28 (breach of residency obligation), 40 (misrepresentation) and 41 (inadmissibility for non-compliance for continuing employment following loss of permanent resident status after unsuccessful IAD appeal) of the Act.

[15] On November 14, 2019, the H&C application received first-stage approval. The decision was based on the best interests of the children. The officer wrote:

> Having carefully reviewed all of the evidence before me, I find that the best interests of the child is determinative. I find that Yousef

> will benefit from the ongoing medical care from doctors in Canada. As such, I find that it would be in the best interests of the child for the applicants to remain with him in Canada to continue to provide care and support to him.
>
> I have considered all information and evidence regarding this application in its entirety. I considered the personal circumstances of the applicants including their establishment in Canada, ties to Canada, the best of interests of the child and their risk of return to Egypt. After reviewing the factors and evidence presented herein, I am satisfied that the applicants have established that a positive exemption is warranted on H&C grounds. [emphasis added]
>
> The application is approved.

[16] Notwithstanding the officer's assertion that he or she had considered all the information in the application, the decision was reversed in an undated and unsigned "addendum" that reads as follows:

> On November 14th 2019, a positive decision on the above noted clients' humanitarian and compassion application was rendered. In the Written Reasons and Decision, I found that the best interests of the child, Yousef, to be determinative.
>
> It has come to my attention that male applicant, Haitham Mohamed Tawik Adebelfattah, was found guilty for directly or indirectly misrepresenting or withhold material facts relating to a relevant matter that induced or could have educed an error in the administration of the *IRPA*, to wit: provide false information in a Canadian Permanent Resident Card renewal application and failure to comply in The Provincial Her Majesty the Queen order#1776350 dated July 10th, 2015. The male applicant was fined to pay $20,000.00.
>
> Having carefully considered all of the evidence before me, I give significant negative weight to the male applicant's complete disregard for Canadian immigration laws. As such, I find that his behaviour outweighs the best interests of the child, Yousef. I have conducted a review of country conditions in Egypt and I find that Yousef will benefit from sufficient health care there. I acknowledge that different standards of living exist between countries. Many countries are not as fortunate to have the same social, including financial and medical supports as can be found in

> Canada. However, Parliament did not intend for the purpose of section 25 of the *Immigration and Refugee Protection Act* (IRPA) to be to make up for the difference in standard of living between Canada and other countries. Rather, the purpose of section 25 of the Act is to give the Minister the flexibility to deal with extraordinary situations which are unforeseen by IRPA where humanitarian and compassionate grounds compel the Minister to act.
>
> Having balanced the humanitarian and compassionate factors present in this case against the male applicant's complete and deliberate disregard for Canadian immigration laws, I find the latter outweighs the former. I recognize the applicants' ties to Canada and the children in and of themselves are compelling factors; however, I do not find that the sum of these factors or any of the others raised by the applicants sufficient to overcome the male applicant's disregard for immigration laws.
>
> For all the stated reasons, this application is refused.
>
> [emphasis added]

[17] After the Court granted leave to judicially review this decision, the Minister agreed to conduct a new assessment of their H&C application if the family agreed to discontinue the application. That agreement resulted in the reassessment of the application, which was negative and resulted in the decision now under review.

[18] As in their first H&C application, the family submitted that their establishment in Canada, ties to Canada, the best interests of the children, and their risk of return to Egypt warranted a positive result in their application. Supplementary evidence was filed supporting the application.

Issues and Analysis

[19] The Applicant asserts that the decision under review raises two issues:

1. Whether the officer breached the principles of fundamental justice in demonstrating a reasonable apprehension of bias with respect to the application; and
2. Whether the decision is unreasonable.

[20] Both counsel acknowledged that H&C decisions are among the most difficult decisions an officer makes because of their discretionary nature. I agree. However, courts have provided ample jurisprudence to assist and guide officers in that assessment. In the matter before the Court, I conclude that the officer failed to follow that guidance and this has resulted in an unreasonable decision.

[21] Many of the submissions made regarding a reasonable apprehension of bias really go to the issue of the reasonableness of the decision. Although it is evident from the decision that the officer was offended by the conduct of Haitham, I am not persuaded that this establishes a reasonable apprehension of bias.

[22] The following are the problematic aspects of the reasons that lead me to conclude that the decision cannot stand.

[23] The first concerning aspect is the officer's inappropriate focus on the circumstances of Yousef's birth.

[24] In assessing the establishment factor, the officer observes that the family lost their status due to Haitham's misrepresentation as to time spent in Canada. The officer also noted their unsuccessful appeal against the removal order. The officer reproduces the following paragraph from the reasons of the IAD, dismissing their appeal:

> On July 24, 2008, the family came to Canada. According to the appellants' statements at the hearing, their goal was to stay in the country for a few days to start looking at different places to settle and to make some initial inquiries. The female appellant then returned to Canada in September 2009. The male appellant joined her a few weeks later. A second son was born. They all left at the end of October 2009. **The appellants did not hide the fact that they had done this for that child to be born in Canada**. They believed that this would facilitate their settlement and it fit well with their plans. The male appellant also testified that, at that time, he was in contact with a consultant in Halifax, and the goal was to help them with their settlement. They supposedly had discussions with the consultant regarding the possibility of the appellants pretending to be in Canada while they were actually elsewhere. I do not know whether this was agreed to, or if it was simply a general conversation. Nevertheless, near the end of their stay, the appellants rented accommodations but did not live there, since the place was not furnished. They also registered for a Canadian telephone number in their names. [bolding added by the officer]

[25] The officer made the choice to bold and emphasize the circumstances of Yousef's birth in Canada. The misrepresentation as to time spent in Canada is worthy of the officer's consideration; the birth of Yousef is not. It is impossible to justify why the officer takes such great offence at this.

[26] The IAD noted the family had their youngest son born in Canada as "this would facilitate their settlement and it fit well with their plans." As counsel notes, "had Yousef been born abroad, he would have had no status in Canada and would have needed to be sponsored for permanent residence by his parents." More importantly, as he further notes, as a permanent resident at the time, there was nothing improper or questionable about Sara returning to Canada to give birth to her son. She had every right to do so. In short, it is unreasonable for the officer to give this negative weight.

[27] The second concerning aspect is the officer's assessment of the family's ties to their community in Canada, especially the children's ties.

[28] The officer did not address the family's ties to the community separate from their establishment.

> Counsels' [*sic*] newer submissions dated 05 November 2021 suggests that there is an impressive collection of new accreditations, certificates, honours, awards, accomplishments and community participation by all 4 members of the family. Counsel has provided over 30 such confirmations of employment, academic excellence and community engagement (as well as previous submissions) and states the family are more actively engaged in life and community than most Canadians he knows. Counsel states the children follow very much in their parents footsteps encouraging academic and/professional success, community engagement in the local mosque and in the large general community, physical activity, artistic endeavours and civic involvement. Counsel states the applicant is now a professional pharmacist and is also employed at CBBC Community College working with students in the Pharmacy industry) working in the Walmart pharmacy organization. Counsel states the male applicant has passed all of his qualifying exams to practice pharmacy and in addition to his full time position at Dalhousie, he is also a pharmacist-in-training doing his requisite internship with the Lawtons Drug store chain. Counsel has submitted an

> employment letter from Dalhousie University dated 21 October 2021 wherein it states that Haitham Fathalla (the male applicant) is currently employed with the College of Pharmacy, Dalhousie University as the Undergraduate Curriculum Administrator and that his contract is valid until October 31, 2024. [emphasis added]

[29] The officer's use of the word "suggests" is inappropriate as the evidence submitted does more than suggest, it establishes that this family, as stated by their counsel "are more actively engaged in life and community than most Canadians." It also establishes the children's exceptional integration into their community and schools, and their high degree of academic achievement.

[30] The officer's conclusion in weighing this factor is that "The applicants state that they are well-established in Canada and have developed strong community connections and support networks, however, considering their background and experiences, there is little evidence before me to indicate that the applicant's [*sic*] would be unable to re-establish themselves in either Egypt or UAE."

[31] There was no evidence that this family had any right to return to the UAE and it was unreasonable for the officer to consider it.

[32] Moreover, the officer writes that "the applicants have not demonstrated with sufficient evidence that any difficulties arising from starting over again in Egypt or UAE are insurmountable [emphasis added]."

[33] A positive H&C decision does not require a finding that they would be unable to re-establish themselves in Egypt. That puts far too high a barrier to a positive decision.

[34] The third concerning aspect is the officer's use of the parents' misrepresentation to colour all other factors.

[35] The Minister submits that "This Court has held that it is not an error for an H&C decision-maker to consider an applicant's establishment against a misrepresentation and accord the establishment little weight." Cited in support are the decisions in *Zou v Canada (Minister of Citizenship and Immigration)*, 2020 FC 368 [*Zou*] and *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2017 FC 27.

[36] In both cases, it was the establishment of the wrongdoer that was discounted. Here the officer uses it to discount the parents' establishment and their children's establishment and community ties. No child is to be held responsible for his father's wrongdoing.

[37] Moreover, as stated in *Zou*, it is important not to double count the misrepresentation. Having weighed it against the parents' establishment in Canada, the other H&C factors raised are to be examined without reference to the misrepresentation. I am unable to conclude that the officer restricted the impact of the misrepresentation to the parent's establishment.

[38] The fifth concerning aspect is the officer's cursory analysis of the best interests of the children, and most especially the interests of Yousef, which were the basis for the first positive H&C decision.

[39] In assessing the best interests of the children, the officer writes: "I am satisfied that the best interests of the children would be met if the children continued to benefit from the personal care and support of their parents." I agree with the Applicants that it would be unusual for the interests of children not to be with loving parents. To find that this is the only thing that is in the best interests of these children is to say nothing. By focusing on the obvious, the officer unreasonably discounts the other circumstances that points to the children's interests being best met in Canada.

[40] Although the officer recites the evidence relating to the children's education and their accomplishments in Canada, and Yousef's medical difficulties and extensive treatment in Canada, which is ongoing, the officer writes "I have insufficient evidence regarding the children's ability to obtain education, health care or other amenities in Egypt." The officer's conclusion: "I have carefully considered the best interests of the children and I am not satisfied that their best interests will be jeopardized" if they are removed from Canada.

[41] This is not a correct approach to a BIOC analysis. An officer is required to identify what would be in the best interests of the children, and weigh that factor against the totality of circumstances to determine whether the special H&C relief is warranted. I do not dispute that it may be appropriate for an officer to consider the child's circumstances in Canada relative to

those they would experience if removed, but jeopardy is not the test. An example of an appropriate consideration of the children's circumstances would be: Are their best interests served by continuing their schooling in Canada or are they served by being schooled in a new country with a different educational regime?

[42] In my view, the most egregious aspect of the officer's decision is with respect to the medical issues facing Yousef. It is worth noting that the first H&C decision based the positive decision on this aspect of the application. The officer there wrote:

> Counsel submits that the applicants' youngest son, Yousef, is a Canadian citizen, and is a medically vulnerable child who is very fortunate to be under the consistent care of a team of medical professionals in Canada. Counsel submits that Yousef's symptoms cause him physical distress, personal suffering and they are a source of great worry for his parents. Yousef is an Ig-A Deficient child —an immunodeficiency resulting in or contributing to several conditions in which Yousef has numerous episodes of bronchitis, conjunctivitis, chronic diarrhea, gastrointestinal inflammation, vomiting and other types of viral infections. Yousef is under the care of an ongoing medical investigations steered by Immunology and Gastroenterology team the IWK, a children's hospital in Halifax, Nova Scotia. Yousef also suffers from asthma, hypertension and acute pancreatitis/hepatitis and gastro esophageal Reflux Disease (GERD). Most recently, Yousef has been experiencing near daily bouts of nausea and vomiting the cause of which remains unknown and under investigation. He has also experienced elevated blood pressure. Counsel submits that although Yousef's medical situation is complicated and uncertain, he is fortunate to be under the care of a team of dedicated treatment providers in Nova Scotia. He has been ill since his birth and has been followed and cared for by a team of medical specialists at the IWK Health Care Centre in Halifax, Nova Scotia. His current treatment includes the following doctors and specialists: Dr. Gerges (family physician), Dr. McLaughlin (pediatrician), Dr. Wornell (pediatric nephrologist) and Dr. Otley (pediatric gastroenterologist) and immunologist. Medical documentation has been provided in support of this application.
>
> Having carefully reviewed all of the evidence before me, I find that the best interests of the child is determinative. I find that Yousef

> will benefit from the ongoing medical care from doctors in Canada. As such, I find that it would be in the best interests of the child for the applicants to remain with him in Canada to continue to provide care and support to him.

[43] The record shows that his condition has not materially changed in the interim. The officer discounted this child's dependence on his current health care regime by concluding, "documentary evidence reveals that medical care exists in Egypt and while the quality of care might not be equal to that available in Canada, medical treatment can be obtained." In so minimizing the best interests of this Canadian born child, the officer rendered an unreasonable decision.

Conclusion

[44] Counsel asked the Court not to remit this H&C application back for redetermination, but to direct that the prior first stage approval be reinstated. I will not do so. The assessment of the application is the responsibility of an officer of the Minister of Employment and Immigration, not this Court. However, as this application has now been assessed twice, it is appropriate to give some direction to the next reviewing officer. Specifically, the reviewing officer is to consider the conduct of Haitham in pleading guilty, paying a large fine, and being truly contrite when considering the weight to give to his misrepresentation of the family's time in Canada. The officer is also to give weighty consideration to Yousef's health. His many issues have been treated in Canada for a number of years by his health care team and the reviewing officer is to consider the adverse affects on his good health that would be occasioned, to some degree, by removal to Egypt. Lastly, the reviewing officer should not entirely discount the establishment of

the family in Canada simply because they misrepresented their time here. A true weighing of the evidence is required.

[45] No question was proposed for certification.

JUDGMENT in IMM-8895-21

THIS COURT'S JUDGMENT is that this application is allowed, the name of the Respondent is amended with immediate effect to Minister of Citizenship and Immigration, the application for relief on humanitarian and compassionate grounds is to be reconsidered by a different officer, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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