Federal Court  Cour fédérale

Date: 20220217

Docket: IMM-1307-21

Citation: 2022 FC 208

Ottawa, Ontario, February 17, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

MILAN PETER
KVETOSLAVA ONDRASOVA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The decision of a senior immigration officer refusing the Applicants' request to apply for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds will be set aside. The decision is unreasonable because the officer did not consider the totality of the Applicants' circumstances, the officer applied the wrong test by requiring the Applicants to demonstrate that their establishment and hardship were "exceptional," the officer unreasonably failed to properly consider the evidence of discrimination, and the officer engaged in speculation

concerning the ability of the male Applicant's siblings to assist with re-establishment in the Czech Republic.

Background

[2] The Applicants, Milan Peter [Peter] and Kvetoslava Ondrasova [Ondrasova], are citizens of the Czech Republic. They are in a common-law relationship. Both identify as Roma.

[3] At the time of their H&C application, the Applicants had one daughter and Ondrasova was pregnant with their second child, a son. Their daughter was born in Toronto in October 2014. Their son was born in Markham in March 2020.

[4] Both Applicants describe a difficult childhood in the Czech Republic. There was domestic violence in Peter's home, including towards him at the hands of his father. At age 14 he was forced to quit school to work. Ondrasova was bullied at school, where she was the only Roma student in her class.

[5] The Applicants each came to Canada separately as minors in 2009. Their families made refugee claims. The Applicants attended high school in Canada where they met and began a relationship. Peter's parents did not approve of Ondrasova.

[6] Peter's family's refugee claim was rejected and leave for judicial review to the Federal Court was denied. Ondrasova's family's claim was similarly rejected, but leave was granted. While Ondrasova's family's judicial review was still in progress, Peter's family returned to the

Czech Republic in June or July of 2012. Peter claims that his parents tricked him into signing removal documents and he did not wish to leave.

[7] According to Ondrasova, after Peter returned to the Czech Republic, she became depressed. In the affidavit submitted with the Applicants' H&C application, she writes:

> I had my heart broken and my life had no meaning; it stopped me from enjoying my life. I did not want to go to school or go out. I lost a tremendous amount of weight, 10kg, in just 4 months. I was severely depressed. I did not want to eat or talk with anybody. I stayed locked up in my room and I waited near the computer for Milan to call me. I did not want any help and even if my parents and siblings were trying, all I wanted was to be with Milan because he was my whole world. My only resolve was to die or leave my family and safe life in Canada and fly to the love of my life that I could not live without. I felt my only option was to die or to go be [with] Milan in the Czech Republic. My parents convinced me not to leave and my family's lawyer also advised me against it. But I could not think clearly. I could only think of dying or being with Milan. He is and was my life's love, and with his absence, my life was no longer meaningful.

[8] Ondrasova ultimately removed herself from her family's application for judicial review in October 2012 and returned to the Czech Republic in November 2012. She was then 19 years old. Her family eventually reached a settlement with the Minister and they were all granted permanent resident status in August 2018.

[9] In the Czech Republic, the Applicants lived with Peter's family. Peter's parents were physically and emotionally abusive to Ondrasova, and she was made to do a significant amount of housework. At one point, she was kicked out of the house and had to sleep in the park. She suffered a miscarriage, which she attributes to the deterioration of her health from the strain of

the housework she was made to do. She says that when she told Peter's parents she lost the baby, "they laughed and ridiculed me."

[10] The Applicants fled Peter's parents and returned to Canada in December 2013, taking only passports and a small bag. They were issued temporary resident permits to attend a wedding and, when examined at the airport, they claimed that had been residing in the United Kingdom. They submitted applications to extend their visas but these were refused. Their permits expired on January 9, 2014, but they remained in Canada.

[11] The Applicants became estranged from Ondrasova's family after returning to Canada, as they felt that she should leave Peter due to his abusive family. However, the Applicants reunited with Ondrasova's family in February 2019 and they now reside together in Markham. Peter no longer has contact with his family.

[12] The Applicants applied for permanent residence from within Canada on H&C grounds on September 30, 2019.

The Decision

[13] On January 29, 2021, the officer, in a lengthy decision, denied the Applicants' H&C application. I will summarize only those portions relevant to the decision I have reached.

[14] The officer noted that reference was made in the Applicants' submissions to the settlement agreement regarding Ondrasova's relatives. The officer noted that neither of the

Applicants were a part of this settlement and that H&C decisions rely on the personal circumstances of the Applicants. The officer therefore considered the settlement agreement irrelevant and accorded it no weight.

[15] The officer acknowledged that the country condition documents for the Czech Republic indicated that conditions "are far from perfect for minorities" and in particular Roma, and that Applicants had stated that they will face "family domestic and gender-based violence, discrimination, evictions, hate speech, [and a] lack of housing and employment." The officer accepted that Roma people can face discrimination but found that there was no objective evidence indicating that the Applicants had been targeted as Roma when they returned in 2012, nor that, if they returned, they would be "subjected to discrimination to such a degree that an exemption is warranted on that basis."

[16] The officer was not satisfied that there was "an adequate link between the country conditions and the applicants' personal circumstances" and was "not satisfied that they will face personal difficulties that are not experienced by the general population or by someone in a similar situation." The officer also found that their evidence "does not support that adverse country conditions in the Czech Republic will have a direct, negative impact on them or that they are a member of a group that will be affected by discrimination in [the] Czech Republic."

[17] The officer considered the evidence that Ondrasova had a history of being bullied and ill-treated by her classmates. The officer accepted that she was "treated badly by other children and experienced little help from an unprofessional teacher." However, the officer found that her

statements were “unsupported by objective evidence that the actions of the children were racially motivated.” The officer noted that a letter from Ondrasova’s sister submitted in support of the application does not refer to similar treatment at school and her mother in her letter of support does not provide any explanation or details supporting her assertion that life is very hard for Roma people. The officer found that it would have been reasonable for Ondrasova’s mother to explain why they left the Czech Republic in 2009. The officer then found “[t]he possibility exists that the reason the applicant’s spouse was ill-treated in school could also have been that the children simply did not like her and [was] unconnected to her being Roma.” The officer therefore gave little weight to her statement that she was a victim of racial discrimination.

[18] With respect to evidence to family abuse from Peter’s parents, the officer found that there was nothing to suggest that this was racially motivated, since Peter’s parents are the same race as the Applicants. The officer then indicated that the evidence did not support that the Applicants would face such abuse in the future since they had cut off all contact with Peter’s parents.

[19] The officer found that “[t]he submissions do not support that the applicants have established themselves in Canada to such an extent that their departure would cause a negative impact on them or others in Canada.”

[20] The officer noted that the Applicants had been in Canada for over seven years and therefore “a measure of establishment is expected to have occurred.” However, the officer did not find “their degree of establishment to be exceptional for the number of years they have been in Canada in relation to similarly situated individuals who have been in Canada for a comparable

amount of time" nor that "they have integrated into Canadian society to the extent that their departure would cause hardship that was beyond their control and not anticipated by the IRPA."

[21] The officer noted that there was no indication that the Applicants, since returning to Canada, had applied for a work permit, nor had any bank or pay statements been provided to support their financial standing. The officer noted that a letter had been submitted that referred to Peter working in Canada, but that this letter is undated and provides no detail regarding the work. The officer indicated that the Applicants had not provided evidence to demonstrate that they have been legally able to work in Canada.

[22] The officer noted that the Applicants entered Canada on temporary resident permits after having been previously removed and had overstayed their visas without authorization. The officer indicated that they made no efforts to regularize their status for over 5 years and noted that their stay in Canada has been entirely within their control. The officer indicated that applicants cannot expect to profit from years they lived a worked in Canada illegally (citing *Joseph v Canada (Minister of Citizenship and Immigration)*, 2015 FC 904). The officer gave "significant negative weight the applicants' disregard for the Immigration laws of Canada."

[23] The officer found that the evidence did not support that the Applicants would be unable to re-establish themselves in the Czech Republic or that doing so would constitute hardship. The officer did not "find the applicants' circumstances to be exceptional" and therefore gave "hardship of return to the Czech Republic little weight." The officer noted that the Applicants spoke Czech as their first language, could also communicate in English, and had lived in the

Czech Republic both as children and as adults, and therefore the evidence did not support a finding that they would be unable to obtain employment. The officer also noted that Peter's sister and brother lived in the Czech Republic and that, in the absence of evidence otherwise, it was reasonable to expect that they could assist with re-establishment.

[24] The officer considered the best interests of the Applicants' children. The officer indicated that Ondrasova was pregnant at the time of the application but that no updates had been provided. However, the officer proceeded on the assumption that this child had been born. The officer also considered to a lesser extent the best interests of the Applicants' nieces and nephews, and other children in their extended family. Overall, the officer found that it was in the children's best interests for the Applicants to remain in Canada and that this was "a significant factor" in the application.

[25] The officer noted that the Applicants' children are Canadian citizens, likely Czech and EU citizens, and possibly Polish citizens. The officer indicated the Applicants' daughter lived with not only her parents but also her extended family and had likely developed close bonds with them. The officer also indicated that she likely had the opportunity to learn Czech.

[26] The officer indicated that it would be in the Applicants' children's best interests not to be separated from their family. The officer also indicated that there were significant benefits to remaining in Canada, including education, continuity in living arrangements, and family ties.

[27] The officer found that were the Applicants to return to the Czech Republic, there would be a period of adjustment, both for the Applicants' children and for their nieces and nephews. If the Applicants' children did not already speak Czech, a period of time to develop the ability to communicate would be necessary, "but might be assisted by relatives with whom all family members may wish or be willing to have a relationship in the Czech Republic."

[28] The officer found that if the children were in the Czech Republic, they could still continue their relationships with their extended family and that it may in fact increase the possibility of developing new relationship ties with their cousin, aunt, and uncle on their father's side (Peter's siblings and niece).

[29] The officer indicated that it was likely that the Applicants' daughter had started school by the time of the decision. However, the officer indicated that she was "likely not attending now due to COVID-19 restrictions," though she "may have been able to return to school for a time."

[30] The officer acknowledged that the Applicants feared that their children would face discrimination in school and elsewhere as a result of their Roma ethnicity. While the officer indicated that bullying continued to be an issue in the Czech Republic, there were now mandatory requirements for schools regarding anti-bullying policies. The officer acknowledged however that it was possible the Applicants' children would face discrimination.

[31] The officer considered and weighed the factors in the application and came to the conclusion that H&C relief was not warranted. The officer found that the Applicants personal

circumstances were not “unusual in comparison to the situation of others similarly situated to them in the Czech Republic such that an exemption is justified.”

[32] The officer gave “significant weight to the understanding that the exercise of discretion on humanitarian an compassionate grounds should be something other than that which is inherent in the departure of a person after a person has been in place for a period of time.”

[33] The officer found that the strongest factor in favour of relief was the best interests of the children. However, the officer did not find this to be determinative, and gave “more weight in this application to the immigration laws as they exist in Canada,” finding that “the difficulties the applicants may encounter in leaving Canada arise from the normal and foreseeable working of the law.”

Issues

[34] Two issues were raised by the Applicants: (1) whether the decision is reasonable, and (2) whether they were denied the right to procedural fairness because the officer considered the COVID-19 pandemic and restrictions without giving the Applicants notice that this would be considered or an opportunity to respond.

[35] In my view, the second issue does not need to be considered, as I find that the decision under review to be unreasonable for the following three reasons.

Failure to Consider the Totality of the Evidence of the Applicants' Circumstances

[36] In my view, the officer made a fundamental error by failing to consider in any way Ondrasova's previous refugee claim, made as a dependent of her parents.

[37] According to the Supreme Court of Canada in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 21, H&C relief should be granted "in circumstances that 'would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another.'"

[38] In order to assess whether the Applicants' circumstances would excite a desire to relieve their misfortunes, it is necessary to look at the entirety of their circumstances.

[39] As set out above, the circumstances of Ondrasova are as follows: she came to Canada in May 2009 at age 15 with her parents. She met Peter in 2010 in Canada. Both of their families made refugee claims in Canada. Peter and his family were deported in July 2012 while Ondrasova's family's claim was still under judicial review. Ondrasova withdrew from her family's application in October 2012 so that she could be with Peter. She was removed from Canada in November 2012. At the time, she was 19 years old. She was in love.

[40] Once in the Czech Republic, Peter and Ondrasova lived with Peter's family. Peter's parents were physically and emotionally abusive to her. She escaped the abuse by returning to Canada.

[41] After Ondrasova removed herself from the leave application, a settlement agreement was reached and her entire family were given permanent resident status. Given that she was a dependent on her family's claim, had she not been in love with Peter and removed herself from her family's claim, she would now be a permanent resident of Canada.

[42] The history of Ondrasova's family's application provides important context as to how the Applicants, and Ondrasova in particular, have come to be seeking an H&C exemption. Ondrasova was a young women on the cusp of becoming a permanent resident. She made a choice because of love that led to her living in an abusive situation and giving up her pending status in Canada. She is now seeking to be spared from the immigration consequences of that choice.

[43] Despite the important context that her family's application provides, the officer dismissed it entirely, writing:

> The applicants' submissions include reference to a settlement agreement regarding relatives among others in similar situations to the applicants and having been granted temporary resident permits and permanent residence through H&C applications. Neither of the applicants were included as part of the settlement. An H&C decision relies on the personal circumstances and evidence presented and not on whether an exemption has been granted or refused in another H&C application. I do not find reference to the outcome of others [*sic*] H&C applications relevant to this application and accord them no weight with respect to this application.

[44] The officer is correct in saying that each H&C application must be assessed on its own merits and that the outcome in one application does not dictate the outcome in another. However, the context of Ondrasova and her family's immigration history to Canada is relevant

and it was unreasonable to give this no consideration or weight. It is relevant when determining whether her circumstances cry out for humanitarian and compassionate relief.

Failure to Properly Consider the Evidence

[45] The officer unreasonably made findings in disregard to the evidence or without evidence by: (1) saying that there was no proof that the Applicants' second child had been born despite counsel having provided the birth certificate, and (2) saying that the Applicants could be supported by Peter's brother and sister, despite Peter not having a brother, one of his sisters being a teenager, and both living with his abusive parents.

[46] While perfection is not the standard to be expected and the first error is slight, the second is quite relevant as the officer concluded that these siblings could help the Applicants and their children integrate into Czech society since they were estranged from Peter's parents. That conclusion is highly suspect given the true circumstances of his siblings.

[47] The officer's finding that the abuse Ondrasova suffered at school was not racially motivated but may have been merely because the students did not like her is absurd, and contrary to her evidence, which accords with country condition evidence before the officer:

> As the only Roma child in the class, I was beaten and bullied by the non-Roma students in my class on a daily basis. The students bullied me by calling me names and slapping and pushing me daily since the first day of school. The non-Roma students called me a "black monkey" and they threw shoes and other things at me. Every day they came [up] with something new, there were days when I brought my snack to school and they threw it in the garbage bin and they told me that Roma are using their parent's tax money to pay for the food because all Roma are on social assistance.

> […]
>
> My parents decided to go to [the] school and talk to my teacher who denied everything and told them that l was the one provoking the problems with the other students, and that is why they were bullying me and beating me and she added that the Roma do not know how to behave and that is how it usually goes. My parents tried to address the mistreatment at school but instead had to listen to stereotypes about the Roma.

Requirement to Demonstrate Exceptional Establishment and Hardship

[48] The officer erred by requiring the Applicants to demonstrate that their establishment and the hardship they would face were "exceptional" compared to others in similar situations. In so doing the officer applied an incorrect test.

[49] In *Zhang v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1482, I found an officer's decision to be unreasonable because it required the applicant's circumstances to meet the threshold of being exceptional:

> [19] In my view, the test under subsection 25(1) and the question to be asked, is this: Understanding that relief from the rigidity of the law is exceptional, do the particular circumstances of the applicant excite in a reasonable person in a civilized community a desire to relieve their misfortunes?
>
> […]
>
> [23] There is a significant difference between observing that this exceptional relief is provided for <u>because</u> the personal circumstances of some are such that deportation falls with more force on them than others, and stating that the relief is available <u>only to those who demonstrate</u> the existence of misfortunes or other circumstances that are <u>exceptional relative to others</u>. The first explains why the exemption is there, while the second purports to identify those who may benefit from the exemption. The second imports a condition into the exception that is not there.

> [24] Once the exception is established in law, as it is in subsection 25(1), it is available to all but will only be granted to those whose particular circumstances excite in a reasonable person in a civilized community a desire to relieve their misfortunes. It requires only an examination of the personal circumstances of an applicant. It does not require that a comparative analysis be done.
>
> [25] Subsection 25(1) of the Act allows the Minister to grant an exemption to an application requirement "if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected." Thus, the sole question that must be asked is whether humanitarian and compassionate relief for this applicant is justified.
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> *Zhang* at paras 19 & 23–25 [emphasis in original]

[50] In the present case, the officer uses the word "exceptional" six times in the decision. In most cases, the word is used to describe the nature of H&C relief and is acceptable. However, the officer made the following two findings regarding the Applicants' establishment and the hardship they would face if returned to the Czech Republic:

> While the applicants have presented evidence to indicate a modicum of establishment in Canada, I do not find their degree of establishment to be exceptional for the number of years they have been in Canada in relation to similarly situated individuals who have been in Canada for a comparable amount of time.
>
> […]
>
> The evidence before me does not support that the applicants would be unable to re-establish themselves in the Czech Republic, or that doing so would constitute hardship. I do not find the applicants' circumstances to be exceptional and consequently, I give the aforementioned hardship of return to the Czech Republic little weight in my decision.

[51] In these passages, the officer was of the opinion that the Applicants were required to demonstrate exceptional establishment and exceptional hardship in order for those factors to

weigh in their favour. The statement regarding hardship is particularly clear, indicating that the little weight given to hardship was a direct consequence of it not being exceptional. This is an error and it adversely impacts the outcome.

Conclusion

[52] My failure to address each of the Applicants' submissions should not be interpreted as rejecting them. Rather, I find that the three errors above are the most serious, result in an unreasonable decision, and require that the application be assessed by a different officer.

[53] No question was posed for certification.

JUDGMENT IN IMM-1307-21

THIS COURT'S JUDGMENT is that the application is allowed, the decision under review is set aside, and the Applicants' H&C application be assessed anew by a different officer.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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