Federal Court Cour fédérale

Date: 20190128

Docket: IMM-2003-18

Citation: 2019 FC 117

Ottawa, Ontario, January 28, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

OLEH YANCHAK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision by a delegate of the Minister of Immigration, Refugees and Citizenship [the Minister] dated April 20, 2018, which denied the Applicant's application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

II. Background

[2] The Applicant, Oleh Yanchak, is a citizen of Ukraine born February 28, 1992, in Sambir, Ukraine. He is currently 26 years old.

[3] The Applicant graduated from Lviv Polytechnic University in 2014 with a Master's degree in computer science. He was unable to find employment in Ukraine.

[4] The Applicant entered Canada on April 3, 2015, on a temporary resident visa, and subsequently received a number of extensions to his temporary resident status.

[5] Since coming to Canada, the Applicant has lived with his first cousin, Olena Beshley, her husband, Igor Avdeev, and their child, Nikita Avdeev [Nikita]. Nikita is currently three years old, and the Applicant has been involved in caring for Nikita, as set out below.

I. Decision Under Review

[6] On November 8, 2016, the Applicant filed an application under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] for permanent residence from within Canada based on H&C grounds [the Application].

[7] The Application cited as H&C factors establishment in Canada, linkages with family members, best interests of the child, and adverse country conditions in Ukraine.

[8] The Application was denied by a delegate of the Minister [the Officer] in a decision dated April 20, 2018 [the Decision].

II. Standard of Review

[9] Substantive review should be conducted using the reasonableness standard. Decisions made under section 25 of the IRPA are highly discretionary and subject to deference (*Kaur v Canada (Minister of Citizenship and Immigration),* 2017 FC 757 at para 55).

[10] The issue of whether the Officer applied the correct legal test when assessing H&C considerations is reviewed using the correctness standard (*Marshall v Canada (Minister of Citizenship and Immigration),* 2017 FC 72 at para 27 [*Marshall*]).

III. Issues

[11] The issues are:

A. Did the Officer err in assessing the hardship the Applicant would face in Ukraine?

B. Did the Officer err by making determinative findings with no evidentiary or factual basis?

C. Did the Officer err in assessing the Applicant’s establishment in Canada?

D. Did the Officer err in assessing the best interests of the child?

IV. Analysis

A. *Did the Officer err in assessing the hardship the Applicant would face in Ukraine?*

[12] When considering H&C applications, *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61 [*Kanthasamy*] has established that the Court should consider all relevant H&C considerations:

> The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.
>
> [Emphasis in original]

[13] *Chirwa v Canada (Minister of Citizenship and Immigration),* [1970] IABD No 1, at page 350 [*Chirwa*] was cited in *Kanthasamy,* above, at paragraph 13, and states that H&C considerations refer to:

> … those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act.

[14] As stated in *Stuurman v Canada (Citizenship and Immigration)*, 2018 FC 194 at paragraph 24 [*Stuurman*], it will be a reviewable error if a delegate of the Minister fails to apply the broader, equitable approach dictated by *Kanthasamy*:

> The Officer in this case unreasonably assessed the Applicants' length of time or establishment in Canada because, in my view, the Officer focused on the "expected" level of establishment and, consequently, failed to provide any explanation as to what would be an acceptable or adequate level of establishment. The Officer's assessment of the Applicants' level of establishment is perfunctory at best and, thus, unreasonable because it was considered through the lens of "unusual and undeserved or disproportionate hardship" and not, as *Kanthasamy* dictates, more broadly through the lens of an humanitarian and compassionate perspective that considers and gives weight "to all relevant humanitarian and compassionate considerations"…
>
> [Emphasis added]

[15] The Applicant argues that the Officer only considered the Applicant's potential return to Ukraine through a hardship lens, and did not apply the compassionate approach that *Kanthasamy* requires.

[16] The Officer acknowledged that "the current backdrop in Ukraine is comprised by a deteriorating security situation and an intensifying political, and economic crisis due to armed conflict between the Ukrainian military and separatist forces." The Officer then found that: (i) the Applicant had failed to prove he would be drafted, (ii) the Applicant's mental health had ameliorated, (iii) the Applicant could find work in Ukraine, and (iv) the Applicant's parents could support him.

[17] What the Officer failed to do is show any compassionate consideration that goes beyond the strict hardship lens. In particular, as is discussed below, the Officer rejected the Applicant's mental health issues on a speculative basis, and failed to consider whether returning the Applicant to a war-torn country might aggravate these mental health issues.

[18] Accordingly, the Officer erred in law by viewing the Applicant's situation solely through the hardship lens and applying the wrong legal test.

B. *Did the Officer err by making determinative findings with no evidentiary or factual basis?*

[19] The Officer noted the mental health issues suffered by the Applicant due to anxiety around being forced to leave Canada and the strong possibility of being conscripted into the military, and stated that this psychological response is comprehensible. The Officer then seized upon language in a psychotherapist's report, dated October 15, 2016, which stated that the Applicant required treatment for at least six months. Based on this language, the Officer dismissed the Applicant's mental health issues on the assumption that the Applicant had cured his mental health issues because 18 months had passed since the date of the report.

[20] The Applicant argues that the Officer erred by (i) concluding that the Applicant no longer had mental health problems because more than six months had passed, and (ii) failing to consider that a return to Ukraine would adversely affect the Applicant's mental health. I agree.

[21] The Respondent simply states that the Officer's conclusion was reasonable given there was no further evidence that the Applicant continued to suffer from mental health issues.

[22] By concluding that the Applicant no longer had mental health problems because more than six months had passed, the Officer misconstrued the report and overlooked a fundamental point of the report. The Officer failed to appreciate that the report stated the Applicant required medical treatment for <u>at least</u> six months, not that his mental health conditions would be cured after six months had passed.

[23] Additionally, as outlined in the leading decision of *Kanthasamy,* at paragraph 48, delegates of the Minister have a duty to consider how an applicant's mental health would be affected upon return to their country of origin:

> … the very fact that Jeyakannan Kanthasamy's mental health would likely worsen if he were to be removed to Sri Lanka is a relevant consideration that must be identified and weighted regardless of whether there is treatment available in Sri Lanka to help treat his condition.

[24] An immigration officer's failure to conduct such an analysis may render the officer's assessment of an applicant's mental health unreasonable (*Sutherland v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1212; *Stuurman,* above).

[25] The Officer failed to appreciate that the psychotherapist's conclusions were premised on the Applicant not returning to Ukraine, and failed to analyse how the Applicant's mental health would be affected by a return to Ukraine. For all of the above reasons, the Officer's conclusions regarding the Applicant's mental health are unreasonable.

[26] As well, in his written submissions made to the Officer, the Applicant described the unsuccessful efforts he made to secure employment after completing his Master's degree. These difficulties were also evidenced on the Applicant's immigration forms and in a letter from his brother-in-law, Igor Avdeev, which were before the Officer.

[27] The Officer acknowledged in general terms the difficulties associated with finding employment in a new country, and concluded:

> It is noted that the applicant completed a Master's degree in Computer Science in December 2014. He has not shown that he could not use his acquired skills and advanced education to secure employment in his chosen field to earn his livelihood.

[28] The Applicant argues that the Officer's conclusion was directly contradicted by the evidence before him. I agree. In the absence of an adverse credibility finding, or any meaningful engagement with the evidence put forward by the Applicant which suggested that the Applicant was unable to find employment in Ukraine despite a diligent search, the Officer's conclusion was unreasonable. It also demonstrates a lack of appreciation of the dire situation in Ukraine and the extreme difficulty the Applicant faces in gaining employment in a war-torn country. While not in-of-itself a basis to find that the Officer was unreasonable, when combined with the other findings concerning the Applicant's mental health and support of his parents, overall the decision is unreasonable.

[29] With respect to the Officer's finding that the Applicant's parents could support him in Ukraine, the Officer drew an unfounded and speculative inference that the Applicant's aging parents, 63 and 59 years old at the date of the Decision, would have the means to continue to

support him while living in a country at war, with rapidly rising cost of living and hyperinflation. The Officer's analysis fails to engage with the evidence put forward by the Applicant which suggested that the Applicant's parents would not be able to support him due to their limited salaries and a lack of full time employment for the Applicant's mother. Additionally, the Officer's reasoning again demonstrates a lack of appreciation for the economic situation in Ukraine.

[30] With respect to the Officer's analysis of the prospect of the Applicant being drafted into the Ukrainian military, while that analysis is questionable, it is not unreasonable.

C. *Did the Officer err in assessing the Applicant's establishment in Canada?*

[31] The Applicant argues that the Officer erred, when considering the Applicant's establishment in Canada, by conducting a perfunctory analysis and failing to consider much of the evidence. I disagree. The Officer's reasons show an appreciation for the evidence put forward by the Applicant, including engagement in the community as a student and volunteer, reference letters from family members and members of the community, and the availability of financial support from Ms. Beshley and her husband. The Officer was reasonable to conclude that the Applicant's circumstances relating to establishment in Canada did not fall into the "special category of cases" where a H&C exemption is warranted (*Ramotar v Canada (Minister of Citizenship and Immigration),* 2009 FC 362 at para 33). The Applicant is in effect disputing the weight that the Officer assigned to the evidence.

D. *Did the Officer err in assessing the best interests of the child?*

[32] The Applicant argues that given the evidence that was before the Officer of the close relationship between Nikita and the Applicant, it was not reasonable for the Officer to reach this conclusion. I disagree. The Officer acknowledged the close relationship between Nikita and the Applicant, but went on to conclude that the removal of the Applicant from Canada, while unfortunate, would not rise to the level of being contrary to Nikita's best interests. This finding was reasonable.

[33] Giving my findings of unreasonableness above, this application is allowed.

JUDGMENT in IMM-2003-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is remitted to a different Officer for reconsideration;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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