Federal Court  Cour fédérale

Date: 20100325

Docket: IMM-4265-09

Citation: 2010 FC 331

Montréal, Quebec, March 25, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

MRS. NICOLE PHILIPPE EL HAJJ
M. ANTOINE NASSIF ABOU RJEILY
AND MR. JAD ANTOINE ABOU RJEILY

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

and

THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Nicole Philippe El Hajj (the principal Applicant), Antoine Nassif Abou Rjeily, (the principal Applicant's husband) and Jad Antoine Abou Rjeily (the principal Applicant's son) pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, for judicial review of a decision dated July 24, 2009, by the Immigration Appeal

Division of the Immigration and Refugee Board (the IAD), rejecting the Applicants' appeal against a deportation order issued against them.

BACKGROUND FACTS

[2] The Applicants are citizens of Lebanon. The principal Applicant's husband had served in the Lebanese army. He attained the rank of general, but retired three months thereafter.

[3] The principal Applicant applied for and obtained a permanent resident visa under the entrepreneur class and they entered Canada on December 22, 2001. Their landing was subject to the conditions set out in the paragraph 23.1(1) of the then-applicable *Immigration Regulations, 1978,* (the *Regulations*). Pursuant to this provision,

> […] within a period of not more than two years after the date of an entrepreneur's landing, the entrepreneur
>
> (*a*) establishes, purchases or makes a substantial investment in a business or commercial venture in Canada so as to make a significant contribution to the economy and whereby employment opportunities in Canada are created or continued for one or more Canadian citizens or permanent residents, other than the entrepreneur and the entrepreneur's dependants;
>
> […] il est obligatoire d'imposer les conditions suivantes au droit d'établissement:
>
> *a*) dans un délai d'au plus deux ans après la date à laquelle le droit d'établissement lui est accordé, l'entrepreneur établit ou achète au Canada une entreprise ou un commerce, ou y investit une somme importante, de façon à contribuer d'une manière significative à la vie économique et à permettre à au moins un citoyen canadien ou un résident permanent, à l'exclusion de lui-même et des personnes à sa charge, d'obtenir ou de

	conserver un emploi;
(*b*) participates actively and on an on-going basis in the management of the business or commercial venture referred to in paragraph (*a*);	*b*) dans un délai d'au plus deux ans après la date à laquelle le droit d'établissement lui est accordé, l'entrepreneur participe activement et régulièrement à la gestion de l'entreprise ou du commerce visé à l'alinéa *a*);
(*c*) furnishes, at the times and places specified by an immigration officer, evidence of efforts to comply with the terms and conditions imposed pursuant to paragraphs (*a*) and (*b*); and	*c*) dans un délai d'au plus deux ans après la date à laquelle le droit d'établissement lui est accordé, l'entrepreneur fournit, aux dates, heures et lieux indiqués par l'agent d'immigration, la preuve qu'il s'est efforcé de se conformer aux conditions imposées aux termes des alinéas *a*) et *b*);
(*d*) furnishes, at the time and place specified by an immigration officer, evidence of compliance with the terms and conditions imposed pursuant to paragraphs (*a*) and (*b*).	*d*) dans un délai d'au plus deux ans après la date à laquelle le droit d'établissement lui est accordé, l'entrepreneur fournit, à la date, à l'heure et au lieu indiqués par l'agent d'immigration, la preuve qu'il s'est conformé aux conditions imposées aux termes des alinéas *a*) et *b*).

[4] Before obtaining visas for herself and her family, the principal Applicant submitted a business plan, according to which she expected to set up in Canada a perfume shop. She stated that she would invest 120,000$ in that business, and bring a total of $400,000 with her. The business

plan stated that it was based on market research. However, before the IAD, the principal Applicant and her husband admitted that no research had, in fact, been done.

[5] However, after arriving in Canada, the principal Applicant realized that the market conditions here were quite different from those in Lebanon, and that a perfume shop would not be a viable venture. Instead of going ahead with the investment she planned on making, she invested $15,000 in a web design company owned by the son of a friend in the fall of 2003. She told the IAD that she performed secretarial work for the company, and she would on occasion pay for the company's expenses out of her personal bank account. The business was unprofitable and she stopped her association with it in early 2005, after losing about $10,000 in addition to her investment.

[6] Sometime in 2006, the principal Applicant and her husband consulted a lawyer who advised them to keep looking for investment opportunities so as to fulfill the conditions of their admission. In early 2007, they purchased a café in Montréal for $80,000.

[7] For 11 months, both of them worked at the café from 6 a.m. to 9 p.m., 7 days a week. They had two employees – one part time, and one full time. However, they quickly realized that the business was not profitable, and eventually gave it up. Their loss, including the cost of the purchase of the business, was close to $120,000.

DECISION UNDER REVIEW

[8] The Applicants having conceded that the removal order against them was valid in law, the only question for the IAD was whether there existed sufficient humanitarian and compassionate grounds on the basis of which they should remain in Canada. The IAD noted that the test for answering this question was the one developed in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL), and approved by the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84.

[9] With respect to the first factor it considered, the seriousness of the offence leading to the removal order, the IAD concluded that the principal Applicant failed to satisfy the conditions of her admission to Canada. She waited until the end of the two-year time period during which she was supposed to make an investment to finally invest $15,000, which was not a "substantial investment" as required by the *Regulations*, and was much less than she had stated she planned to invest. She also did not actively manage the business she invested in.

[10] The IAD found implausible and disbelieved the principal Applicant's assertions that she was not aware of the conditions of her admission until she consulted a lawyer in 2006. It noted that she presented a business plan to immigration officials before obtaining visas for her family, and that the conditions were stated on the documents which were issued to them upon their landing. In any event, the IAD considered that it was the principal Applicant's responsibility to enquire as to the conditions attached to her status in Canada.

[11] The IAD further found that the Applicants had still not fulfilled the conditions of their admission to Canada and were unlikely to fulfill them in the future, as they had few savings left. Therefore, a suspension of the removal order would not be effective to remedy the breach of their admission conditions.

[12] As to establishment in Canada, the IAD noted that the Applicants have no property here, and there is little evidence of their integration. While they also stated having no property in Lebanon, the IAD observed that the principal Applicant's parents still live there, and that she visits the country regularly, as does her son. Her husband has a sister in Canada, but the IAD was of the view that no evidence showed that she would be prejudiced by the Applicants' removal.

[13] Finally, the IAD concluded that the Applicants would not suffer undue hardship in case of removal from Canada. It considered that there was no evidence that they would be subject to any risk in Lebanon, noting that the principal Applicant was coming back from a four-month stay there. While recognizing that her son spent seven years in Canada, it noted that he had returned to Lebanon since his arrival here, and that it would not be an unknown country for him. The IAD found that he did not establish that he would be prejudiced by removal to Lebanon.

[14] Thus, no sufficient humanitarian and compassionate considerations existed to prevent the Applicants' removal.

STANDARD OF REVIEW

[15] As the Supreme Court concluded in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 58, the standard of review of the IAD's decisions on the existence of humanitarian and compassionate considerations is, unless the issues raised related to procedural fairness, reasonableness. On this standard, "[t]here might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome." (*Ibid*., at para. 59).

ANALYSIS

[16] The thrust of the Applicants' submissions is that the IAD failed to take into account the evidence that supported their claim. The principal applicant made two investments in Canada, the first of them during the two-year period after arriving here, and that she was involved in managing both of the businesses she invested in.

[17] The Applicants contend that given their hard work at their Montréal café and considering that they spent most of their life's savings on their investments, subsequent losses, and living expenses, the IAD could not reasonably fault them for not making sufficient efforts comply with the conditions of their admission.

[18] The Applicants also take issue with the IAD's evaluation of the amounts of their investment, which, contrary to the IAD's usual practice did not take into account the losses incurred after the

original investments. They further submit that the IAD erred in finding that the principal Applicant made her first investment towards the end of 2003, because she actually made it in September of that year, and for giving undue weight to the fact that she was not the majority shareholder of that business.

[19] The Applicants submit that their right to natural justice was breached because Citizenship and Immigration Canada (CIC) failed to follow up on its official's promise, made at the interview of January 2005, to send them a letter cancelling the conditions of their landing or advising them of steps to take to comply with them. They note that CIC's policy is to assist entrepreneur immigrants in meeting the conditions of their arrival, suggesting that this was not done in their case.

[20] Furthermore, in their view, the efforts they made were greater than those which, in other cases, were found to be sufficient. They submit that while their efforts were unsuccessful, there is no legal requirement to succeed, and note that most businesses created in Canada fail. While they made mistakes and may have been naïve, their efforts were sufficient to support their application for a humanitarian and compassionate reversal of the removal order against them.

[21] Finally, the Applicants also attack the IAD's findings on the issue of hardship they would suffer if removed to Lebanon. They take the IAD to have stated that the principal applicant would not experience any loss, harm or damage in case of removal, and consider that it could only so conclude by ignoring evidence. They rely on the principal Applicant's husband's testimony with respect to the lack of prospects in Lebanon, and submit that the IAD ignored this evidence.

[22] For their part, the Ministers submit that the IAD's decision is reasonable and supported by extensive reasons. The fact that the IAD did not mention certain elements of the evidence does not mean that it ignored them; it must be presumed to have taken them into account. The Applicants are merely disagreeing with the IAD as to the weight it should have given to the various elements of the evidence, and such disagreement cannot ground an application for judicial review. It is not the Court's role to re-weigh the evidence duly taken into account by the IAD.

[23] I agree with the Ministers. The IAD's decision is justified, transparent, and intelligible, and some imperfections from which it suffers are of no consequence; it is accordingly not open to this Court to interfere with it (*Khosa*, above).

[24] I do not share the Applicants' view that the IAD ignored documentary evidence of their efforts to comply with the conditions of their admission. Although the IAD did not specifically refer to the numerous documents related to the operation of the Applicants' café, it did not question their involvement in the operation of that business. It referred to the principal Applicant's testimony on the subject, and as it found it credible, it was not necessary to refer to or to discuss the documentation supporting it.

[25] As for the IAD's reference to the amounts of initial investments rather than the Applicants' total expenses on their business ventures, while it might have been preferable to mention the latter and not only the former, I do not think that this omission was material. I note, in particular, that whether the principal Applicant invested $15,000 or $25,000 in her first business venture, either amount is manifestly inadequate by benchmark set in her own business plan on the faith of which

she and her family obtained their visas. In this context, the warning given by the Supreme Court in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 56, is apposite: "a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole." This is also applies to the IAD's alleged mistake in stating that the principal applicant's first investment was made "vers la fin 2003" when it was, in fact, made in September of that year.

[26] Further, several of the Applicants' arguments amount to nothing more than an invitation to re-weigh the evidence, which it is not the Court's role to do. Thus, I see no reason to interfere with the IAD's finding that the principal Applicant, who applied to immigrate to Canada as an entrepreneur and presented a business plan in order to do so, and whose visa (along with those of her husband and son) bore the conditions of her landing, must have been aware of those conditions. Because of this, CIC's failure to follow up on its interview of the principal Applicant in 2005 is also immaterial. Clearly, the conditions of the Applicants' landing had not been lifted, as they received no letter to that effect. So long as the conditions remained in force, the Applicants had to comply with them, and the IAD could reasonably find that they knew or ought to have known this.

[27] Most importantly, I see no reason to interfere with the IAD's finding that the principal Applicant's efforts were insufficient. The IAD concluded, in substance, that the Applicants' efforts were too little, too late. The principal Applicant's initial investment was inadequate, and her involvement in managing it, limited at best; her second investment was late, and its failure, swift. Although the *Regulations* did not provide a specific legal requirement as to the success of the investment by an entrepreneur immigrant, it is plain that their aim in creating this class of

immigrants is to foster the development of the Canadian economy and the creation of jobs for citizens and permanent residents other than would-be entrepreneur immigrants. Thus there is nothing unreasonable in taking into account the success of investments by such immigrants when evaluating the efforts they make to comply with the conditions of their landing. Therefore, in my view, the IAD's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law." (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47.) The fact that the IAD could have come to the contrary conclusion is not enough to render the one it came to unreasonable.

[28] Furthermore, on this issue, each case can only be assessed on its own facts. Other cases are unlikely to be of much assistance. Of the cases cited by the Applicants, many bear little resemblance to the present one. Even the one which is, in my view, the most similar to the case at bar, *Alvarez Vivo v. Canada (Public Safety and Emergency Preparedness)*, 2008 CanLII 78687 (I.R.B.), differs from it in that the applicant in that case made consistent inquiries and efforts, in the first four years following his landing in Canada, to set up a business here so as to comply with his undertaking as an entrepreneur immigrant. In the case at bar, the IAD found that it took the principal Applicant the better part of two years to make a first, completely inadequate investment. Her first significant investment was not made until over five years after her arrival in Canada.

[29] Finally, I do not find the IAD's conclusions as to the hardship the Applicants would face in case of removal to Lebanon to be unreasonable. First, it is simply not true that the IAD found that the principal Applicant would not suffer any prejudice if removed from Canada. The sentence with which the Applicants take issue refers not to her, but rather to her husband's sister: "L'appelant a

une soeur qui vit au Canada. Aucun élément de preuve n'a été présenté qui laisse entendre qu'elle subirait un quelconque préjudice si les appelants étaient renvoyés du Canada." In addition, the IAD took note of the testimony of the principal Applicant's husband as to the lack of prospects in Lebanon. Yet it was not obliged to conclude, even on the basis of an opinion of a well-informed and educated person, that a country's limited prospects mean that anyone sent back to that country will suffer undue hardship.

[30] I understand the Applicants' frustration and disappointment. Though their effort was late and unsuccessful, they did work hard in trying to make their café business a success. They received less guidance than they might have expected from CIC. They also received, they say, wrong advice from incompetent or unscrupulous consultants. At the same time, as the IAD found, they came to Canada on the faith of a business plan which was not "entièrement juste" – and that seems to have been a euphemism: the Applicants simply had not done the market research the business plan purported to be based on. That being said, the Applicants have had a chance to make their case to the IAD, which made reasonable findings and explained its decision.

[31] For these reasons, the application for judicial review of the decision is dismissed.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is dismissed.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

David Berger	FOR THE APPLICANTS
Michel Pépin	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

David Berger Montréal, Quebec	FOR THE APPLICANTS
John H. Sims, Q.C., Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENTS