Date: 20080709

Docket: IMM-5204-07

Citation: 2008 FC 847

Ottawa, Ontario, July 9, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NELLI TIKHONOVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of a visa officer (Officer) dated November 13, 2007 (Decision) that refused the Applicant's application for permanent residence from within Canada on humanitarian and compassionate grounds.

BACKGROUND

[2] The Applicant, Ms. Tikhonova, is a 32-year-old female citizen of Russia. She has a three-year-old Canadian born daughter named Shanice.

[3] Ms. Tikhonova claims to have suffered mental, physical, and emotional abuse and neglect while growing up as a child in Russia. In 1994, at the age of 18, she met Mr. Bert Douglas Montgomery, an American businessman, through a matrimonial advertisement. The following year, the couple married and moved to the United States. When Mr. Montgomery moved his business to Canada in 1996, Ms. Tikhonova followed. Mr. Montgomery promised Ms. Tikhonova that he would handle all documents and applications involved in attaining landed status in Canada for his wife, whose green card had been cancelled as a result of her lack of residency in the United States.

[4] The Applicant says that Mr. Montgomery was less than honest with her. He did very little to help her attain status in Canada and, sometime between 2000 and 2001, he was arrested in Saipan, the capital of the United States Commonwealth of the Northern Mariana Islands, and is presently serving time in the United States. It also came to light that Mr. Montgomery was already married when he met and married Ms. Tikhonova and, therefore, their marriage was a nullity.

[5] In 2001, Ms. Tikhonova met Sylvester Anthony Fagan, whom she calls Mark. Ms. Tikhonova and Mark lived together from 2001 to 2004. Their daughter, Shanice, was born in October 2004. Shortly afterwards, Ms. Tikhonova ended her relationship with Mark because she alleges he was violent. She did not contact the police because of her lack of status in Canada and because of her fear that she might be deported and would have to leave Shanice in Canada with Mark. Ms. Tikhonova and her daughter now live with a friend in Vancouver.

[6] On March 20, 2007, Ms. Tikhonova applied for permanent residence in Canada on humanitarian and compassionate grounds. In her application, she conveyed the essential elements of her story as set out above, adding that she fears being returned to Russia because she has lost all ties with her family and has no means of financial support there. She fears that she will be unable to provide adequate care for Shanice in Russia, and she fears that her daughter will suffer abuse at the hands of her family. The application was rejected in a letter dated November 13, 2007. This letter is the Decision that is the subject of the present application.

DECISION UNDER REVIEW

[7] The Officer determined that Ms. Tikhonova had not provided sufficient humanitarian and compassionate considerations to warrant an exemption from the requirements of subsection 11(1) of the Act to apply for and obtain an immigrant visa from outside Canada. The Officer did not believe Ms. Tikhonova would suffer unusual, undeserved, or disproportionate hardship if required to apply for permanent residence from outside Canada.

[8] With respect to the best interests of Shanice, the officer wrote as follows:

> I have taken into consideration the best interests of the applicant's daughter. I note that Shanice has just turned three in October. I acknowledge that it may be difficult for her to leave her familiar environment. However, I am satisfied she is young enough that she would be able to adapt and assimilate to her new environment after an initial period of adjustment, while her mother applies for permanent residence in the prescribed manner. Given her age, I am not satisfied that Shanice has developed significant attachments to the community or that a significant degree of integration into Canadian society has taken place. She is a Canadian citizen and will

> retain her citizenship regardless of her country of residence. I am satisfied that the love, care and nurturing she is currently receiving from her mother will continue no matter where they reside.

[9] The Officer then noted that Ms. Tikhonova is resourceful and has been able to make friends and establish a support group in Canada. He concluded, however, that her integration in Canada in and of itself was insufficient to warrant an exemption under the Act. The Officer also stated that, notwithstanding Ms. Tikhonova's claim to have had a childhood plagued by abuse, her parents and brother, who still reside in Russia, might still be a source of support during her initial resettlement there. The Officer acknowledged that Ms. Tikhonova would experience difficulty and that returning to Russia to make her application would cause disruption and anxiety, but found that her return would not cause unusual and undeserved or disproportionate hardship.

ISSUES

Preliminary Issue

[10] As a preliminary matter, it is necessary to address the affidavit included in Ms. Tikhonova's application record. In her affidavit, Ms. Tikhonova puts forward what she claims to be the "full story" regarding her childhood experiences, and tells a tale of a father who was "an animal." She says her father was a criminal who began selling his daughter for sex to his criminal associates when she was 13 years old. Ms. Tikhonova states that an immigration consultant led her to believe her application would succeed and that she did not include details of her history in her application because she "was too ashamed and wanted to block [her] childhood experience out of [her] mind and did not think it necessary to air [her] 'dirty linen' in public." The Respondent submits that the

information contained in the affidavit was not part of the record before the Officer and, therefore, does not properly form part of the record of this judicial review. Unfortunately, even though I have great sympathy for the Applicant's very difficult past, I must agree with the Respondent.

[11] It is a well-recognized principle that, apart from a few exceptions that do not arise in this case, an application for judicial review involves a review of the record before the original decision-maker. Further, it is well settled that, as a general principle, the onus is on an applicant to provide the necessary information, and it falls to an applicant to put before a visa officer all material necessary for a favourable decision (*Madan v. Canada (Minister of Citizenship and Immigration)* (1999), 172 F.T.R. 262). It follows that an officer is under no obligation to seek clarification or additional information when the material submitted is insufficient to meet the relevant selection criteria. Notwithstanding the fact that the information contained in Ms. Tikhonova's affidavit may have bolstered her chances of a favourable decision, she failed to provide such information to the Officer as she was required to do. Because the information was not before the Officer, it cannot form part of the record for the present application, though I should mention that this by no means restricts Ms. Tikhonova from including this information in any subsequent applications she may file with the Immigration and Refugee Board.

Principle Issue

[12] Although Ms. Tikhonova raises a number of issues, I believe they can be rephrased and concisely restated as one: Did the Officer err by failing to consider the existence of humanitarian and compassionate grounds and the best interests of Shanice?

STATUTORY FRAMEWORK

[13] The following provisions of the Act are applicable in these proceedings:

Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11. (1)** L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.
Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national	**25. (1)** Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout

and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

STANDARD OF REVIEW

[14] Recently, in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (para. 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[15] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[16] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 61, the Supreme Court of Canada held that the standard of review applicable to a visa officer's decision of whether or not to grant an exemption based on humanitarian and compassionate considerations was reasonableness *simpliciter*. A long line of cases have since applied that standard. Thus, in light of the Supreme Court of Canada's decision in *Baker* and *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to this issue to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47). Put another way, the Court may only intervene if the Officer's Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ANALYSIS

[17] The Applicant bears the onus of establishing that her circumstances are such that having to obtain a permanent resident visa outside Canada would be an unusual, undeserved or disproportionate hardship. An applicant has a high threshold to meet when requesting an exemption from the application of subsection 11(1) of the Act. Considerable deference must be afforded to decisions of Immigration Officers exercising the powers conferred pursuant to the Act and its Regulations (*Baker*, *supra*, at para. 62).

[18] Counsel for Ms. Tikhonova has put forward a number of arguments that all share one common strand: that the Officer's Decision was not reasonable and that the Officer failed to consider the best interests of Shanice and the undue, unusual and disproportionate hardship Ms. Tikhonova and Shanice will experience if they are returned to Russia. Considerable reliance is placed on the Supreme Court of Canada's decision in *Baker*, which is the only case cited in written submissions. Counsel for Ms. Tikhonova also submits that, pursuant to Guideline 9.07 of the Department's Immigration Manual, the Officer ought to have considered that Ms. Tikhonova and Shanice would not have support in Russia.

[19] The Respondent submits that the Officer's reasons demonstrate that the Officer was alert, alive, and sensitive to the best interests of the child and that this Court ought not to intervene on judicial review simply because it would have weighed the relevant factors differently to arrive at a different conclusion (*Serda v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 at para. 12).

[20] The Respondent also submits that the Officer adequately addressed any potentially unusual or disproportionate hardship that would exists if Ms. Tikhonova were to return to Russia. The Officer noted that it would not be unreasonable for Ms. Tikhonova to re-establish contact with her family in Russia. Failing that, Ms. Tikhonova has demonstrated an ability to make friends in Canada and will similarly be able to make friends in Russia who may offer support and assistance.

[21] After reviewing the Officer's Decision and the submissions of both parties, I am satisfied that the Officer was alive, alert and sensitive to the best interests of Shanice when assessing whether or not to grant an exemption to the requirements of the Act on humanitarian and compassionate grounds. The Officer considered the child's age, socialization and attachment to her mother. The Officer found that, because of her young age, Shanice "would be able to adapt and assimilate to her new environment after an initial period of adjustment, while her mother applies for permanent residence in the prescribed manner." The Officer also held that Shanice has not "developed significant attachments to the community or that a significant degree of integration into Canadian society had taken place." These considerations, in my view, clearly indicate that the Officer was aware of and sensitive to the best interests of Shanice when he made his Decision.

[22] Further, the Officer's conclusions, both with respect to the best interests of the child and whether Ms. Tikhonova would suffer an unusual, undeserved, or disproportionate hardship if required to apply for permanent residence from outside Canada, were not unreasonable. I note, however, that given her unfortunate childhood experiences, the Officer's conclusion that Ms. Tikhonova may be able to re-establish contact with her father and rely upon him for assistance is unreasonable. However, I cannot say that it is impossible or unrealistic to expect that Ms. Tikhonova may reconnect with her mother (who is now divorced from Ms. Tikhonova's father) and her brother and seek assistance from them upon her return to Russia. In addition, the Decision is also based upon the Officer's observations of the Applicant's own demonstrated resourcefulness.

[23] Indeed, Ms. Tikhonova has had a very difficult childhood and has experienced many difficulties in her past and will undoubtedly face further difficulties in returning to Russia. However, I cannot find, on the facts of this case, that the Officer erred in concluding that she would not suffer an unusual, undeserved, or disproportionate hardship if required to return to Russia to apply for permanent residence status. There is no doubt that Ms. Tikhonova views Canada as a more desirable place in which to raise her daughter and that her removal from Canada will result in a significant disruption to her life. However, this is not sufficient reason to grant an exemption from the requirements of the Act on humanitarian and compassionate grounds. This is not what Parliament intended when it adopted section 25 of the Act. Even if I might have reached a different conclusion on the facts, this does not make the Officer's Decision unreasonable and, as the Respondent points out, given the facts that the Applicant provided to the Officer, the Officer really had very little to work with. It was the Applicant's responsibility to place a full account of her situation before the Officer and, if she failed to do this, then the Officer cannot be faulted or his Decision rendered unreasonable. For these reasons, I must dismiss this application for judicial review.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. **This application for judicial review is dismissed.**

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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