

Federal Court



Cour fédérale

Date: 20170825

Docket: IMM-784-17

Citation: 2017 FC 787

Toronto, Ontario, August 25, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

GYULANE RUSZO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of a Senior Immigration Officer [the Officer], dated January 12, 2017, rejecting the Applicant's application for an exemption on humanitarian and compassionate [H&C] grounds to permit her to apply for permanent residence from within Canada.

[2] As explained in greater detail below, this application is allowed, because the Officer's decision involved concerns about the credibility or genuineness of documentary evidence offered by the Applicant in support of her allegations, and she was not afforded an opportunity to respond to those concerns.

II. Background

[3] The Applicant, Ms. Gyulane Ruszo, is a 57-year-old female citizen of Hungary. She first entered Canada on a visitor's visa on February 22, 2010, and on March 17, 2010, she made a refugee claim, along with various family members, based on fear of persecution due to their Roma ethnicity. On May 7, 2012, the Refugee Protection Division [RPD] rejected the refugee claims of Ms. Ruszo and her family, finding that they failed to rebut with clear and convincing evidence the presumption of adequate state protection in Hungary. Ms. Ruszo and her family applied for judicial review of this decision, leave for which was denied, following which they were removed from Canada on February 1, 2013.

[4] On March 1, 2016, Ms. Ruszo again entered Canada with different family members (her daughter, son-in-law, grandson and two granddaughters, one of whom was born when the family was previously in Canada and is therefore a Canadian citizen) and initiated another refugee claim. On March 3, 2016, she was deemed ineligible to have her refugee claim referred to the RPD for consideration, because her claim had already been rejected by the RPD. On April 7, 2016, Ms. Ruszo applied for a Pre-Removal Risk Assessment [PRRA], which was refused on January 5, 2017. That decision is the subject of another application for judicial review in Court file no. IMM-786-17, which was heard concurrently with the present application.

[5] On July 8, 2016, Ms. Ruszo initiated the H&C application which gives rise to the present application for judicial review. The members of Ms. Ruszo's family who accompanied her to Canada also sought H&C relief. The H&C applications were supported by one set of submissions prepared by the applicants' counsel and raised grounds related to adverse conditions in Hungary, their family ties and establishment in Canada, and the best interests of Ms. Ruszo's grandchildren.

[6] On December 28, 2016, Ms. Ruszo's family received a positive decision based on the medical condition of her Canadian born granddaughter, Amanda, who was born with multiple birth defects (hypotonia, congenital hypothyroidism, and a rare chromosome disorder which resulted in dysmorphic features). Separately, on January 12, 2017, Ms. Ruszo received a negative decision. It is that decision which is the subject of the present application for judicial review.

[7] While acknowledging the difficulties faced by many Roma in Hungary, the Officer found that Ms. Ruszo had not provided sufficient objective documentary evidence to demonstrate that she was a victim of adverse country conditions, such as discrimination and segregation, denial of medical care, social assistance, housing, employment, education or state protection, or that she experienced violence as a result of her ethnic background. On the subject of establishment, the Officer found that Ms. Ruszo had not provided sufficient objective documentary evidence to determine that her degree of establishment in Canada justified an exemption on H&C grounds. Ms. Ruszo also failed to satisfy the Officer that her return to Hungary would be detrimental to the well-being or development of her grandchildren.

III. Issues

[8] The Applicant raises the following issues for the Court's consideration:

- A. Whether the Officer breached procedural fairness by failing to provide notice that the Applicant would be assessed separately from the members of her family;
- B. Whether the Officer erred in the treatment of documentary evidence;
- C. Whether the Officer's assessment of hardship focused on past persecution rather than a forward-looking analysis;
- D. Whether the Officer ignored relevant documentary evidence that the Applicant would face hardship upon return to Hungary;
- E. Whether the Officer erred in assessing the Applicant's degree of establishment in Canada.

IV. Analysis

[9] My decision to allow this application for judicial review turns on one of the arguments raised by the Applicant under the second issue articulated above, related to the Officer's treatment of the documentary evidence. The Applicant argues that the Officer made a veiled credibility finding or otherwise discounted evidence based on concerns that she could not reasonably have anticipated, requiring the Officer to provide her with an opportunity to respond to these concerns. In particular, she refers to the Officer's treatment of evidence intended to corroborate her alleged eviction from her home, along with other Roma, in the so-called "numbered streets" neighbourhood of Miskolc, Hungary.

[10] The Officer noted that the affidavit sworn by the Applicant's daughter indicated that in 2014 the city of Miskolc started mailing eviction notices to residents of the numbered streets neighbourhood. The Officer also acknowledged that, according to the objective country condition evidence, the mayor of Miskolc and city authorities engaged in the forced eviction of individuals living in this neighbourhood. However, the Officer found that the Applicant had failed to provide sufficient objective evidence to demonstrate that she and her family lived in this neighbourhood and were forced from their home. In reaching this conclusion, the Officer noted that neither the Applicant nor her daughter provided a copy of an eviction notice. Instead they relied on a letter, with English translation, from the Roma Nationality Self – Government of County City Miskolc, signed by Vice-Chairman Ferenc Gulyas.

[11] The Officer observed that this letter indicated that the Applicant, her daughter and her daughter's family "had their home in the 'numbered street' of the Miskolc city Roma Ghetto (5, Sixth Street, Miskolc), which has become the object of 'slum' elimination and they have become victim of this process." The letter further stated that the applicants were "evicted by the City authorities, without offering them other housing solution" and not permitted to "resettle within 50 km area of Miskolc region, as they are not eligible for health care and social care too".

[12] In analyzing this letter, the Officer noted the following:

- A. In the Background/Declaration provided by the Applicant in support of her H&C application, she provided her home address for the relevant time as 33 Szamos Utca, Miskolc, rather than 5, Sixth Street, Miskolc as set out in Mr. Gulyas' letter;

- B. It was unclear whether Mr. Gulyas wrote the letter based on firsthand knowledge of the Applicant's personal situation or whether he based the content of the letter on information that was provided to him;
- C. While the evidence included a translator's affidavit for the letter, there was no evidence of the translator's accreditation;
- D. The first paragraph of the Hungarian language original version of the letter consisted of five sentences, while the first paragraph of the English translation consisted of two sentences;
- E. The English translation included a parenthetical reference to the Applicant's family's address in the numbered streets neighbourhood, but the Hungarian language original did not;
- F. No postmarked envelope was included with the letter to confirm that it originated in Miskolc and was sent by the Vice-Chairman of the Roma Nationality Self – Government of County City Miskolc.

[13] As a consequence of these observations, and the resulting inability to verify the letter's origin or the accuracy of the translation, the Officer found that it was difficult to assess the reliability of the source of the information in the letter and therefore gave the letter very little evidentiary weight.

[14] As noted above, the Applicant's position is that this analysis by the Officer represents a veiled credibility finding, or otherwise a discounting of evidence based on concerns that she could not reasonably have been anticipated. She submitted in her Memorandum of Argument

that this required the Officer to provide her with an oral interview. The Applicant revised her position at the hearing of this application, submitting that the Officer was required to provide her an opportunity to respond to these concerns, although not necessarily through an oral interview.

[15] The Respondent's position is that the Officer's treatment of the letter involved a finding as to its weight and the sufficiency of evidence, not an assessment of its credibility. The Respondent relies on the decision of this Court in *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 [*Ferguson*], in which Justice Zinn explained that it is open to a trier of fact to move immediately to an assessment of weight or probative value of evidence without considering whether the evidence is credible, because the credibility is irrelevant if the evidence is to be given little or no weight in any event.

[16] As this issue raises considerations of procedural fairness, it is reviewable on the standard of correctness (see *Leonce v Canada (Minister of Citizenship and Immigration)*, 2011 FC 831, at paras 2-3; *Duka v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1071 [*Duka*], at paras 8-9).

[17] My conclusion is that the Applicant has correctly characterized the Officer's treatment of the letter as involving credibility concerns. While I accept the legal principles explained in *Ferguson*, I do not consider them to assist the Respondent in the case at hand. There is an element of the Officer's analysis of the letter which could be characterized as an assessment of its weight or probative value, i.e. the uncertainty whether the author wrote the letter based on firsthand knowledge of the Applicant's personal situation or whether he based the content of the

letter on information that was provided to him. However, the Officer's other observations, as to inconsistencies between the addresses stated in the letter and in the Applicant's Background/Declaration, inconsistencies between the English and Hungarian versions of the letters, and the absence of a postmarked envelope, represent concerns about the credibility or genuineness of the evidence. Indeed, the Officer expressly referred to difficulty assessing the reliability of the source of the information. As noted by Justice Zinn at paragraph 25 of *Ferguson*, a finding that evidence is not credible represents a finding that the source of the evidence is not reliable.

[18] The Applicant offers various explanations for the inconsistencies identified by the Officer. However, as these explanations were not before the Officer, they do not assist the Court in analyzing the reasonableness of the Officer's decision. Rather, they support an argument that the Applicant should have been provided with an opportunity to respond to the Officer's concerns with Mr. Gulyas' letter, such that the Officer could have considered these explanations and reached a more fully informed conclusion as to the appropriate treatment of the evidence.

[19] The Applicant submits that the lack of evidence of eviction was determinative of the Officer's finding that she had not suffered from discriminatory eviction policies and was not at risk of homelessness. I accept that the evidence surrounding the Applicant's alleged eviction was linked to her allegation of denial of housing, health care and social assistance and therefore to the hardship she was arguing in her H&C application. It is therefore my conclusion, consistent with the jurisprudence in *Duka*, that in the absence of an opportunity to respond to the Officer's concerns about Mr. Gulyas' letter, the Applicant was denied procedural fairness. The Officer's

decision must be set aside and the issue returned to another immigration officer for consideration.

[20] It is therefore unnecessary for the Court to rule on the other issues raised by the Applicant. I note that, at the hearing of this application, the Applicant proposed a question for certification for appeal related to the first issue raised by the Applicant, whether the Officer breached procedural fairness by failing to provide notice that the Applicant would be assessed separately from the members of her family. Her proposed question is as follows:

Is it a breach of procedural fairness for an officer to sever an application in a manner that raises new issues without giving an applicant an opportunity to respond to the new issues raised by the severance?

[21] As my decision is to allow this application for judicial review for reasons unrelated to the Officer's severance of the Applicant's H&C application from that of her family, the proposed question would not be determinative of an appeal. It is therefore not appropriate for certification. However, the Applicant is now aware that her family's H&C application has been granted and will be able to make any additional submissions which she considers relevant to her own application as a result of these circumstances before her application is considered by another immigration officer.

JUDGMENT in IMM-784-17

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and this matter is returned to another immigration officer for consideration in accordance with the above Reasons. No question is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-784-17

STYLE OF CAUSE: GYULANE RUSZO V THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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JUDGMENT AND REASONS: SOUTHCOTT, J.

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