Federal Court  Cour fédérale

Date: 20150505

Docket: IMM-4671-14

Citation: 2015 FC 583

Ottawa, Ontario, May 5, 2015

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ISTVANNE GULYAS
JANOS TOTH
ISTVAN GULYAS
KRISZTOFER RACZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of a senior immigration officer [Officer],

dated April 3, 2014 [Decision], which rejected the Applicants' application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

II. BACKGROUND

[2] The Applicants are a family from Hungary. They include the Principal Applicant, her common-law spouse, her nineteen-year-old son, and her ten-year-old grandson [Minor Applicant]. The Principal Applicant and the children came to Canada to seek refugee protection in December 2010. Her common-law spouse joined them in February 2011. The Applicants' refugee claim was based on their fear of Skinheads due to their Roma ethnicity.

[3] In May 2011, the Minor Applicant was hit by a car while crossing the street. He suffered a traumatic brain injury and has been receiving a range of treatments, including occupational therapy, physiotherapy, speech-language therapy and special education support. There is pending litigation to seek compensation for his injuries.

[4] The Refugee Protection Division of the Immigration and Refugee Board [RPD] rejected the Applicants' claim for refugee protection in June 2012. The Federal Court denied leave for judicial review of the RPD decision in November 2012.

[5] The Applicants submitted an H&C application in October 2012. They continue to claim they will face discrimination based on their ethnicity if required to return to Hungary. They also claim that the Minor Applicant will be unable to access the health and educational services that he requires and is currently accessing in Canada.

III. DECISION UNDER REVIEW

[6] The Applicants' H&C application was rejected on April 3, 2014.

[7] The Officer said that she considered the Applicants' H&C application on the standard of unusual and undeserved, or disproportionate hardship. She defined unusual and undeserved hardship as that which is not anticipated by the Act or the *Immigration and Refugee Protection Regulations*, SOR/2002-227 and is usually beyond an applicant's control. She defined disproportionate hardship as a hardship which would have a disproportionate effect on an applicant due to his or her personal circumstances.

[8] The Officer first considered hardship relating to discrimination and adverse country conditions in Hungary. She said that she had reviewed both the RPD decision and the Applicants' Pre-Removal Risk Assessment submissions, as she was also charged with conducting that assessment. She also reviewed the Applicants' documentary evidence and conducted her own research into the treatment of Roma in Hungary.

[9] The Officer found that the documentary evidence did not corroborate the Applicants' claims of past hardship while living in Hungary. She noted that "[d]iscrimination continued to significantly limit Roma access to education, employment, health care, and social services." However, she found that the Hungarian government provides public employment opportunities for registered unemployed persons, funding for special colleges for Roma students, and funding to improve the living conditions for Roma persons living in segregated settlements. She also

noted that the Hungarian government established a Roma Affairs Council to "elaborate proposals for the social inclusion of Roma and to monitor the implementation of government programs." She found that while the conditions in Hungary may not be ideal for Roma citizens, there are avenues of redress and recourse available to the Applicants and having to access the programs would not constitute a hardship.

[10] The Officer then considered the Applicants' establishment in Canada. She noted that the adult Applicants had both attended school in Hungary. The Principal Applicant was unemployed when she came to Canada but she had worked in the past. Her spouse had been working in Hungary when he came to Canada. There was no indication that the adult Applicants had attended any courses to upgrade their job or language skills in Canada.

[11] The Applicants' submissions indicated that the Principal Applicant was unable to work due to injuries from a car accident but no details were provided. The Officer acknowledged that the Principal Applicant cares for the Minor Applicant but noted that he is in school full-time. The financial information indicated that the Applicants supported themselves through social assistance. There was no indication that they had any savings or owned any assets.

[12] The Officer said there was no evidence to indicate that the Principal Applicant's son was employed or attending school. The evidence indicated that he was involved with the Roma Community Centre as a dancer. There was no other evidence that the Applicants were involved in the community in Canada.

[13] The Officer requested updated information regarding the Minor Applicant's injuries in July 2013. She acknowledged he was in an intensive rehabilitation program including speech and physical therapy. The treatments were largely funded through his insurance and he also received one-on-one support from a Special Needs Assistant at school. The Minor Applicant's lawyer indicated that he is entitled to compensation for his injuries and that the litigation process could take longer than three to four years.

[14] A June 2013 medical progress report indicated that the Minor Applicant "had recovered well from his injuries, and was able to do any activity except full contact sports or anything where he could be hit in the head." He had no further medical appointments scheduled at the time. There was a recommendation that he see an orthopedic surgeon and engage in exercises to strengthen his muscles. The report indicated that while his English was improving, he had missed a large amount of school and was significantly behind.

[15] The Officer noted that the Minor Applicant's mother had signed a consent form to permit the Minor Applicant to travel to Canada with the Principal Applicant. However, there was no documentation to support that the Principal Applicant had legally adopted the Minor Applicant, nor was there any information to suggest that the Minor Applicant could legally be included in the Principal Applicant's application for permanent residence. There was also no indication that the Minor Applicant's mother could not care for him, or that they had not been living together in Hungary.

[16] The Officer said she had reviewed the evidence from the Applicants regarding the difficulties that Roma people experience in accessing healthcare in Hungary. However, she said that the articles failed to provide any information as to whether these applicants, and particularly the Minor Applicant, would be able to access healthcare.

[17] The Officer found that while the Applicants' return to Hungary may cause hardship, it would not be unusual, undeserved or disproportionate. While the Minor Applicant was entitled to seek compensation for his injuries, the legal process was long and arduous. There was no information to suggest the Minor Applicant's medical treatment could not continue in Hungary. There was also no information to suggest the Minor Applicant would not benefit from being reunited with his mother in Hungary. She concluded that "[t]he information before [her] does not support that the needs of this child and his family can only be served by them obtaining permanent residency in Canada."

[18] The Officer said that a consideration of the best interests of the child [BIOC] required that she be "alert and alive to the interests of children in accordance with the Convention on the Rights of the Child." She said that the BIOC was to be given substantial weight but was only one of many important factors to be considered in an H&C application. She said she had considered the BIOC in her earlier assessment and that the information did not suggest that the Applicants' return to Hungary would "adversely impact the best interests of the minor applicants such that it warrants an exemption."

[19] In conclusion, the Officer found there was no evidence to suggest that the Applicants would have any difficulties readjusting to Hungarian society and culture. The adult Applicants were educated and employed in Hungary, and they have immediate family members living in Hungary. The fact that the Applicants find Canada a more desirable place to live is insufficient to warrant an H&C exemption.

IV. ISSUE

[20] The Applicants raise one issue in this application: Whether the Officer's BIOC analysis was reasonable.

V. STANDARD OF REVIEW

[21] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[22] The Federal Court of Appeal has recently confirmed that H&C decisions are reviewable on a standard of reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 37; *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at para 18. The range of reasonable outcomes remains limited by the established legal principles to be applied in assessing the BIOC: *Blas v Canada (Citizenship and Immigration)*, 2014 FC 629 at paras 18-20; *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at para 9 [*Hawthorne*]; *Sinniah v Canada (Citizenship and Immigration)*, 2011 FC 1285 at paras 59-64 [*Sinniah*]; *Arulraj v Canada (Citizenship and Immigration)*, 2006 FC 529 at para 14.

[23] 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": see *Dunsmuir*, above, at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the 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."

VI. STATUTORY PROVISIONS

[24] The following provisions of the Act are applicable in this proceeding:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

VII. ARGUMENT

A. *Applicants*

[25] The Applicants submit that the Officer's BIOC analysis failed to meet the standards set out in *Hawthorne*, above, at para 5.

[26] First, the Officer ignored the evidence regarding the Minor Applicant's inability to access the rehabilitation and education services that he requires in Hungary. The Officer unreasonably discounted the documentary evidence which indicates that Roma people "face serious barriers in access to healthcare" because it did not address the Applicants' specific circumstances. In doing so, she ignored the evidence which did address the Applicants' specific circumstances. In particular, the Minor Applicant's occupational therapist indicated she had searched for rehabilitation services in Hungary and been unable to find an equivalent or comparable treatment to that which the Minor Applicant is receiving in Canada. In addition, she had experience in the special education system in Hungary and said that children with severe brain injuries are placed in special schools which would be inappropriate given the Minor Applicant's abilities. The Officer's failure to mention or analyze the evidence which directly contradicted her conclusions is a reviewable error: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 17 [*Cepeda-Gutierrez*].

[27] Second, the Officer committed a reviewable error in failing to consider that the Minor Applicant's lawyer indicated that his compensation claim could be dismissed if he was not available in Canada at various stages of the litigation process.

[28] Third, the Officer erred in relying on the benefits that she felt would arise from the Minor Applicant being reunited with his mother. The evidence indicated that his mother gave the Minor Applicant to the Principal Applicant at a young age. There is also evidence that the Principal Applicant is the Minor Applicant's legal guardian and caregiver.

B. *Respondent*

[29] The Respondent submits that the Officer reasonably considered the BIOC in the H&C application. The H&C process is an exceptional remedy designed to provide relief from unusual and undeserved, or disproportionate hardship: *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at paras 11, 15-17 [*Legault*]. While an officer must be "alert, alive and sensitive" to the BIOC, they are not determinative but rather one factor to be considered: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75 [*Baker*]; *Legault*, above, at para 12; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 24 [*Kisana*].

[30] The Officer detailed the Minor Applicant's medical history, his rehabilitation program and the details of the most recent medical report. However, the Applicants did not provide sufficient evidence that the Minor Applicant could not receive comparable health care in Hungary. The Federal Court has held that mental illnesses or chronic illnesses do not give non-Canadians a right to remain in Canada: *Gardner v Canada (Citizenship and Immigration)*, 2011 FC 895 at para 41; *Bichari v Canada (Citizenship and Immigration)*, 2010 FC 127 at para 28.

[31] Contrary to the Applicants' assertion, the Officer did consider the evidence of the Minor Applicant's occupational therapist. However, there was no error in the Officer's failure to refer to her opinion that the Minor Applicant could not access health care in Hungary. The occupational therapist did not provide any details regarding the research she conducted to determine that the Minor Applicant would be unable to access equivalent rehabilitation services.

There was also no error in the Officer's failure to quote from her opinion on the Hungarian education system. Her experience as a teacher in Hungary is from approximately twenty years ago and is of little probative value.

[32] The Officer reasonably concluded that while civil litigation is time-consuming, it is temporary and does not justify obtaining the exceptional remedy of permanent residency on H&C grounds. There is no guarantee that the Minor Applicant is entitled to compensation.

[33] Finally, the evidence is unclear as to whether the Principal Applicant has legal custody of the Minor Applicant. There is a distinction between legal custody of a child and temporary custody while a parent is residing abroad. It was reasonable for the Officer to find that the Principal Applicant's statement that she has custody of the Minor Applicant to be insufficient evidence of custody arrangements. In addition, the evidence shows that the Minor Applicant's mother moved to Canada one month after the car accident and he lived with her for at least one and a half years. There is significant evidence that the mother was the Minor Applicant's primary caregiver.

C. *Applicants' Reply*

[34] In reply, the Applicants submit that while an H&C application is not designed to eliminate all hardships, the "unusual, undeserved or disproportionate" hardship has no place in a BIOC analysis: *Sinniah*, above; *Hawthorne*, above.

[35] The Applicants also clarify that they are not arguing that the Officer gave the wrong amount of weight to the evidence regarding the Minor Applicant's treatment but rather they argue that the Officer failed to assess it entirely.

VIII. ANALYSIS

[36] I agree with the Respondent that the Applicants are not entitled to an affirmative result in their H&C application simply because the best interests of the Minor Applicant favours that result. See *Legault*, above, at 12; *Kisana*, above, at para 24;

[37] In reaching a final decision on an H&C application, an officer is required to be "alert, alive and sensitive" to the BIOC affected by the decision and to take these best interests into account when deciding the application. See *Baker*, above, at para 75. The Officer purports to do that when she says "I have considered the best interests of the children included in these applications as required and previously mentioned in this assessment, along with the personal circumstances of this family" (CTR at 11).

[38] However, in deciding what weight to give to the BIOC in the overall decision, the Officer must show a reasonable awareness of the situation actually faced by the children; otherwise, she cannot be said to be alert, alive and sensitive to those interests.

[39] In this case, the Officer does not demonstrate such an awareness. As the Applicants point out, the Officer does not engage with evidence which addresses the inability of the Minor Applicant to access the rehabilitation and education services that he requires in Hungary. The

Officer says that the documentation provided does not contain "information specific to the healthcare available to the applicants in particular, the FA's grand-son," and that the "information before me does not support that the child would be unable to access healthcare or other supports in Hungary with regard to both his injuries and additional issues that may have resulted from his injuries" (CTR at 10). However, the Minor Applicant's occupational therapist gives direct information about what the child requires that is not available in Hungary.

[40] The Officer says that she has "read and considered all the information and evidence presented by the applicants as well as publically available documentation" (CTR at 8). The Officer also acknowledges that the articles provided show that "issues of discrimination affect the healthcare received by many of the Roma population," but says that "the articles do not provide information specific to the healthcare available to the applicants" and so do not "support that the child would be unable to access healthcare or other supports in Hungary with regard to both his injuries and additional issues that may have resulted from his injuries" (CTR at 10). However, the Applicants provided specific evidence from the Minor Applicant's occupational therapist, who had researched the situation in Hungary which spoke directly to the issue of why the Minor Applicant's needs could not be met in Hungary. This evidence directly contradicts what the Officer says, yet it is not discussed. It is not sufficient for the Officer to say that she has looked at all the evidence, but then fail to engage with and address evidence that contradicts her conclusions and, in this case, addresses the very issue that the Officer says is deficient, i.e. the lack of evidence specific to the Applicants. See *Cepeda-Gutierrez*, above.

[41] Similar problems arise with regard to the Officer's treatment of the evidence about the deficiencies in Hungary's educational system and their impact upon the Minor Applicant, as well as evidence from the Minor Applicant's solicitor about what would happen to the child's legal right to compensation and the legal process he is involved in Canada should he be removed at this time.

[42] These considerations need not have been determinative of the overall H&C application, but simply ignoring evidence and reaching BIOC conclusions that are directly contradicted by the evidence renders the whole Decision unreasonable because it means that an appropriate balancing of the factors at play cannot have occurred and that the Officer was not alert, alive and sensitive to the BIOC.

[43] The Respondent says that this evidence was addressed when the Officer says the "information before me does not support that the needs of this child and this family can only be served by them obtaining permanent residency in Canada." In other words, the Respondent says it is sufficient for the Officer to acknowledge that evidence has been provided and to then provide a general conclusion without saying why the occupational health evidence and legal evidence does not support such a conclusion. If this were the case, then it would mean that no arbitrary conclusions could ever be challenged. The jurisprudence of the Court is clear that this is not a reasonable approach to dealing with important evidence that contradicts an officer's general conclusions. See *Hinzman v Canada (Citizenship and Immigration)*, 2010 FCA 177 at para 38, quoting *Cepeda-Gutierrez*, above; *Ratnarajah v Canada (Citizenship and Immigration)*, 2010 FC 1054 at para 17; *Zheng v Canada (Minister of Citizenship and Immigration)* (1995), 27

Imm LR (2d) 101 at para 13 (FCTD). An H&C officer has a wide discretion but that discretion cannot be exercised in an arbitrary way that is not transparent and intelligible.

[44] As a consequence, this matter must be returned for reconsideration in which the BIOC are fully identified and given appropriate weight.

[45] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different officer.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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