Federal Court Cour fédérale

Date: 20190724

Docket: IMM-5236-18

Citation: 2019 FC 986

Ottawa, Ontario, July 24, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

MICHAL MARCIN ZIMA
AGATA ZIMA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Michal Marcin Zima, and his wife, Agata Zima, are citizens of Poland who have resided in Canada for more than a decade. They have two Canadian-born children. Mr. Zima's parents are Canadian citizens residing in Mississauga and his siblings also reside in Canada.

[2] In April 2018, the Applicants applied for a permanent residence visa from within Canada on humanitarian and compassionate [H&C] grounds or, alternatively, a temporary resident permit. In a decision dated July 31, 2018, a Senior Immigration Officer refused the H&C application and the request for a temporary resident permit. 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. They ask the Court to set aside the decision and remit their H&C application for reconsideration by a different officer.

I. The Officer's Decision

[3] After summarizing the Applicants' immigration history, the Officer noted that the Applicants had remained in Canada since the expiry of their temporary status. The Officer also noted that they cited as H&C factors their establishment and integration in Canada, their family ties, the best interest of their son, and the hardships they would face if required to leave Canada and return to Poland.

[4] The Officer considered that Mr. Zima had worked as a stone carver and his wife worked at a day care and at a flower shop, and that they have an extended family in Canada, had made friends, and integrated into their community. Although the Officer gave some favourable weight to the Applicants' establishment in Canada, the Officer found their establishment not to be exceptional, noting that it was not uncommon for individuals residing in Canada to be employed, to become integrated into their communities, form friendships, pay taxes, volunteer their time, and maintain good civil records. The Officer also found that the Applicants' time spent in Canada beyond 2014 was not because of circumstances beyond their control, and that their

prolonged stay in Canada beyond the time they were initially authorized to remain did not weigh in their favour. For the Officer, this showed a disregard for Canadian immigration laws and the Officer gave negative weight to the circumstances surrounding the Applicants' establishment beyond 2014.

[5] The Officer acknowledged that, while the Applicants had bonded with family and friends in Canada, separation from family and friends in Canada would not sever the bonds that had been established since relationships were not bound by geographical locations. The Officer found insufficient evidence that these relationships were characterized by a degree of interdependency and reliance to such an extent that, if separation were to occur, it would justify granting an exemption under H&C considerations.

[6] The Officer also acknowledged that, while the Applicants had been outside of Poland for a prolonged period of time, there was no sufficient objective evidence that either of the Applicants would be unable to find employment in Poland; and there was no information that Mr. Zima could not return to Poland and obtain employment as a stone carver or his wife could not obtain employment at a day care. The Officer remarked that the Applicants also had the option of seeking and obtaining employment elsewhere in the European Union.

[7] The Officer found Mr. Zima's employment skills obtained in Poland, England and Canada were transferrable, and that insufficient evidence had been provided to show he could not return to Poland or the European Union and use his existing skills and knowledge to obtain employment. The Officer noted that Ms. Zima also had employment experience in Poland,

England and Canada and that insufficient objective evidence had been presented that she could not seek or obtain employment in Poland or elsewhere in the European Union.

[8] The Officer referenced various excerpts from documentation on country conditions in Poland and noted that, while different standards of living exist between countries, Parliament did not intend section 25 of the *IRPA* to make up for the difference in the standard of living between Canada and other countries. In the Officer's mind, the purpose of section 25 was to give the Minister flexibility to deal with extraordinary situations unforeseen by the *IRPA* where H&C grounds compel the Minister to act.

[9] The Officer noted that Ms. Zima's parents reside in Poland and that insufficient evidence had been adduced to show they would be unable or unwilling to assist the Applicants in resettlement and re-establishment upon return to Poland. The Officer found the Applicants had familial ties to Poland and it was feasible for them to return to Poland and resume their relationship with their family there. In the Officer's view, the Applicants presented themselves as adaptable and resourceful individuals, noting that since they had left Poland they had resettled in two different countries, which demonstrated an ability to adapt to new locales and differing cultures and to secure employment. The Officer accepted that, while returning to Poland might pose some hardship and there would be a period of adjustment, the Applicants would not be returning to an unfamiliar place, language or culture.

[10] The Officer then considered the best interests of the Applicants' son, noting that they were expecting a second child. In this regard, the Officer stated:

> The applicants submit that it is in their son's best interests that they be allowed to remain in Canada as he has spent the majority of his life here and that he has made friends. With respect to the best interests of the child … I am aware that it is an important factor and should be given significant weight … however, I am also aware that it is not necessarily a determinative factor. There is insufficient objective evidence before me that the best interests of their son would be compromised if he were to return to Poland in the company of both parents. … the child would be in the company of his parents who provide care and support for him. I therefore find that whatever adjustments the child will have to make, he will do so with the care and support of both his parents. The applicants have provided insufficient objective evidence that relocating to Poland and resettling there will have a negative impact on their son. The applicants did not adduce any objective evidence that their son would be unable to attend school, obtain health care, participate in extra-curricular activities or that his best interests would be compromised or that he would be denied any rights if they were to return to Poland. While I acknowledge that their son has spent the majority of his life in Canada given his young age, it is reasonable that he would be able to adapt to changing situations with the continued support of his parents.
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> I have considered the best interests of [sic] child along with the personal circumstances of the applicants and I find that the applicants have not demonstrated that the general consequences of returning to Poland would be counter to the best interest of their son.

[11] After assessing the best interests of the Applicants' son, the Officer accepted that, while the Applicants might face some difficulties in readjusting to life in Poland, it was reasonable to believe that during their years in Poland they would have developed and continued to have friends, acquaintances, and social networks, and they would not be returning to an unfamiliar place, language, culture or place devoid of a familial network rendering re-integration unfeasible. The Officer took into account that the Applicants did not wish to return to Poland, but not wishing to return to Poland was not, in the Officer's view, a sufficient reason to allow the Applicants to become permanent residents of Canada.

[12] Thus, the Officer refused the H&C application and, because there were insufficient H&C grounds to warrant a positive exemption for permanent residence, also found there were not sufficient grounds to warrant issuance of a temporary resident permit.

II. Standard of Review

[13] An immigration officer's decision to deny relief under subsection 25(1) of the *IRPA* is reviewed on the reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*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; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15 [*Legault*]).

[14] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "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). 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).

III. Did the Officer fail to reasonably assess the best interests of the child?

A. *Applicants' Submissions*

[15] According to the Applicants, the Officer misapprehended the evidence regarding their son's establishment and ties to Canada. They note that he was born in Canada, has spent his whole life here, and has never been to Poland; yet, the Officer appears to believe that the child previously resided in Poland. The Applicants say this is evident in the reasons where the Officer states that their son "has spent the majority of his life in Canada" and his best interests would not be compromised were he to "return" to Poland with his parents. The Applicants acknowledge that this error alone would not be fatal; but, when taken together with the Officer's overall approach, it demonstrates that the best interests of the child [BIOC] analysis is fatally flawed.

[16] The Applicants complain that the Officer never identified their son's best interests, making it impossible for the Officer to give them considerable weight. According to the Applicants, the Officer failed to consider that it may be in their son's best interests to remain in Canada with them and measure that against the scenario which is treated as a foregone conclusion that he would be resettling in Poland.

[17] The Applicants say the Officer erred by limiting the BIOC analysis to hardship thresholds, focusing only on whether their son would be adversely affected by residing in Poland. In the Applicants' view, the BIOC analysis was conducted through a basic needs lens, and the question for the Officer was not what was in their son's best interests but, rather, whether dislocation to Poland would harm him.

B. *Respondent's Submissions*

[18] In the Respondent's view, the Applicants' issues with the Officer's consideration of the BIOC amount to a disagreement with the weight the Officer attached to them. The Respondent says the Officer recognized that the BIOC should be given significant weight in the assessment of an H&C application and correctly noted that such interests were not necessarily a determinative factor.

[19] Contrary to the Applicants' arguments, the Respondent maintains it was not a fatal flaw to note that their child had spent a majority of his life in Canada, as opposed to his entire life. According to the Respondent, when the Federal Court of Appeal stated in *Legault* that the best interests of the child must be "well-identified and defined" it was not attempting to impose a magic formula to be used by immigration officers in the exercise of their discretion under subsection 25(1) of the IRPA.

C. *Analysis*

[20] In *Kanthasamy*, the Supreme Court of Canada observed that:

> [35] The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interest": [citations omitted]. It must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity: [citation omitted]. The child's level of development will guide its precise application in the context of a particular case.
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> …
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> [39] A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision

> are not sufficiently considered: [citation omitted]. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: [citation omitted]. Those interests must be “well identified and defined” and examined “with a great deal of attention” in light of all the evidence: [citations omitted].

[21] In this case, the assessment of the best interests of the Applicants’ son was unreasonable because the Officer did not recognize that he had lived his whole life in Canada (and not as the Officer stated “a majority of his life”); and, since he had never been to Poland, he could not “return” there. Without this basic factual foundation, it is difficult to see how the Officer was alert, alive and sensitive to the child’s best interests, especially when the Officer found insufficient evidence to show that his best interests would be compromised if he went with his parents to Poland. The Officer unreasonably failed to address the evidence that the Applicants would have difficulty finding adequate housing and economic support to provide their son with a basic standard of living in Poland.

[22] The Officer’s reasons do not demonstrate that he or she turned their mind directly to what the best interests of the Applicants’ son would be. On the contrary, the Officer’s reasons assume that since his parents would not be granted permanent residency on H&C grounds, it was in his best interest to go with them to Poland. Rather than identifying and defining the best interests of the Applicants’ son and giving them considerable weight, the Officer instead focused on whether moving to Poland would be detrimental to his best interests.

IV. Did the Officer reasonably assess the Applicants' establishment and hardship?

A. *Applicants' Submissions*

[23] The Applicants say the Officer made a factual error by only considering their establishment until 2014 when, in fact, Mr. Zima maintained his visitor status until March 31, 2016, and his wife had visitor status until September 10, 2015. In the Applicants' view, the Officer discounted one to two years of their establishment based on a factual error, and this led the Officer to assign negative weight to their establishment beyond the time they were authorized to remain in Canada.

[24] According to the Applicants, it was unreasonable for the Officer to require exceptional establishment. In the Applicants' view, the Officer's comment - that it was not uncommon for individuals residing in Canada to be employed, to become integrated into their communities, form friendships, pay taxes, volunteer their time and maintain good civil records - undermined their level of establishment and imposed a requirement that establishment go beyond what may normally be expected of individuals residing in Canada for more than a decade.

[25] The Applicants say the Officer unreasonably used positive factors of establishment that favoured granting an exemption and speculated that these factors could shield them from hardship on return to Poland. In the Applicants' view, it was unreasonable for the Officer to find that, while the Applicants might experience some hardship upon return to Poland, this was somehow offset by their skills and Mr. Zima's ability to start a business in Canada.

[26] According to the Applicants, the Officer unreasonably viewed their establishment through a lens of hardship. When conducting an analysis of the Applicants' hardship, they say the Officer failed to recognize the hardship the Applicants would face if forced to seek employment in another country within the European Union due to poor conditions in Poland.

B. *Respondent's Submissions*

[27] The Respondent says it was not unreasonable for the Officer to note that any time spent in Canada beyond 2014 was not as a result of circumstances beyond the Applicants' control since they had control over their stay in Canada. According to the Respondent, the Officer was permitted to use their expertise and experience to compare the Applicants' level of establishment to that of others. In the Respondent's view, the fact Canada may be a more desirable place to live than another country is not determinative on an H&C application.

[28] The Respondent notes there will inevitably be some hardship associated with being required to leave Canada, and that this alone will not generally be sufficient to warrant H&C relief. In the Respondent's view, the Applicants did not show there were any special circumstances to warrant an exemption and they have not shown the Officer unreasonably assessed the evidence.

C. *Analysis*

[29] The Officer's assessment of the Applicants' establishment is problematic.

[30] Although the Officer gave "some favourable weight" to the Applicants' establishment, he or she failed to examine and consider whether disruption of their establishment in Canada to return to Poland to apply for permanent residence weighed in favour of granting an exemption under subsection 25(1) of the *IRPA*. It was unreasonable for the Officer to assign negative weight to the Applicants' establishment beyond the time they were authorized to remain without assessing the degree to which they established themselves during that period of time.

[31] In my view, the Officer unreasonably discounted the degree to which the Applicants had established themselves in Canada and failed to provide any explanation as to why the establishment evidence was insufficient (*Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 at para 21; also see *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258 at para 80; *Stuurman v Canada (Citizenship and Immigration)*, 2018 FC 194 at para 24; and *Ahmadzai v Canada (Citizenship and Immigration)*, 2018 FC 725 at para 14).

V. Conclusion

[32] The Officer's decision must be set aside and the matter returned for redetermination by a different officer.

[33] The Officer unreasonably assessed the best interests of the Applicants' son as well as their establishment in Canada.

[34] Neither party proposed a serious question of general importance to be certified under paragraph 74(d) of the *IRPA*; so, no such question is certified.

JUDGMENT in IMM-5236-18

THIS COURT'S JUDGMENT is that: the application for judicial review is granted; the decision of the Senior Immigration Officer dated July 31, 2018, 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

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APPEARANCES:

Natalie Domazet	FOR THE APPLICANTS
Teresa Ramnarine	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mamann Sandaluk & Kingwell LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT