Federal Court Cour fédérale

Date: 20100107

Docket: IMM-3262-08

Citation: 2010 FC 19

Ottawa, Ontario, January 7, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

LYUDMYLA HNATUSKO
OLEKDSAMDR HNATUSKO

Applicants

And

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision of a pre-removal risk assessment (PRRA) officer (the officer) dated May 29, 2008, wherein the officer decided that an exemption

would not be granted for permanent residence on an humanitarian and compassionate (H&C) ground application.

[2] The applicants request that the decision be set aside pursuant to subsection 18(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and the matter referred back to a different officer for redetermination.

Background

[3] Lyudmyla Hnatusko and Olekdsamdr Hnatusko (the applicants) are citizens of the Ukraine. Oleksandr Hnatusko (the son) arrived in Canada on January 26, 2002 and filed a claim for refugee protection. Lyudmyla Hnatusko (the principal applicant and mother of the co-applicant) arrived in Canada on September 7, 2002 and also filed a claim for refugee protection.

[4] The refugee claims were heard jointly on July 19, 2004. A negative decision was rendered on August 25, 2004. The claim was refused because the Refugee Protection Division (the Board) found that on a balance of probabilities, the applicants did not suffer the harm alleged, the Board found the country documents did not support the allegations that Pentecostals are persecuted in the Ukraine, and found that the applicants were not credible in their claims of persecution based on religious belief. Leave for judicial review was denied.

[5] On December 19, 2007, the applicants filed an H&C application and in March of 2008 were called in to an immigration office to complete a PRRA application. The applications were heard contemporaneously and decided by the officer.

[6] On May 30, 2008, the applicants' PRRA application was denied. Leave for judicial review of the PRRA decision was granted and was heard alongside the leave for judicial review of this, the H&C decision.

[7] The basis of the applicants' wish to remain in Canada is religious persecution as part of an untraditional faith in the Ukraine: Pentecostals.

[8] In the H&C application, the principal applicant also raised the issue of domestic abuse by her husband in Canada. The principal applicant stated that her former counsel mistakenly argued that the domestic abuse she experienced in Canada at the hands of her husband would preclude her from being able to defend herself against violence and gender based discrimination in the Ukraine. The principal applicant feels this was an error and states that it was the domestic abuse suffered at the hands of her ex-husband that she wished to be the focus of the H&C application. She stayed with an abusive husband who had been sponsoring her in an application for permanent residency and only left him when the abuse became overbearing and violent.

The Officer's Decision

[9] The officer found that the issues in the Board hearing and the PRRA and H&C application to be quite similar, but noted that the focus in an H&C analysis was on hardship faced by the applicant, as opposed to risk of persecution. The officer had concluded in the PRRA decision that there was insufficient evidence that religious freedom for the applicants would not exist in the Ukraine. Further, there was insufficient evidence that they would be subjected to persecution despite instances of harassment and discrimination towards religious groups. These instances, for the officer, in the H&C context, did not amount to unusual, undeserved or disproportionate hardship. She specifically pointed to a BBC News Report which documented the increase in popularity of the Pentecostal Church in the Ukraine and the reported 25, 000 members in the capital, Kiev.

[10] The officer then addressed the issue of domestic abuse and noted the abuse that the principal applicant suffered by her Canadian husband. The officer mentions that the principal applicant's counsel raised concerns of whether she will have the right to fair and impartial justice and whether she will be able to defend herself in the Ukraine, but concludes that there is insufficient evidence that the applicant would be faced with gender-related discrimination and violence in the Ukraine.

[11] The officer also noted the principal applicant's ties to the community and substantial degree of establishment, but considered that such establishment was to be expected given the principal applicant's time in Canada and her abilities and did not warrant an exception. The length of time the applicants have been in Canada was not given any weight because the applicants chose to remain in Canada under enforceable removal orders knowing that there was always a possibility that they would have to leave. Close relationships with friends would naturally develop while in Canada,

according to the officer. However, most of their life has been spent in the Ukraine and there is no evidence that they could not reintegrate. Similar levels of independence and establishment would therefore be achievable in the Ukraine.

Issues

[12] The applicants submitted the following issues for consideration:

1. Did the PRRA officer err in law in failing to evaluate this H&C application according to the CIC Manual IP-5 Guidelines section 13.10 and failing to apply the Gender Guidelines issued by the Chairperson?

2. Did the PRRA officer err in law in relying on extrinsic and irrelevant factors to refuse the application and in failing to provide the applicants an opportunity to respond to her concerns?

[13] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer commit a reviewable error by failing to discuss or refer to the specific sections of the CIC Manual dealing with family violence and the Gender Guidelines?

3. Did the officer err in the evaluation of the evidence?

Applicants' Written Submissions

[14] Initially, the applicants were represented by an immigration consultant who failed to raise the issue of domestic violence experienced by the principal applicant appropriately. No reference was made to the Gender Guidelines or any case law on the issue of gender violence in H&C applications. Further, for some unknown reason, the immigration consultant argued that the principal applicant feared domestic violence arising in the Ukraine. This was in error. The fear and impact of violence were as a result of the principal applicant's husband's abuse. No submissions were made on this and as such, the wrong test went to the officer.

[15] Mr. Justice LeDain in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 defined the standard of care of counsel which was stated as that of a "reasonably competent solicitor". Because of the incompetence of the immigration consultant, the principal applicant was deprived of a full and complete determination of her case. The principal applicant gave the immigration consultant police reports, hospital records and a summary of the abuse but they were not submitted. The principal applicant should not be punished for the negligence of her counsel.

[16] The CIC Manual specifically mandates that the officer ought to consider using positive discretion when a person leaves an abusive relationship and a sponsorship fails. This H&C decision fell within the parameters of the domestic violence policy and ought to have been evaluated accordingly.

[17] In regards to the decision as a whole, the officer appeared to be focused mainly on the issue of the applicant's religious persecution. It is evident that the assessment was erroneously made in the context of a PRRA.

[18] Finally, it is the applicants' position that the H&C application was based on domestic violence and establishment. Detailed information on employment including tax returns provided a more complete application based on length of stay, continuous employment, good civil record and integration into the community; which were not considered in their totality.

Respondent's Written Submissions

[19] It was incumbent on the applicants to submit all information and raise all issues to satisfy the requirements of the Act (see *Owusu v. Canada* 2004 FCA 38). A very high threshold must be met before incompetence of a representative will result in a redetermination. Framing the issues differently falls short of the threshold required to be met.

[20] The officer did consider risk as part of the H&C application as she appropriately factored in the possibility of disproportionate hardship if returned to the Ukraine. In any case, the domestic violence was considered within the broader risk assessment (ie: hardship focus). The officer stated "I am cognizant of the fact the principal applicant was abused, while in Canada, by her Canadian husband...".

[21] In regards to the Gender Guidelines, they have no application to the H&C process or decision. The applicants' reliance on IP-5, 13.10, which deals with family violence, is also misplaced. It is clear that the manual and guidelines are not legally binding and do not create any legal entitlement, but more importantly, there was no concern that the officer misunderstood the principal applicant's situation, as section 13.10 attempts to address.

[22] The final issue regarding the totality of the evidence and weighing of factors is beyond the role of the Court in this judicial review. The H&C application is not a simple application of legal principles but a fact specific weighing of factors. The officer addressed the relevant factors and as such there was no error, even if the Court would have weighted the factors differently.

Analysis and Decision

[23] **Issue 1**

What is the appropriate standard of review?

The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 stated at paragraph 62 that a standard of review analysis does not need to be conducted where the standard of review applicable to the particular question before the Court is well-settled by past jurisprudence.

[24] The seminal case for H&C applications is *Baker v. MCI*, 1999 Can. LII 699 (S.C.C.). In *Baker* above, it was held that the standard of review applicable to an officer's decision of whether or not to grant an exemption based on H&C considerations was reasonableness *simpliciter* which,

Dunsmuir above, collapsed to the standard of reasonableness. The Supreme Court in Baker above, stated at paragraph 62:

> … I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court – Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.

[25] Since *Dunsmuir* above, other judicial reviews of H&C decisions have adopted reasonableness given the discretionary nature of such a decision and its factual underpinning" (see *Zambrano* v. *Canada (Minister of Citizenship and Immigration)*, 2008 FC 481 (Can, LII), 2008 FC 481).

[26] For a decision to be reasonable, there must be justification, transparency and intelligibility within the decision making process. The decision must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (see *Dunsmuir* above, at paragraph 47).

[27] **<u>Issue 2</u>**

Did the officer commit a reviewable error by failing to discuss or refer to the specific sections of the CIC Manual dealing with family violence and the Gender Guidelines?

With respect to CIC Manual IP-5, section 13.10, there is no doubt that this section applies to the principal applicant's situation but at the same time, the mere applicability of the section does not have the effect of automatically causing the applicants' H&C application to succeed.

[28] In the present case, the officer was aware of the abusive situation that the principal applicant had left and the officer did not fault the principal applicant for no longer having an approved sponsorship.

[29] There was no reviewable error with respect to the application of section 13.10 which reads:

> **Family violence**
>
> 13.10 Family members in Canada, particularly spouses, who are in abusive relationships and are not permanent residents or Canadian citizens, may feel compelled to stay in the relationship or abusive situation in order to remain in Canada; this could put them at risk.
>
> Officers should be sensitive to situations where the spouse (or other family member) of a Canadian citizen or permanent resident leaves an abusive situation and, as a result, does not have an approved sponsorship.

[30] The applicants also submitted that the officer failed to apply the chairperson's guidelines and thus made a reviewable error. I am of the view that these guidelines, the Gender Guidelines,

more aptly apply in the adjudication of Convention refugee claims. Consequently, the officer did not make a reviewable error in this respect.

[31] The applicants' representative was an immigration consultant. The applicants have submitted that the consultant did not properly frame the issues in the H&C application and thus, was negligent resulting in a denial of natural justice for them. From a review of the file, I am satisfied that despite this, the real issues and factual background was understood by the officer. The officer was aware of the domestic abuse in Canada. The officer made no error in this respect.

[32] **Issue 3**

Did the officer err in the evaluation of the evidence?

I am of the view that the evidence was analyzed in detail and in respect to the H&C considerations enunciated in the Act. The officer made mention of the employment of the principal applicant, the ties to the community, and the length of time spent in Canada. I do not accept that these factors were ignored because of an undue focus on risk emanating from the PRRA decision. The officer recognized the appropriate place of evaluating risk: as a hardship factor.

[33] As a result, I am of the opinion that the officer did not make a reviewable error and consequently, the application for judicial review is dismissed.

[34] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[35] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The *Immigration and Refugee Protection Act*, S.C. 2001, c.27:

3.(1) The objectives of this Act with respect to immigration are	3.(1) En matière d'immigration, la présente loi a pour objet :
(a) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;	a) de permettre au Canada de retirer de l'immigration le maximum d'avantages sociaux, culturels et économiques;
(b) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada;	b) d'enrichir et de renforcer le tissu social et culturel du Canada dans le respect de son caractère fédéral, bilingue et multiculturel;
(b.1) to support and assist the development of minority official languages communities in Canada;	b.1) de favoriser le développement des collectivités de langues officielles minoritaires au Canada;
(c) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;	c) de favoriser le développement économique et la prospérité du Canada et de faire en sorte que toutes les régions puissent bénéficier des avantages économiques découlant de l'immigration;
(d) to see that families are reunited in Canada;	d) de veiller à la réunification des familles au Canada;
(e) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian	e) de promouvoir l'intégration des résidents permanents au Canada, compte tenu du fait que cette intégration suppose des obligations pour les nouveaux arrivants et pour la

society;

société canadienne;

(f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;

f) d'atteindre, par la prise de normes uniformes et l'application d'un traitement efficace, les objectifs fixés pour l'immigration par le gouvernement fédéral après consultation des provinces;

(g) to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities;

g) de faciliter l'entrée des visiteurs, étudiants et travailleurs temporaires qui viennent au Canada dans le cadre d'activités commerciales, touristiques, culturelles, éducatives, scientifiques ou autres, ou pour favoriser la bonne entente à l'échelle internationale;

(h) to protect the health and safety of Canadians and to maintain the security of Canadian society;

h) de protéger la santé des Canadiens et de garantir leur sécurité;

(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and

i) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;

(j) to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society.

j) de veiller, de concert avec les provinces, à aider les résidents permanents à mieux faire reconnaître leurs titres de compétence et à s'intégrer plus rapidement à la société.

25.(1) The Minister shall, upon request of a foreign national in

25.(1) Le ministre doit, sur demande d'un étranger se

Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national 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.

trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout 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.

FEDERAL COURT

SOLICITORS OF RECORD

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