Federal Court  Cour fédérale

Date: 20220527

Docket: IMM-4278-20

Citation: 2022 FC 767

Ottawa, Ontario, May 27, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

MARIANA ATAMANCHUK
IURII ATAMANCHUK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a negative humanitarian and compassionate decision [the H&C Decision] made by a Senior Immigration Officer. This Application was heard concurrently with the Applicants' application for judicial review of a negative pre-removal risk assessment decision [the PRRA Decision] made by the same officer on the same date (see *Atamanchuk v Canada (Minister of Citizenship and Immigration)*, 2022 FC 766).

[2] I find that the officer's analysis of the best interests of the Applicants' son is unreasonable and thus the decision cannot stand.

Background

[3] The Applicants, Iurii Atamanchuk and Mariana Atamanchuk, are husband and wife. They have a son who was born in Canada in 2016.

[4] The Applicants fled Ukraine in 2016 due to persecution because of Iurii's past membership in the Party of Regions. Iurii says that he only joined the party when they were in power in order to register his brokerage company. Due to his membership in this organization, Iurii was accused of being a pro-Russian separatist. The Applicants faced death threats and Iurii was assaulted multiple times.

[5] The Applicants made a refugee claim. The Refugee Protection Division [RPD] rejected their claim. The RPD found the Applicants credible but determined that they had an internal flight alternative [IFA] in Kyiv. The RPD's decision was upheld by the Refugee Appeal Division [RAD]. The Applicants were not represented by counsel in either proceeding.

[6] After the Applicants' refugee claim was refused, they made an application for permanent residence on humanitarian and compassionate [H&C] grounds. While their H&C application was pending, the Applicants were served with a pre-removal risk assessment [PRRA] application.

[7] Both the H&C and the PRRA applications were refused by the same officer on July 31, 2020. The Applicants applied for judicial review of both decisions.

The H&C Decision

[8] The officer considered adverse country conditions in Ukraine, the Applicants' establishment, and the best interests of their son and goddaughter.

Adverse Country Conditions

[9] The officer considered the Applicants' submission that the general quality of life in Ukraine is low and the economic situation is poor. The officer found that information regarding country conditions provided by the Applicants from a website call Numbeo was not reliable. The officer noted that the Applicants had not "submitted other evidence to further substantiate the country conditions in Ukraine or how they would face hardship as a result." The officer therefore assigned no weight to country conditions.

Establishment

[10] The officer considered evidence of the Applicants' employment, volunteerism, and English language proficiency and assigned each of these some weight.

[11] The officer considered a letter of support from the Zaidel family, refugees from Ukraine whom the Applicants had helped settled in Canada. The officer accepted that the Applicant's relationship with the Zaidel family was stronger than a normal friendship and assigned it some weight. However, the officer found that the Applicants had not demonstrated that this relationship was interdependent or that they would be unable to continue it at a distance.

[12] The officer considered additional letters of support from friends. The officer found that it is to be expected that the Applicants would have developed friendships in Canada and that there was nothing to suggest that these friendships could not be continued at a distance. The officer gave these letters little weight. The officer also gave little weight to letters from the Applicant's employers, their landlord, and their son's daycare, characterizing them as "generic in nature."

[13] The officer noted that the Applicants had spent the majority of their lives in Ukraine, where they were previously employed and educated. The officer found that they had not established that it would be not viable for them to return.

[14] Overall, the officer assigned "some weight" to establishment.

Best Interests of the Child

[15] The officer noted the Applicants' submission that it was in their son's best interest to remain in Canada.

[16] The officer found that given the Applicants' son was 4 years old, "he would have ample time and opportunity to learn Ukrainian and adapt to Ukrainian society."

[17] The officer considered country condition documents that stated that there were challenges in education and health programs for children in Ukraine. It was noted that this evidence was with respect to marginalized groups and children living in rural areas and that the Applicants had not established that their son fit this profile.

[18] The officer considered reports that vaccination rates in Ukraine were low. It was found that the evidence indicated that low vaccination was due to vaccine hesitancy and that there was insufficient evidence to demonstrate that the Applicants would be unable to have their son vaccinated. The officer also found that there was insufficient evidence to establish that their son would be unable to obtain adequate medical treatment for his asthma.

[19] The officer also consider submissions regarding the best interests of the Applicants' goddaughter, a member of the Zaidel family. The Applicants' desire to be close to their goddaughter was noted. The officer also noted however that she is in the care of her parents, who are now well established in Canada, and found that the Applicants had not established that they would not be able to maintain a relationship with their goddaughter outside of Canada.

[20] Overall, the officer found that the Applicants had not "demonstrated how the best interest of their son or their goddaughter would be compromised should they return to Ukraine." The officer assigned "little weight" to the best interests of the children.

[21] Overall, the officer found that the Applicants had demonstrated some establishment but had failed to demonstrate hardship due to adverse country conditions or that the best interests of the children would be compromised. The officer found that the Applicants' establishment was not significant enough on its own to warrant relief.

Issues

[22] The Applicants raise three issues:

1. Whether the officer erred by ignoring the evidence of the Applicants' risk and hardship in Ukraine, which had been put forth in their PRRA application;

2. Whether the officer conducted an improper establishment analysis; and

3. Whether the officer conducted an unreasonable analysis of the best interest of the Applicants' son.

Analysis

1. Evidence of Risk and Hardship

[23] The Applicants submit that the officer erred, and acted in bad faith, by ignoring the findings of RPD and RAD, as well as the officer's own findings made in the PRRA Decision.

The Applicants submit that these findings, particularly the findings in the PRRA Decision, were before the officer and clearly indicated that the Applicants would face hardship upon return to Ukraine. The Applicants submit that the officer's finding that, aside from the evidence considered in the H&C Decision, "[t]he applicants have not submitted other evidence to further substantiate the country conditions in Ukraine and how they would face hardship as a result" demonstrates that evidence that was before the officer was clearly ignored without justification.

[24] The Respondent submits that the Applicants are attempting to require the officer to consider materials beyond their H&C submissions. The Respondent notes that the Applicants did not raise the risk they faced in Ukraine in the H&C submissions and that the only reference to conditions in Ukraine is that the "general level of life in Ukraine is by [far] the lowest in Europe." The Respondent submits that the Applicants cannot impugn the H&C Decision for not considering circumstances that they did not raise.

[25] In the alternative, the Respondent notes that the RPD, RAD, and officer in the PRRA Decision all found that the Applicants have a viable internal flight alternative. The Respondent submits that the officer's finding in the PRRA Decision addresses the Applicants' prospective risk in Ukraine.

[26] The Applicants' H&C submissions do not make any mention of the risks that were considered by the officer in the PRRA Decision. However, one could question whether it is truly fair for the officer to have found that there is no evidence of hardship, when they are clearly aware of a risk of persecution in at least some part of Ukraine that they themselves accepted as

credible. On the other hand, the Applicants made their H&C submissions before the PRRA and there was no guarantee that the same officer would be assessing both applications.

[27] I am not persuaded that the officer in this case was required to consider submissions and evidence found in the latter filed PRRA application.

[28] This Court has found that where the same officer is assessing both an H&C application and a PRRA, there is a narrow exception to the general rule that officers can only consider the evidence put before them. Justice Diner summarized the exception as follows:

> [W]here the same officer decides the PRRA just before deciding the H&C, that officer must consider evidence provided in the PRRA for the purposes of that H&C, assuming that the underlying arguments have been raised in the H&C.
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> *Denis v Canada (Minister of Citizenship and Immigration)*, 2015 FC 65 [*Denis*] at para 47 [emphasis added]

[29] In *Denis*, in both the PRRA and H&C applications, the applicant raised her sexual orientation. The officer unreasonably found that there was no evidence regarding her sexual orientation in the H&C application, despite evidence being provided on the PRRA.

[30] In *Giron v Canada (Minister of Citizenship and Immigration)*, 2013 FC 114 [*Giron*], Justice O'Reilly held at paragraphs 16 – 17 that:

> In my view, in circumstances where the officer deciding the H&C has also conducted the PRRA, and where that officer relies on the PRRA analysis in deciding the issue of hardship on the H&C, fairness requires that the officer consider all of the PRRA submissions.

> Essentially, the linkage between the risk assessment in the PRRA and the hardship analysis in the H&C is made by the officer, not the applicant. The applicant is entitled to full assessment of his H&C application. If the officer chooses to import his PRRA analysis into the H&C, the applicant is entitled to expect that all of the relevant PRRA submissions will also be considered.
>
> [emphasis added]

[31] Together, *Giron* and *Denis* suggest two circumstances in which a PRRA and an H&C application determined by the same officer become linked. The first is where the risk raised by an applicant in the PRRA is also raised as a basis for hardship in the H&C application. If this is done, then the officer must consider the PRRA evidence in the H&C application (per *Denis*). The second is where the officer chooses to incorporate one decision into the other application (per *Giron*). If the officer chooses to rely on the PRRA evidence for one aspect of the H&C assessment, they cannot ignore it for others.

[32] Neither condition for linking the two decision is met here. Unlike in *Denis,* the Applicants did not raise the underlying argument of their personal risk in their H&C submissions. They did not raise any personal hardship that they would face as a result of their perceived political affiliation. This distinguishes this case from *Denis*, where sexual orientation was explicitly raised in the H&C application.

[33] Unlike in *Giron*, the officer did not choose to import any part of the PRRA analysis into the H&C. The H&C Decision makes no reference whatsoever to the PRRA Decision and its findings.

[34] Because the two decisions were not linked, there was no obligation for the H&C officer to consider the findings regarding risk from the PRRA Decision.

2. Analysis of Establishment

[35] The Applicants submit that the officer failed to properly consider their positive establishment in Canada and instead found that they would not face hardship upon return to Ukraine. The Applicants submit that the officer applied positive factors against them by relying on their education and employment experience to indicate that they would not face hardship re-establishing themselves, when these factors should be considered as positive factors in favour of H&C relief (relying on *Lauture v Canada (Minister of Citizenship and Immigration)*, 2015 FC 336 [*Lauture*] and *Sosi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1300 [*Sosi*]).

[36] The Applicants submit that the officer minimized their social establishment by stating that they can continue their social relationships without being in Canada. The Applicants further submit that officer failed to provide reasons as to why their positive establishment factors were insufficient to weigh in favour of relief and argue that this is an error (relying on *Chandilas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 258 [*Chandilas*] at para 80).

[37] The Respondent submits that the Applicants misstate the officer's finding, which was that establishment was a positive factor. The Respondent submits that, contrary to *Chandilas*, the officer was not required to articulate an expected level of establishment and reasonably found

that the difficulty the Applicants would face in re-establishing in Ukraine does not rise to the level of warranting an H&C exemption.

[38] I agree with the Respondent that the officer weighted establishment in the Applicants' favour. What the Applicants take issue with is the fact that their establishment was not given enough weight to warrant relief. This is largely an attempt to have this Court reweigh the evidence and grant it more positive weight than it was already given. That is not the role of this Court on judicial review.

[39] I do not read *Chandilas* as saying that an officer must set out what level of establishment was required. What the officer was required to do was provide an explanation as to why the Applicants had not demonstrated that applying for permanent residence from outside Canada "would impose hardship going beyond that which is inherent in having to leave Canada" (*Chandilas* at para 82). Here, the officer explained that the Applicants' upbringing, education, and work history in Ukraine did not demonstrate that it would not be viable to return, and the officer did not find any evidence of significant hardship in Canada that would justify relief on its own.

[40] The Applicants' reliance on *Lauture* and *Sosi* is misplaced. In both of those cases, the officer's error was relying on positive characteristics that would serve them well in Canada to justify removal. In this case, the positive attributes that the officer relied on were the Applicants' upbringing, education, and work history in Ukraine. The officer relied on these attributes to demonstrate that the Applicants were familiar with Ukraine and would have relevant education

and work experience to re-establish themselves. This is relevant, although it is more properly the subject of a hardship analysis than an assessment of establishment. However, putting it under the heading of establishment is not necessarily an error, especially since establishment as a whole was weighed in favour of relief.

3. Analysis of Best Interests of the Child

[41] The Applicants submit that the officer made two clear errors in the assessment of the best interests of their son.

[42] First, the Applicants submit that the officer erred by assuming that their four-year-old child is resilient and will therefore adapt if removed to Ukraine. The Applicants submit that this type of reasoning was found to be unreasonable by Justice Russell in *Mughrabi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 898 [*Mughrabi*]. The Applicants submit that by this logic, the younger a child is, the easier it would be to find that removal would not be contrary to their best interests.

[43] Second, the Applicants submit that rather than considering the best interests of the child, the officer applies a hardship test. The Applicants submit that the officer effectively asked the Applicants to demonstrate that their son would face undue hardship. Rather than determining what is in the child's best interests, the officer instead considered what would make the adjustment less difficult.

[44] The Respondent submits that the officer did not apply a hardship test but instead properly considered factors that might mitigate the adverse consequences of removal. The Respondent submits that the Applicants' reliance on *Mughrabi* is misplaced. In *Mughrabi*, the applicant provided detailed reports regarding the specific impact of removal the child, which were not provided in this case.

[45] I find that the officer's analysis of the best interests of the Applicants' son is both insufficient and unreasonable.

[46] In *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 [*Williams*], Justice Russell found at paragraph 63 that:

> When assessing a child's best interests an officer must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over another, and then finally, in light of the foregoing assessment determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application.
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> [emphasis in original]

[47] In *Patousia v Canada (Minister of Citizenship and Immigration)*, 2017 FC 876 [*Patousia*] at paragraph 55, Justice Manson found that "subsequent jurisprudence has found it is not necessary to abide strictly by the Williams test, so long as the officer identifies and defines the best interests and gives them considerable weight" [emphasis added].

[48] At no point in the H&C Decision does the officer identify the Applicants' son's best interests. The closest thing to an identification of his best interests is noting that the "Applicants

submit that it is in their son's best interest to remain in Canada." If the officer did consider what the Applicant's son's best interests were, it appears that it was not that he remain in Canada, as the officer found that the Applicants had not "demonstrated how the best interest of their son…would be compromised should they return to Ukraine."

[49] The officer's analysis is clearly aimed at responding to concerns raised by the Applicants and is not, in my view, concerned with determining what the Applicants' son's best interests are. As set out in *Patousia*, an officer is required to determine what the best interests of the child are, not to conduct a hardship analysis. Here, the officer's analysis is entirely focused on whether the Applicants have demonstrated how their son will be negatively impacted by removal. It is a hardship analysis.

Conclusion

[50] The decision under review provided an insufficient and therefore unreasonable analysis of the best interests of the Applicants' son and must be set aside. No question was proposed for certification.

[51] The circumstances in Ukraine have materially changed since the Applicants submitted their H&C application and the officer rendered the decision. Fairness dictates that the Applicants be provided an opportunity to amend their application to address these changed circumstances, should they wish to do so.

JUDGMENT IN IMM-4278-20

THIS COURT'S JUDGMENT is that this application is granted, the officer's decision denying the Applicants' application for permanent residence from within Canada on humanitarian and compassionate grounds is set aside, the application is to be determined anew by a different officer after the Applicants are provided a reasonable opportunity to file further submissions, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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