Federal Court  Cour fédérale

Date: 20171116

Docket: IMM-1101-17

Citation: 2017 FC 1043

Ottawa, Ontario, November 16, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

IREK LOHAZYAK, IRYNA LOHAZYAK and DANYLO LOHAZYAK

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] The Principal Applicant, Irek Lohazyak, age 50, his spouse Iryna Lohazyak, age 35, and their son, Danylo Lohazyak, age 11, are citizens of Ukraine. They fled Ukraine in response to persecution from members of the Principal Applicant's family following his conversion from Islam to Christianity. The Applicants claimed refugee protection upon arrival in Canada in June 2014, but the Refugee Protection Division [RPD] of the Immigration and Refugee Board [Board] rejected their claim. The Refugee Appeal Division [RAD] of the Board denied their appeal of the

RPD's decision, and leave to appeal to this Court was denied. The Applicants applied for a Pre-Removal Risk Assessment [PRRA], but the PRRA application was rejected in a decision dated January 26, 2017. The Applicants then applied for permanent residence on humanitarian and compassionate [H&C] grounds. In a letter dated January 30, 2017, a Senior Immigration Officer decided that an exemption would not be granted for the Applicants' application for permanent residence from within Canada on H&C grounds. The Applicants have now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the Officer's decision.

I. Background

[2] The Principal Applicant comes from a Tatar Muslim family and he was raised as a Muslim. In 2002, he converted to Evangelical Baptist Christianity and began to preach his new religion among his family and friends. His younger brother also converted to Christianity. The rest of his family rejected the Principal Applicant and began to threaten and physically abuse him. The Principal Applicant responded to this by leaving his home and his business and travelled to Moscow, Russia, where he lived for approximately one year. During this time, the Applicant's younger brother was murdered.

[3] On his return to Ukraine, the Principal Applicant resided in Kiev. While there, he met Ms. Lohazyak through the local Evangelical Baptist Church. The two married in 2005, and the Principal Applicant took Ms. Lohazyak's name in order to make it more difficult for his family to locate him. The Principal Applicant and his wife were harassed by their neighbours due to their religion, and were evicted. They moved to Lviv, where they continued to proselytize.

Following an incident in which their apartment door was vandalized, the couple returned to Kiev. While in Kiev, their apartment door was again vandalized and they were evicted. The Principal Applicant and his wife went to the police but received no assistance.

[4] In March 2014, while participating in the Euromaidan protests against former Ukrainian president Viktor Yanukovych, the Principal Applicant was injured in an explosion. He sought medical attention in Poland because his location would become known to police if he sought medical treatment in Ukraine. At this time, a Polish newspaper published a photograph of the Principal Applicant and soon thereafter the Principal Applicant received a phone call from a family member who called him a traitor to Islam and threatened to "shoot him like a dog." He subsequently received a number of threatening text messages. The Principal Applicant reported these messages to police but received no assistance.

[5] The Applicants left Ukraine for Canada on June 14, 2014. They were not advised to apply for work permits and did not do so until 2016. The Principal Applicant now works as a construction worker and his wife works as a cleaner. The Principal Applicant and his wife have been suffering from mental health issues stemming from their persecution, including severe anxiety and depression.

II. The Officer's Decision

[6] The Applicants raised three main factors for consideration in their written submissions; namely, their establishment in Canada, the best interests of Danylo, and risk and adverse country conditions.

[7] The Officer first considered the Applicants' establishment in Canada, including the ESL classes they had taken, their claim that they were not advised by counsel to apply for work permits, as well as a petition from friends and letters from their church and the Ukrainian Canadian Social Services attesting to their volunteer activities. The Officer found that their level of establishment, while commendable, was not greater than what would be expected after two and a half years in a new country. The Officer considered an incomplete application for work permits made by the Principal Applicant and his wife in 2014, and gave little weight to their claim they were unable to become self-sufficient until May 2016 because of improper recommendations from their former consultant.

[8] The Officer considered Danylo's best interests and the hardship he faced in Ukraine, including that associated with the Principal Applicant's absence while in Poland to receive medical treatment, and an attempt by members of a gang headed by the Principal Applicant's uncle to kidnap Danylo which was thwarted by a school security guard. The Principal Applicant claimed Danylo had developed medical problems as a result of these events, and submitted a report from a registered psychologist, Dr. Pilowsky, stating that if Danylo remained in Canada he "will return to normative development and adjustment." Medical records from Danylo's family doctor in Ukraine, a letter from Danylo's dance instructor in Ukraine, and a report card from his school in Ukraine were also submitted.

[9] The Officer noted that the Principal Applicant had not raised Danylo's attempted kidnapping before the RPD or the RAD. The Officer assigned little weight to the hardship associated with this alleged kidnapping of Danylo since the allegations related to risk at the

hands of his uncle had been given little weight in the PRRA decision. Little weight was also given to Dr. Pilowsky's assessment of Danylo's mental health and to the letter from his dance instructor, since these documents relayed information about Danylo provided by the Principal Applicant and his wife. In assessing the letter from Danylo's doctor in Ukraine, the Officer acknowledged that something had happened to Danylo which triggered the conditions described by the doctor. The Officer proceeded to note though, that: "Danylo was under the care of physicians and specialists, according to the letter. I find that should his health condition resurface upon their return he would be able to obtain the medical treatment necessary for him to recover." The Officer concluded the assessment of Danylo's best interests by acknowledging that, while the Principal Applicant and his wife were concerned about the safety and well-being of their child, they had not demonstrated that living conditions in Ukraine are so serious as to directly compromise the best interests of Danylo.

[10] The Officer then considered risk and adverse country condition evidence, finding that the Applicants presented the same risk as they had before the RPD and RAD, but augmented it to include the fact that the Principal Applicant's uncle was the leader of a Muslim criminal organization. The Officer noted that:

> As the Officer who made the decision on the PRRA application, I found that the applicant had provided little evidence to support his claim that he will be sought out and harmed by his uncle as a result of his religious beliefs and that there was adequate state protection in Ukraine should the applicant and his fmaily [*sic*] find themselves in need.
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> As the applicant has not established that the risk alleged before the RPD, RAD, PRRA or this application occurred, I am unable to give weight to the applicant's description of hardship resulting from the risk presented. Therefore, I give little weight to this factor.

[11] Although the Officer accepted the diagnosis in Dr. Pilowsky's report that the Principal Applicant and his wife each suffer from Severe Depression and Post-traumatic Anxiety, the Officer noted that the Principal Applicant:

> …has received medical treatment in Ukraine for his conditions and they could all receive medical treatment for their medical conditions upon their return. …Nowhere in the file does the applicant state that he or his family were ever denied healthcare, or that they incurred costs for receiving healthcare to treat their medical conditions, therefore I give this statement little weight.

[12] As to the Principal Applicant's concern about the ongoing violence and instability in Ukraine, the Officer found that most of the violence and instability in Ukraine is located in the eastern part, mainly the Donetsk and Luhansk regions of the country, and the Applicants were residing in and around Lviv, which is not located in the east of the country and is under the control of the Ukrainian government. The Officer further found that, while the Applicants may have difficulty re-establishing themselves in Ukraine amid the general socio-economic challenges faced by that country, there was no sufficient objective evidence to show that they would be unable to obtain the necessities of life in Ukraine.

[13] The Officer concluded by acknowledging that Danylo was happy and comfortable in Canada, but "from the evidence before me I am not of the position to accept that the quality of life Danylo would have in Ukraine would be of such a substandard nature such as to place his wellbeing in jeopardy." The Officer further acknowledged that, while Danylo may encounter initial difficulty re-adapting to life in Ukraine, these initial difficulties would not directly compromise his best interests, The Officer also acknowledged that, after two and one-half years in Canada, it would be difficult for the Applicants to leave and there would be a period of social

and economic adjustment when they first return to Ukraine which would likely result in some hardship for them.

III. Issues

[14] The Applicants frame the issues arising in this application for judicial review as being whether the Officer erred in law by making unfair or unreasonable decisions on the totality of the evidence. In my view, however, since there are no allegations or facts giving rise to any issue of procedural fairness, this application boils down to one issue: was the Officer's decision reasonable?

IV. Analysis

A. *Standard of Review*

[15] An immigration officer's decision to deny relief under subsection 25(1) of the *IRPA* involves the exercise of discretion and is reviewed on the reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44, [2015] 3 SCR 909 [*Kanthasamy*]). An officer's decision under subsection 25(1) is highly discretionary, since this provision "provides a mechanism to deal with exceptional circumstances," and the officer "must be accorded a considerable degree of deference" by the Court (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4, [2016] FCJ No 1305; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15, [2002] 4 FC 358).

[16] Under the reasonableness standard, the Court is tasked with reviewing a decision for "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; and it is also not "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339.

B. *Was the Officer's assessment of the evidence about the Applicants' mental health reasonable?*

[17] Dr. Pilowsky's assessment of Danylo's mental health was based entirely on information provided by his parents; he was not assessed in person. In my view, it was open to, and reasonable for, the Officer to assign little weight to Dr. Pilowsky's assessment of Danylo's mental health when assessing his best interests. The Officer's approach to the medical evidence concerning the Principal Applicant's mental health and that of his wife, however, was not reasonable because it runs afoul of the teachings from *Kanthasamy*.

[18] In *Kanthasamy*, the Supreme Court of Canada found that an H&C officer had unreasonably assessed a psychologist's report about the applicant's mental health, stating that:

> [46] In discussing the effect removal would have on Jeyakannan Kanthasamy's mental health… the Officer said she "[did] not dispute the psychological report" and "accept[ed] the diagnosis". The report concluded that he suffered from post-traumatic stress disorder and adjustment disorder with mixed anxiety and depressed mood resulting from his experiences in Sri Lanka, and that his condition would deteriorate if he was removed from Canada….
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> …
>
> [48] Moreover, in her exclusive focus on whether treatment was available in Sri Lanka, the Officer ignored what the effect of removal from Canada would be on his mental health. As the Guidelines indicate, health considerations *in addition to* medical inadequacies in the country of origin, may be relevant: *Inland Processing*, s. 5.11. As a result, 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 weighed regardless of whether there is treatment available in Sri Lanka to help treat his condition:…
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> [Emphasis in original]

[19] In this case, the medical evidence about the mental health of the Principal Applicant and his wife was such that they were vulnerable to "psychological risk and collapse" if they return to Ukraine. Dr. Pilowsky's report stated that:

> Due to the patients' symptoms and aforementioned concerns, along with the reported symptoms of their son, it is my professional opinion that this family is highly vulnerable to psychological risk and collapse, should they return to Ukraine for any period of time. By all accounts, this is a vulnerable family given their history of trauma, persecution, and overall adversity, and are looking to remain on the path to recovery and security in Canada. It is my opinion that with the ability to remain in this country, their psychological symptoms will begin to slowly improve once more…

> In contrast, this family will associate any time spent in Ukraine at any location as certain death, and each individual's psychological functioning will collapse in turn. Please note that the mere thought of this family being returned to Ukraine is utterly intolerable to Mr. and Ms. Lohazyak's emotional defences, as their coping capacities are clearly overwhelmed.

[20] In my view, the Officer in this case, like the officer in *Kanthasamy*, ignored what the effect of removal from Canada would be on the mental health of the Principal Applicant and his wife. The Officer did not reasonably consider or adequately identify and assess and weigh the fact that returning to Ukraine would trigger or cause further psychological harm to the Principal Applicant and his wife. The Officer did not consider whether this hardship was such that it warranted H&C relief. The Officer's treatment of the medical evidence concerning the Principal Applicant's mental health and that of his wife, in view of *Kanthasamy*, was unreasonable. The Officer's decision is, therefore, set aside and the matter will be returned to another officer for redetermination.

V. Conclusion

[21] For the reasons stated above, the Applicants' application for judicial review is allowed. Neither party raised a serious question of general importance; so, no such question is certified.

JUDGMENT in IMM-1101-17

THIS COURT'S JUDGMENT is that: the application for judicial review is granted; the decision of the Senior Immigration Officer dated January 30, 2017, is set aside; the matter is returned for redetermination by a different immigration officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1101-17
STYLE OF CAUSE:	IREK LOHAZYAK, IRYNA LOHAZYAK and DANYLO LOHAZYAK v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
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