Federal Court  Cour fédérale

Date: 20150305

Docket: IMM-5852-13

Citation: 2015 FC 282

Ottawa, Ontario, March 5, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ROMAN TRACH
GANNA SVOBODOVA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] The Applicants applied for permanent residence from within Canada in 2004 and, claiming humanitarian and compassionate [H&C] grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], asked for exemptions from any criteria of the *IRPA* that they did not satisfy. Their requests were refused by a senior immigration

officer [the Officer] some nine years later in 2013 and they now seek judicial review pursuant to subsection 72(1) of the *IRPA*, asking this Court to set aside the Officer's decision and return the matter to a different officer for re-determination.

[2] The Applicants are citizens of Ukraine. Mr. Trach, who is now 52 years old, came to Canada in 1999, and Ms. Svobodova, who is now 46 years old, followed him to Canada in 2000. They married each other in 2004, and prior to that had two sons together, Oleh and Mykola, now ages 13 and 10. Both their children are Canadian citizens, but neither Mr. Trach nor Ms. Svobodova attempted to regularize their status here until August 31, 2004, when they applied for permanent residence from within Canada on H&C grounds.

[3] The Applicants updated their application in response to requests from Citizenship and Immigration [CIC] in 2006 and again in 2010. Their application was refused, however, on April 27, 2012, so the Applicants sought and obtained leave of this Court for judicial review of that refusal on April 26, 2013. The Minister of Citizenship and Immigration then agreed to reconsider the matter, and the Applicants were afforded a further opportunity to update their application, which they did by letter dated August 22, 2013. Thus, their H&C application was returned to a different officer for reconsideration, and it is this Officer's decision that is presently under review.

II. Decision under Review

[4] On August 27, 2013, the Applicants' H&C application was refused a second time.

[5] In her reasons, the Officer first assessed the Applicants' links to Canada. She gave some credit to Mr. Trach for maintaining the same job for 13 years and granted some weight to the fact he had amassed savings of almost $165,000, but nevertheless drew negative inferences because he never had a work permit and there was no evidence that he had declared his income. Otherwise, the Applicants' civil records were good and the Officer approved of the Applicants' involvement in their church and community. The Officer also recognized that the Applicants had "some ties to Canada," but she said that their "links with family, friends, work, community organizations, etc… are not uncommon." There were also no significant barriers to returning the Applicants to Ukraine as they spoke the language, could likely find employment, and had family there who could assist them. In the Officer's view the Applicants "have not demonstrated that they would have an unreasonable time becoming re-established in their home country." Although they would need to leave friends behind in Canada, the Officer observed that an H&C application is neither designed to eliminate all hardship nor intended to be an alternative method of applying for permanent residence. Rather, it is only meant to provide relief from unusual and undeserved or disproportionate hardship, and the Officer concluded that the hardships which removal would cause to the Applicants did not meet that standard.

[6] The Officer next considered the best interests of the Applicants' children, and noted that this factor is important and should be given substantial weight, but it is not necessarily determinative. As Canadian citizens, neither child was under a removal order but the Officer recognized that they would likely have to follow their parents to Ukraine if the H&C application was unsuccessful. The Officer noted that both children wanted to stay in Canada and were doing well socially and academically, and the Officer considered this to be a positive element.

However, the Officer believed that the children could adapt to life in Ukraine. Both were active in the Ukrainian community in Canada and the Officer concluded that they would have been exposed to Ukrainian culture and traditions. Further, they were taking classes in the Ukrainian language and their report cards indicated that they were making excellent progress. For this reason, the Officer rejected evidence from the children's Ukrainian language instructor that the children lacked the language skills necessary to be placed in an appropriate grade if they went to Ukraine. The Officer was satisfied that the children would be educated in Ukraine, even though it would not be as favourable as the education that they could receive in Canada. The Officer considered the country documentation and observed that children's rights were protected in Ukraine and that the public education system was improving. Private schools were also an option, and the Officer rejected the Applicants' assertion that they could not afford it by noting that they had significant savings and could likely secure employment. The Officer therefore concluded that there was "insufficient evidence to establish that the general consequences of having to apply [for permanent residence] from outside Canada would have a significant negative impact on the children involved."

[7] Finally, the Officer assessed the potential risks which the Applicants alleged they would face if they returned to Ukraine. Specifically, Mr. Trach stated that he had been politically active in 1996-1997 and was targeted by the opposition, but the police did not help him. As well, both Applicants allegedly feared that criminals would target them for their perceived wealth and that they would suffer economic hardship if they could not find employment. The Officer therefore assessed the country conditions in Ukraine at the time (which was before the ousting of President Viktor Yanukovych and the ensuing unrest). She noted that crime was an issue and concluded

that there were a number of human rights problems as well, but ultimately she decided that exposure to these things would not be an unusual and undeserved or disproportionate hardship since the Applicants "did not provide sufficient personalized evidence to support their allegations of risks in Ukraine".

[8] The Officer concluded that "[a]fter examining the factors both individually and as a whole, I am not satisfied that the factors justify an exemption as per A25 (1)," and therefore rejected the application.

III. The Parties' Submissions

A. *The Applicants' Arguments*

[9] The Applicants focus their arguments upon the best interests of the children [BIOC]. The Applicants state that their children have never lived anywhere other than in Canada. The children's teacher corroborates their limited language skills in Ukrainian, and if the children were compelled to leave Canada they would not be able to remain at the same grade level of education in Ukraine.

[10] The Applicants state that the Officer did not address those facts in her decision. Further, the Applicants state that the Officer's reference to the UNICEF Report was improper and diminished the assessment of the BIOC. The fact that the boys might be able to attend English schools in Ukraine ignores the fact that English is not the language in Ukraine and would only serve to isolate the boys.

[11] According to the Applicants, the Officer erred by failing to analyze that evidence and instead focused on whether the children's basic needs could be met in Ukraine (citing *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 at paragraphs 63-64 [*Williams*]; and *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 at paragraphs 15-16, 414 FTR 268 [*Sebbe*]). Although the Respondent disputes the pertinence of *Williams*, the Applicants note that it has not been overturned and, even if the specific formula suggested in *Williams* is not mandatory, the Officer's decision does not stand up to the principles of BIOC analyses reiterated therein.

[12] Furthermore, the Applicants rely on *Kobita v Canada (Citizenship and Immigration)*, 2012 FC 1479 at paragraphs 52-53, 423 FTR 218, to state that it was an error for the Officer not to compare and contrast the options for the children. According to the Applicants, the Officer here, like the officer in *Etienne v Canada (Citizenship and Immigration)*, 2014 FC 937 at paragraph 9 [*Etienne*], was "on a search for undeserved or disproportionate hardship…and did not turn his mind to" identifying the BIOC.

[13] As well, the Applicants say that the Officer did not properly weigh the many negative impacts that removal to Ukraine would have on the children against other relevant factors (*Felix v Canada (Citizenship and Immigration)*, 2014 FC 582 at paragraph 28, 27 Imm LR (4th) 130). Specifically, the Applicants submit that the Officer did not look at the "real life impact" on the two boys in this case (*Faisal v Canada (Citizenship and Immigration)*, 2014 FC 1078 at paragraph 35).

[14] The Applicants submit that the Officer's dismissal of the Applicants' evidence of establishment was also unreasonable. The Applicants note that this family has not been "underground" and their whereabouts were known at all times to CIC. The Applicants say the Officer did not have enough regard for the length of time the Applicants have been here in Canada and the degree to which they have become established.

[15] According to the Applicants, there were really only two negative aspects with respect to their application, notably the fact that Mr. Trach had been working without status and not paying taxes. However, this is common, the Applicants say, noting the decision in *Gelaw v Canada (Citizenship and Immigration)*, 2010 FC 1120 at paragraph 37, 375 FTR 233.

B. *The Respondent's Arguments*

[16] The Respondent acknowledges that this is a challenging case with respect to the BIOC. As always, there must be an appropriate balance and it is almost always in the BIOC for children to stay here in Canada with their parents. However, the Respondent states that, although the BIOC is a significant factor, it is but one of several factors to be considered. Moreover, the BIOC cannot make these children "anchor" children to sponsor their parents.

[17] The Respondent contrasts the formula for assessing the BIOC in *Williams* with that in *Simkovic v Canada (Citizenship and Immigration)*, 2014 FC 943 at paragraphs 13-14, and submits that the *Williams* formula is fact-dependent and should not be applied mechanically (citing also *Hoyos v Canada (Citizenship and Immigration)*, 2013 FC 998 at paragraphs 32-33, 440 FTR 84).

[18] The Respondent states that even though the BIOC will often favour the non-removal of a child's parent or parents, an officer must still look at all the other factors. According to the Respondent, the Officer here clearly identified the BIOC and was alert, alive and sensitive to them.

[19] The Respondent contends that the Officer's observations that the children were progressing with their Ukrainian language skills, and that they have been exposed to Ukrainian culture and traditions, do not reflect a minimum needs analysis. Furthermore, the Respondent says that it was reasonable for the Officer to look at the availability of international schools in Ukraine, and notes that the Applicants have some $165,000 which could assist in private English-language schools in Ukraine.

[20] As to the issue of the Applicants' establishment, the Respondent states that this factor is not determinative. The Respondent states that the Applicants' decision to remain in Canada was not due to circumstances beyond their control. Although the Respondent acknowledges that the Applicants have been in Canada a long time, they have been here without status and have chosen to stay here without any status.

[21] The Respondent says that the Officer's decision here was thoughtful and thorough and the BIOC was given substantial positive weight. According to the Respondent, the Officer's reasons here are not superficial but, rather, are a careful canvassing of the evidence and the factors to be considered. Lastly, the Respondent states that this Court should not reweigh the evidence which was before the Officer.

IV. Issues and Analysis

A. *Standard of Review*

[22] The appropriate standard of review for an H&C decision is that of reasonableness since it involves questions of mixed fact and law: see, e.g., *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paragraph 18, [2010] 1 FCR 360 [*Kisana*]. This was recently confirmed in *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at paragraphs 30-32, 372 DLR (4th) 539 [*Kanthasamy*], where the Federal Court of Appeal said that an H&C decision is analogous to the type of decision that attracted the reasonableness standard of review in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559.

[23] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 62, 174 DLR (4th) 193 [*Baker*], the Supreme Court emphasized that "considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation [i.e., H&C discretion], 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."

[24] The Court should not interfere, therefore, if an H&C officer's decision is intelligible, transparent, justifiable, and falls within the range of possible, acceptable outcomes defensible in respect of the facts and the law. It is not up to this Court to reweigh the evidence that was before the Officer in this case, and it is not the function of this Court to substitute its own view of a

preferable outcome: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 59 and 61, [2009] 1 SCR 339. As a corollary, this means that the Court does not have "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paragraph 54, [2011] 3 SCR 654).

B. *Was the Officer's Decision Reasonable?*

[25] The Applicants' H&C application was made on August 31, 2004, more than a decade ago. At that time, subsection 25(1) of the *IRPA* provided as follows:

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, 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.	**25.** (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, 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.

[26] In *Kanthasamy* at paragraph 40, the Federal Court of Appeal noted that subsection 25(1) is "an exceptional provision… [and] is not intended to be an alternative immigration stream or an appeal mechanism for failed asylum claimants." At paragraph 47, it added the following:

> While in *Baker* the Supreme Court did not definitively rule on the meaning of subsection 25(1) in the case before it, it is fair to say that its reasoning in the case proceeded on the assumption that unusual and undeserved, or disproportionate hardship was the appropriate standard to be applied under subsection 25(1). Absent any further consideration by the Supreme Court, … this is the appropriate standard to be applied under subsection 25(1). It expresses in a concise way the sort of exceptional considerations that would warrant the granting of such relief within the scheme of the Act.

[27] In this case, the Officer clearly was mindful that "unusual and undeserved, or disproportionate hardship" was the appropriate standard or test to be applied under subsection 25(1). However, for the reasons that follow, the Officer's conclusion, that she was "not satisfied that the difficulties mentioned to support the application would constitute unusual and undeserved, or disproportionate hardship if the applicant was to apply for permanent residence outside Canada", cannot be justified.

(1) The Applicants' Establishment

[28] The Officer in this case made negative inferences from the fact that Mr. Trach had worked in Canada since 2000 without a work permit and provided no evidence of having declared his income while in Canada. These inferences are unreasonable in view of this Court's decision in *Fidel Baeza v Canada (Citizenship and Immigration)*, 2010 FC 362, 88 Imm LR (3d) 254, where Mr. Justice James O'Reilly determined as follows:

> [16] The officer also felt that, if Mr. Fidel Baeza had worked during periods of time when he did not have a work permit, this was further evidence of disrespect for Canadian law. Again, I do not believe this was a reasonable inference. To prove that they had established themselves in Canada, the applicants had to show financial independence. It would not be fair to use evidence of steady employment against them simply because work permits did not cover the entire period of their time in Canada: *Lau v. Minister of Employment and Immigration*, [1984] 1 F.C. 434 (C.A).
>
> [17] I note that the guidelines relating to the issue of establishment (Operations Manual, 1P5) indicate that officers should consider the following questions:
>
> - Does the applicant have a history of stable employment?
> - Is there a pattern of sound financial management?
> - Has the applicant integrated into the community through involvement in community organizations, voluntary services or other activities?
> - Has the applicant undertaken any professional, linguistic or other study that shows integration into Canadian society?
> - Do the applicant and family members have a good civil record in Canada (e.g., no interventions by police or other authorities, child or spouse abuse, criminal charges).
>
> [18] The guidelines do not refer to relatively minor transgressions, such as missing an interview or working without a permit.
>
> [19] In my view, therefore, the officer's conclusion that the applicants had not established themselves in Canada was unreasonable in light of the evidence before him, and out of keeping the guidelines.

[29] The degree of the Applicants' establishment here in Canada is, of course, only one of the various factors that must be considered and weighed to arrive at an assessment of the hardship in an H&C application. The assessment of the evidence is also, of course, an integral part of an officer's expertise and discretion and the Court ought to be hesitant to interfere with an officer's

discretionary decision. However, in this case the evidence of the Applicants' establishment was such that it required an appropriate analysis which was alert and sensitive to the unusual or exceptional length of time during which the Applicants have resided in Canada and established themselves here.

[30] In this regard, I agree with the decision in *El Thaher v Canada (Citizenship and Immigration)*, 2012 FC 1439, where Mr. Justice James Russell stated:

> [56] What is missing is an analysis of the degree of establishment in this case. The Applicant believes it is exceptional and would lead to exceptional hardship if he is removed. This was a highly significant aspect of the H&C application. The Officer did not have to agree with the Applicant but, on these facts, I think he did have to explain why he disagreed.

[31] Similarly, the Officer's assessment with respect to the Applicants' establishment in Canada runs afoul of Mr. Justice Russell Zinn's observation in *Sebbe* at paragraph 21:

> [W]hat is required is an analysis and assessment of the degree of establishment of these applicants and how it weighs in favour of granting an exemption. The Officer must not merely discount what they have done…without giving credit for the initiatives they undertook. The Officer must also examine whether the disruption of that establishment weighs in favour of granting the exemption.

[32] The Officer here found that the Applicants have "some ties to Canada", but that their "links with family, friends, work, community organizations, etc… are not uncommon." In the circumstances of this case, it is difficult to see how the Applicants had merely "some ties to Canada." Mr. Trach has had stable employment for some 13 years in Canada. In addition, the Applicants had amassed sizable savings of some $165,000 at the time when they updated their application in 2010, they were integrated into their community as volunteers and church

members, and they had no criminal convictions in or outside of Canada. This level of establishment was clearly significant, if not exceptional, and it was unreasonable for the Officer to discount it in the manner she did by finding it "not uncommon."

[33] Moreover, it was not reasonable for the Officer to conclude that both Applicants had skills which were "transferable" should they be returned to Ukraine, and that they had not shown any "significant obstacles, that would prevent them from being employed in their home country." There was evidence in the record that Ms. Svobodova had only worked as a chef from 1994 to 1996, and has been unemployed ever since.

(2) The Applicants' Children

[34] In assessing the best interests of the Applicants' children, the Officer stated as follows:

> I recognize that neither child has resided in Ukraine, however, I conclude that the applicants did not submit sufficient supporting documentation that demonstrates that the children would be unable to adapt to their environment in Ukraine or that they would not have access to an education. In addition, I note that as the family has been involved in the Toronto Ukrainian community while in Canada, it is reasonable to assume that the children have also been exposed to Ukrainian culture and traditions.

[35] The Officer then proceeded to review objective evidence as to children's rights and the access to education for children in Ukraine, and determined that "the evidence overall confirms that the children would have access to education in Ukraine." Although the Officer acknowledged "that school conditions in Ukraine for the children may not be as favourable relative to those in Canada," she nonetheless concluded as follows:

> I have considered the best interests of the children and I find that the applicants submit insufficient evidence to establish that the general consequences of having to apply from outside Canada would have a significant negative impact on the children involved. I am not satisfied that these factors in and of themselves justify an exemption as per A25 (1).

[36] In assessing the BIOC, the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125, [2002] 4 FCR 358 [*Legault*]) has stated:

> [12] In short, the immigration officer must be "alert, alive and sensitive" (*Baker*, para. 75) to the interests of the children, but once she has well identified and defined this factor, it is up to her to determine what weight, in her view, it must be given in the circumstances. The presence of children…does not call for a certain result. It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada (which…will generally be the case), that the Minister must exercise his discretion in favour of said parent. Parliament has not decided, as of yet, that the presence of children in Canada constitutes in itself an impediment to any "refoulement" of a parent illegally residing in Canada (see *Langner v. Minister of Employment and Immigration* (1995), 184 N.R. 230 (F.C.A.), leave to appeal refused, SCC 24740, August 17, 1995).

[37] Similarly, in *Kisana*, the Federal Court of Appeal determined that:

> [24] Thus, an applicant is not entitled to an affirmative result on an H&C application simply because the best interests of a child favour that result. It will more often than not be in the best interests of the child to reside with his or her parents in Canada, but this is but one factor that must be weighed together with all other relevant factors. It is not for the courts to reweigh the factors considered by an H&C officer. On the other hand, an officer is required to examine the best interests of the child "with care" and weigh them against other factors. Mere mention that the best interests of the child has been considered will not be sufficient (*Legault*, *supra*, at paragraphs 11 and 13).

[38] The Officer in this case failed to properly or adequately assess the best interests of the Applicants' children. I agree with the Applicants that the Officer unduly focused on whether the children's basic needs could be met in Ukraine, notably with respect to the availability of education. She thereby imported a hardship threshold into her BIOC analysis, which was not reasonable (*Sebbe* at para 16).

[39] The Officer here did not consider whether it might be in the children's best interests to stay in Canada with their parents and maintain the status quo. As Mr. Justice Donald Rennie noted in *Etienne* at paragraph 9: "In order for an officer to be properly 'alert, alive and sensitive' to a child's best interests, the officer should have regard to the child's circumstances, from the child's perspective." This perspective was unreasonably ignored by the Officer in this case. The Applicants' children had submitted letters dated July 27, 2013, which indicated that they wished to stay in Canada. In assessing these letters, the Officer simply stated as follows:

> The applicants submit letters written by their children indicating that they want to stay in Canada. Oleh is 11 years old and Mykola is 9 years old. I note that the children are not under a removal order to Ukraine, however, I note that they would likely return to Ukraine with their parents as they are fully dependent on them. Nevertheless, the children can maintain their Canadian Citizenship, regardless in which country they reside.

[40] Notwithstanding the fact the letter from Oleh clearly states he is 12 years old, and that it may be just a typographical error by the Officer when she states he is 11 years old, the Officer was not "alert, alive and sensitive" to the children's best interests. Not only did she not have full regard to the child's circumstances, from the child's perspective, but she also did not properly identify and define the BIOC and examine them "with a great deal of attention" (*Legault* at paragraph 31) or "with care" (*Kisana* at paragraph 24).

(3) The Allegations of Risk

[41] The Applicants did not take issue with the Officer's risk assessment, so it is unnecessary for the Court to determine whether the Officer's finding that the Applicants "did not provide sufficient personalized evidence to support their allegations of risks in Ukraine" was reasonable.

[42] The Officer's determinations as to the Applicants' degree of establishment and the best interests of their children are unreasonable and the application for judicial review succeeds on these grounds irrespective of her assessment and findings of the risks faced by the Applicants if they were returned to Ukraine.

V. Conclusion

[43] In view of the foregoing reasons, therefore, the Applicants' application for judicial review should be and is hereby allowed and the matter is remitted to a different officer for re-determination.

[44] Neither party raised a question of general importance for certification, so none is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is remitted to a different officer for re-determination.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5852-13
STYLE OF CAUSE:	ROMAN TRACH, GANNA SVOBODOVA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 10, 2014
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	MARCH 5, 2015

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