Federal Court  Cour fédérale

Date: 20140623

Docket: IMM-3540-13

Citation: 2014 FC 600

Ottawa, Ontario, June 23, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

RYMMA MAKARENKO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of N. Case, a Senior Immigration Officer at Citizenship and Immigration Canada [the Officer], pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The Officer refused to exempt the Applicant's permanent residence visa application from the selection criteria of the Act on humanitarian and compassionate [H&C] grounds pursuant to section 25 of the Act.

I. Issue

[2] The issue in this application is whether the Officer's decision was unreasonable.

II. Background

[3] The Applicant is an unmarried citizen of the Ukraine. She is an ethnic Russian and was born on March 23, 1933. She has one son, Iouri Makarenko, and two grandchildren, who were aged 10 and 25 at the time of the Officer's decision. Her son and grandchildren live in Canada. The Applicant came to Canada in May, 2006, to visit her son and has remained in Canada since that time.

[4] In her H&C application, she states that she has been subject to abuse and persecution throughout her life in the Ukraine. She claims to have lost all her savings after she invested them in a bank. In support of this contention she submitted investment certificates.

[5] She also alleges to have been attacked by Ukrainian nationalists because she did not speak Ukrainian.

[6] In Canada, the Applicant is supported by her son and lives alone in a rented apartment which is paid for by him. She attends church and English as a second language classes. She spends time with her grandchildren and has developed several friendships in Canada as is evident from letters of support.

[7] The Applicant previously applied for refugee protection. In a decision dated April 17, 2009, the Immigration and Refugee Board rejected the Applicant's claim, finding that she was not a convention refugee or person in need of protection.

[8] The Applicant also submitted two medical assessments in support of her contention that returning to the Ukraine will cause her psychological hardship. One, from Dr. Pilowsky, states that the Applicant suffers from Post Traumatic Stress Disorder and depression, and that returning the Applicant to the Ukraine would be psychologically detrimental to her. The other, by Dr. Yaroshevsky, indicates that the Applicant suffers from diabetes, depression, insomnia and has difficulty functioning. Dr. Yaroshevsky indicates that she has a patchy memory.

[9] The Officer rendered a decision in the Applicant's case on February 28, 2013. The Officer considered the Applicant's claim based on personalized risk, establishment in Canada, and the best interests of the child.

[10] With respect to risk, the Officer placed considerable weight on the negative determination of the Applicant's prior refugee claim, drawing particular attention to its finding that she had not rebutted the presumption of state protection. The Officer acknowledged that the risk considered in the context of an H&C application is based on the degree of hardship facing the Applicant.

[11] The Officer found that there was insufficient evidence to corroborate the Applicant's statements that she experienced abuse and harassment as a result of her ethnicity and that her

investments were lost. The Officer also examined country condition information relating to the Ukraine at the time of the hearing. The Officer outlined the various redress mechanisms available, including the government's security, legislative and human rights frameworks. The Officer concluded that the Applicant would not face a personalized risk which would amount to an unusual, undeserved, or disproportionate hardship.

[12] The Officer accepted the Applicant was somewhat established in Canada, by virtue of her apartment, friends, and attendance at church. However, the Officer noted that she had stayed in Canada without proper immigration authorization and there should have been an expectation that she would be removed to the Ukraine at some point. The Officer acknowledged that separation from her friends would be difficult, but she would still be able to contact them. Furthermore, the Officer felt she would be able to develop new friendships in the Ukraine. Cumulatively, the Officer found that her establishment in Canada was not such that returning to the Ukraine would constitute unusual, undeserved or disproportionate hardship.

[13] With regard to the impact of the Applicant's departure on her grandchildren, the Officer acknowledged that the Applicant has close ties to her grandchildren and that physical separation would be difficult. However, the Officer noted that her grandchildren live with their parents, and could maintain contact with the Applicant while abroad.

[14] The Officer considered the psychological assessments, and accepted that the Applicant would face anxiety by being removed from Canada. However, the Officer determined that it would not constitute unusual, undeserved or disproportionate hardship.

[15] Finally, with respect to the Applicant's medical conditions, the Officer found there was insufficient corroborative evidence that the Applicant would be unable to receive necessary treatment in the Ukraine, and noted that the Applicant's submitted medical assessments were more than two years old.

[16] Based on the above, the Officer found that there would be no unusual, undeserved or disproportionate hardship for the Applicant if she were made to apply for permanent residence from outside Canada.

III. Standard of Review

[17] The standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 47-48, 51).

IV. Analysis

A. *Was the Officer's decision reasonable?*

[18] The Applicant argues that the Officer failed to adequately consider the reports of Dr. Yaroshevsky and Dr. Pilowsky on the basis that they were not the witnesses of the events leading to the Applicant's medical issues (*Zapata v Canada (Solicitor General)*, [1994] FCJ No 1303). When a psychological assessment has specific and important evidence to an Applicant's case, it should be considered (*Javaid v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1730).

[19] The Applicant further argues that the Officer erred in stating that she could apply for permanent resident status in Canada from outside the country. She notes that the Minister of Citizenship and Immigration put a moratorium on the sponsorship of parents in December, 2011, and the Applicant does not fit under any other immigration categories. The lifting of the moratorium on permanent residence sponsorship applications from abroad was announced after the Officer's decision was made. Regardless, given the Applicant's advanced age and the waiting lists for permanent residence sponsorship, the Officer's assertion would have been unreasonable.

[20] The Applicant also suggests that the Officer failed to consider the cumulative evidence of discrimination against the Applicant. The Applicant notes documentary evidence, including the European Union Commissioner for Human Rights and the United States Department of State Report for 2011, which suggests that elderly people are underprivileged and often live in poverty, that the Ukraine's government is corrupt and that societal discrimination against ethnic minorities persists.

[21] Finally, the Applicant asserts that the Officer determined her degree of establishment in Canada without due regard to the evidence.

[22] The Respondent argues that the Officer carefully considered all the evidence and that the Applicant is asking the Court to reweigh the evidence. As well, notwithstanding the Officer's reference to the Refugee Protection Division's decision and elements of risk determined in that decision, the Officer conducted a proper hardship analysis based on all the evidence.

[23] I believe that two issues were unreasonably dealt with by the Officer. Firstly, while the Applicant made submissions partially on the basis that she is an "…elderly single person" there is no analysis by the Officer of the impact of removing her based on her age. The Applicant is currently 81 years old, has no family in the Ukraine, and according to her medical reports, suffers from memory problems, insomnia, depression, and anxiety. Whether she suffers from these medical issues does not appear to be in dispute.

[24] The Officer's failure to consider the Applicant's age made other conclusions unjustifiable. For example, the Officer concluded that the Applicant would make new friends and establish new social ties in the Ukraine, despite having apparently no family or existing social network. While the Officer's analysis may be reasonable if it concerned a younger person, it is unreasonable when considered in the context of an 81-year-old woman with health issues.

[25] The second aspect in which this decision is unreasonable is demonstrated by the Officer's conclusion that:

> I find the applicant has not established that her personal circumstances are such that the hardships associated with having to apply for permanent residence in the normal manner are in isolation to the hardships associated faced by others who are required to apply for permanent residence from abroad.

[26] The Applicant is correct that at the time of the decision, she could not apply for sponsorship abroad owing to a moratorium imposed by Citizenship and Immigration Canada. While the Respondent is correct in stating that this moratorium has now been partially lifted, this was not apparent at the time of the Officer's decision. Since the Officer was apparently assessing undue hardship on an assumption that the Applicant could apply for permanent residence from

abroad, it is unclear whether the Officer would have come to the same conclusion had they been aware of the fact that the Applicant could not, given her personal characteristics, have applied for permanent residence from abroad. While alone this error would not render the decision unreasonable, in combination with the Officer's failure to consider the Applicant's age, and the reality of her condition and circumstances if returned to the Ukraine, I believe the decision is unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The Applicant's application is allowed and referred back 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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