

Date: 20061220

Docket: IMM-2907-06

Citation: 2006 FC 1518

BETWEEN:

**Abdelkader ZIDOUR
Mohamed Rafik ZIDOUR
Mokhtar ZIDOUR**

Applicants

and

**MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] This is an application for judicial review of a decision by the Immigration Appeal Division of the Immigration and Refugee Board (IAD) dated May 4, 2006, by Bana Barazi, dismissing the applicant's appeal of the removal orders issued against him on April 28, 2004.

* * * * *

[2] Abdelkader Zidour (the applicant) is an Algerian citizen. He was admitted to Canada as an entrepreneur on February 18, 1999, with his three children, Rafik, Mokhtar and Samia. The applicant and the mother of his three children are divorced.

[3] The applicant claims to have invested between \$115,000 and \$125,000 Cdn in a business that he established a week after arriving in Canada.

[4] The applicant moved his family to Montréal and left for Algeria a month later.

[5] Between February 1999 and January 2005, the applicant went to Algeria several times mainly, he says, to deal with family problems. During this period of almost six years, he was in Algeria for about three years.

[6] In 2001, the applicant brought his second wife to Canada where she gave birth to two daughters, the first in 2001 and the second in 2004.

[7] The applicant had been granted landing in Canada as an entrepreneur after accepting the conditions set out in paragraphs 23.1(1)(a),(b),(c) and (d) of the *Immigration Regulations, 1978*, SOR/78-172 (the Regulations).

[8] On April 29, 2004, the Immigration Division (the ID) decided that the applicant and his two sons, Rafik et Mokhtar, were persons contemplated by section 41 of the *Immigration and Refugee*

Protection Act (the Act) because the applicant had failed to comply with the terms and conditions imposed on him as an entrepreneur when he was granted landing on February 18, 1999.

[9] Under subsection 63(3) of the Act, the applicant and his sons appealed the removal orders that the ID had made against them.

[10] On January 24, 2006, the IAD allowed the appeal of the applicant's two sons, Rafik and Mokhtar, but dismissed the applicant's appeal.

[11] The applicant filed this application for judicial review disputing the IAD decision that there are no humanitarian or compassionate considerations preventing enforcement of the removal order. The applicant does not dispute the removal order itself.

* * * * *

[12] The relevant provisions of the Act read as follows:

66. After considering the appeal of a decision, the Immigration Appeal Division shall

- (a) allow the appeal in accordance with section 67;
- (b) stay the removal order in accordance with section 68; or
- (c) dismiss the appeal in accordance with section 69.

66. Il est statué sur l'appel comme il suit:

- a) il y fait droit conformément à l'article 67;
- b) il est sursis à la mesure de renvoi conformément à l'article 68;
- c) il est rejeté conformément à l'article 69.

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

(a) the decision appealed is wrong in law or fact or mixed law and fact;

(b) a principle of natural justice has not been observed; or

(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

...

68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

...

67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé:

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

b) il y a eu manquement à un principe de justice naturelle;

c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[...]

68. (1) Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[...]

* * * * *

[13] The applicant maintains that the IAD erred because it failed to take into account the best interests of the children.

[14] He argues that the Court should take into account Article 7(1) of the *Convention on the Rights of the Child*, as Madam Justice Simpson did in *Martinez v. Minister of Citizenship and Immigration*, 2003 FC 1341, where she found that the separation of a parent and child by the state without a consideration of the best interests of the child would be an ongoing infringement of the child's human rights.

[15] The respondent maintains that the existence of children in Canada does not automatically imply recognition of sufficient humanitarian or compassionate grounds to warrant special relief. The respondent relies on the Federal Court of Appeal decision in *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358, which holds that an immigration officer must be “alert, alive and sensitive” to the interests of the children, and that once the officer has clearly identified and defined this factor, it is up to the officer to determine what weight, in his or her view, it must be given in the circumstances.

[16] In *Legault*, the Federal Court of Appeal also stated that merely mentioning the children is not sufficient, and that their best interests is a factor that must be examined with care and weighed with other factors.

[17] In my view, it is the law as explained in *Legault* that must be applied here.

[18] In this case, the IAD had to consider the best interests of the applicant’s children who came with him from Algeria as well as the best interests of his other children born in Canada.

[19] The IAD took into account the applicant's relationship with his children who came with him from Algeria. The IAD noted that the applicant's daughter had accused her father of assault and threats, and that she had not contacted him since September 2000. As for the applicant's relationship with his two sons, the IAD noted that the older son testified that he had serious problems with his father, and that the younger son also had had difficulties with the applicant. Based on this evidence, the IAD determined that the applicant did not have a good relationship with his children, and that they would not miss him if he were sent back to Algeria.

[20] The IAD also considered the best interests of the applicant's Canadian children. The IAD found that the two daughters were too young to have developed ties in Canada. The panel determined that if they went with their parents to live in Algeria, where both parents are professionals, their parents could find work and take care of the girls. If the mother decided to stay in Canada with her two daughters, their best interests would not be seriously affected, considering that, in any event, based on the evidence, their father was not financially supporting them, and that he was frequently away for long periods of time in Algeria.

[21] In my view, the IAD was "alert, alive and sensitive" to the best interests of the applicant's children. On this issue, I find that the IAD exercised its discretion in good faith, and its decision appears completely reasonable to me. The intervention of this Court is therefore not warranted

[22] Accordingly, the application for judicial review is dismissed.

“Yvon Pinard”

Judge

Ottawa, Ontario
December 20, 2006

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-2907-06

STYLE OF CAUSE: Abdelkader ZIDOUR, Mohamed Rafik ZIDOUR, Mokhtar ZIDOUR v. MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: November 23, 2006

REASONS FOR JUDGMENT BY: The Honourable Mr. Justice Pinard

DATED: December 20, 2006

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