Federal Court  Cour fédérale

Date: 20171128

Docket: IMM-2381-17

Citation: 2017 FC 1072

Ottawa, Ontario, November 28, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

RUZHA TOSUNOVSKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by a Senior Immigration Officer [the Officer] dated May 17, 2017, refusing the Applicant's request under s 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], that she be allowed to apply for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds [the Decision].

[2] As explained in greater detail below, this application is dismissed, because the Applicant has not demonstrated any reviewable errors by the Officer which would support a conclusion that the Decision is unreasonable. While the Officer could have weighed the factors applicable to the H&C analysis differently, so as to reach a different conclusion on the evidence and grant the H&C application, the nature of a reasonableness review in administrative law does not allow the Court to substitute its own assessment of the evidence for that of the decision-maker. The Decision is reasonable and therefore cannot be disturbed by the Court.

II. Background

[3] The Applicant, Ms. Ruzha Tosunovska, is a citizen of the Republic of Macedonia. In 1969, her brother Zlate emigrated from Macedonia to Canada. Zlate then sponsored their mother and one of Ms. Tosunovska's daughters, Suzana, to come to Canada. Suzana married here, had two Canadian-born children, Kristijan and Viktoria, and became a Canadian citizen. Ms. Tosunovska's other daughter, Violeta, immigrated to Canada in 2006 and has also become a Canadian citizen. Violeta, Suzana, her husband, and her children, all live together in Richmond Hill, Ontario.

[4] While many of her family members were moving to Canada, Ms. Tosunovska stayed in Macedonia with her husband, who died in 1995, and then to care for her mother-in-law, who died in 2010. Since the death of her mother-in-law, Ms. Tosunovska has visited her family in Canada repeatedly and for extended periods of time. She last entered Canada in September 2015. Ms. Tosunovska submitted an application for permanent residence from within Canada in April 2016 and did not leave the country at the expiry of her visa in September 2016.

[5] Ms. Tosunovska asked to be permitted to apply for permanent residence from within Canada based on H&C grounds. She argued that, if removed to Macedonia, she would face significant hardship because of the situation in that country generally, her age and status as a widow, and the likelihood that she would encounter financial difficulty. She also submitted that she had developed significant establishment in Canada. Despite having lived in Macedonia for most of her life, the majority of Ms. Tosunovska's connections are now in Canada. She explained that, if removed to Macedonia, she would suffer due to the separation from her grandchildren, other family members, and her church community. She submitted that she would lose her sense of purpose as a matriarch and become isolated and depressed. She also relied on the best interests of her grandchildren, explaining her relationship with them and the role she played in their upbringing and development.

III. Impugned Decision

[6] In the Decision, the Officer considered the country conditions in Macedonia, Ms. Tosunovska's financial circumstances if she were to return to that country, the best interests of her grandchildren, her level of establishment in Canada, and the emotional hardship she would experience if separated from her family members in Canada.

[7] The Officer found that the best interests of the children weighed in favour of Ms. Tosunovska being allowed to remain in Canada, but that the children would not be negatively impacted by her departure to an extent that warranted H&C relief when considered with all the other factors. The Officer also considered the steps that Ms. Tosunovska had taken to be involved in the community in Canada and gave positive consideration to her family ties in

Canada. However, while noting that she may have greater ties to Canada than Macedonia, given her family's immigration to Canada over the years, the Officer found that it had not been demonstrated that Ms. Tosunovska's relationship with her family in Canada was one of such interdependence that it carried significant weight. The Officer further found that the weight accorded to this factor was affected because Ms. Tosunovska could maintain this relationship even if required to return to Macedonia, for example through correspondence and phone calls, visits to Canada, or through taking advantage of other immigration programs, and it was not inconceivable she could foster ties with her existing family in Macedonia. The Officer found that her establishment and family ties carried only moderate weight.

[8] The Officer described Ms. Tosunovska as presenting as a mature, socially active, adaptable, and relatively independent woman who had lived most of her life in Macedonia. While recognizing that she may face a period of adjustment and some hardship in resettling in Macedonia, and stating sympathy for some aspects of her application, the Officer noted that the H&C process is not intended to eliminate all hardship. Rather, the process is designed to provide relief based on a global assessment of H&C considerations, if those considerations justify an exemption. The Officer concluded that granting the requested exemption was not justified by such considerations in this case.

IV. Issues and Standard of Review

[9] The Applicant raises the following issues for the Court's consideration:

A. Did the Officer improperly assess the best interests of the minor children?

B. Did the Officer improperly consider the Applicant's establishment in Canada?

C. Is the Decision otherwise unreasonable?

[10] The parties agree, and I concur, that the standard of review applicable to the Officer's decision is reasonableness.

V. Analysis

A. *Did the Officer improperly assess the best interests of the minor children?*

[11] Ms. Tosunovska submits that the Officer erred by mischaracterizing her role in her grandchildren's lives as primarily that of a maid and babysitter. She argues that the Officer failed to consider the evidence provided by several family members explaining that, beyond performing housework and providing childcare, she nurtures the children and provides them with emotional support. At the hearing of this application, the Applicant's counsel described her as the children's primary caregiver, or at least one of their primary caregivers, noting that the children's parents both work full time.

[12] I disagree that the Decision demonstrates an error of this nature. While noting Ms. Tosunovska's contribution to household duties and childcare, the Officer also noted her close emotional bonds with her grandchildren, her assistance with their upbringing, and her involvement in teaching them about their culture and heritage. Despite this, the Officer found

that there was insufficient evidence to conclude that either the children's physical or emotional welfare would be compromised if Ms. Tosunovska were required to return to Macedonia.

[13] Regarding their physical needs, the Officer noted that the children already had the benefit of having both of their parents and their aunt all living with them in the same household and that the children's parents had cared for them without Ms. Tosunovska's assistance when she was living in Macedonia and in the periods when she returned there after her visits to Canada. The Officer observed that this was at a time when the children would have required more care than they do now, at the ages of 9 and 14, but also concluded that their parents could make alternate caregiver arrangements if required.

[14] With respect to their emotional well-being, the Officer identified the value of Ms. Tosunovska's presence to her grandchildren, as well as publications submitted by Ms. Tosunovska on the importance of the grandparent–grandchild relationship. The Officer acknowledged that separation from their grandmother would have an emotional impact on the children. However, the Officer observed that the children were familiar with such separation, resulting from Ms. Tosunovska's returns to Macedonia in the past, and was not satisfied that the grandchildren could not maintain their relationship with their grandmother through other means such as telephone, email, letters, or further visits to Canada. The Officer concluded that there was insufficient evidence that the children's well-being, both physical and eemotional, would be compromised by separation from Ms. Tosunovska.

[15] In conclusion on the analysis of the best interests of the children, the Officer noted the children's relationship with their grandmother and the potential impact on them if she was not granted an exemption. The Officer gave this factor moderate weight but also concluded that she is not the primary caregiver for the children and that there were other means by which the relationship could be maintained. On this basis, the Officer concluded that the children's best interests would not be jeopardized if an exemption was not granted.

[16] In my view, the Decision demonstrates consideration of the nature of Ms. Tosunovska's relationship with her grandchildren consistent with the evidence that was before the Officer. It is not the Court's role to interfere with the weight that the Officer chose to give to the best interests of the children. The Officer's conclusions are not outside the range of reasonable outcomes.

[17] Ms. Tosunovska relies upon the decision in *Benyk v Canada (Citizenship and Immigration)*, 2009 FC 950 [*Benyk*], which she argues involve facts very similar to the present case. I agree that there are similarities between the two cases, in that both involve an H&C application by a grandmother wishing to remain in Canada with family members and, in particular, grandchildren for whom she was a caregiver. However, there are also differences between the cases, in that the applicant in *Benyk* had lived with her grandchildren continuously for eight years. Also, Justice Harrington's decision in *Benyk* turned significantly on the fact that the H&C officer in that case implied that the grandchildren's mother could get a different job to allow her to care for her children if the applicant returned to the Ukraine. Every H&C application must be assessed based on its own particular facts, and every application for judicial review must take into account both the facts of the case and the reasoning of the decision under review,

applying deference to the decision-maker as required by the standard of reasonableness. *Benyk* does not support a conclusion that the decision of the Officer in the case at hand was unreasonable.

B. *Did the Officer improperly consider the Applicant's establishment in Canada?*

[18] Ms. Tosunovska submits that she has a meaningful life in Canada. With many friends and all of her close family members residing here, she has a vibrant social life in her community and a meaningful role as the matriarch of her family. She contrasts this with her situation if she were to return to Macedonia, where she submits she has no friends, close family, or support system. Ms. Tosunovska argues that the Officer disregarded the evidence to this effect, relating to her personal circumstances, and therefore failed to properly assess her level of establishment in Canada.

[19] In this portion of the Decision, the Officer considered the level of Ms. Tosunovska's integration into the community in Canada and concluded that that aspect of her establishment was not beyond what would normally be expected. The Officer also found that there was little information that she would not be able to integrate similarly into the community in Macedonia where she had resided for the majority of her life. Ms. Tosunovska submits that it was unreasonable to conclude that she could become involved in her community back in Macedonia, in the same manner as she had in Canada, when her entire life revolves around her family members in Canada and she has no social network in Macedonia.

[20] I find no reviewable error in this portion of the Decision. The Decision does not demonstrate that the Officer disregarded the available evidence. Rather, Ms. Tosunovska disagrees with the Officer's assessment of the evidence, with which it is not the province of the Court to interfere.

[21] Ms. Tosunovska relies on the decisions in *Klein v Canada (Citizenship and Immigration)*, 2015 FC 1004, and *Awgu v Canada (Citizenship and Immigration)*, 2015 FC 1277, noting their reference to the officers in those cases demonstrating a lack of sensitivity in evaluating the applicants' degree of establishment in Canada. However, both of those cases involved applicants who had unconventional lives and were thus unable to achieve the conventional markers of establishment. They have little application to the present case. I accept that an H&C decision which demonstrates a lack of sensitivity to the applicant's circumstances can be subject to judicial review, because it does not properly consider the degree of establishment the applicant has achieved. However, I find no error of that sort in the Officer's Decision.

[22] Ms. Tosunovska also refers to *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 [*Lauture*], arguing that the Officer assessed her ability to establish herself if she were to return to Macedonia based on her success in doing to in Canada, thereby effectively using her degree of establishment in Canada against her. In *Lauture*, the officer found the applicants to demonstrate a remarkable engagement in society and to have formed significant community relations. However, because such community involvement could also occur if they returned to their home country of Haiti, the officer did not weigh the establishment factor in their favour.

[23] The analysis by the Officer in the present case does not demonstrate this sort of error. While the Officer did consider the possibility that Ms. Tosunovska could integrate into her community if she returned to Macedonia, the Officer also assessed her degree of establishment in Canada, found that it was not beyond what would normally be expected, and afforded the establishment factor moderate weight in her favour.

[24] Ms. Tosunovska also refers to *El Thaher v Canada (Citizenship and Immigration)*, 2012 FC 1439, and *Anquilero v Canada (Citizenship and Immigration)*, 2015 FC 140, cases in which the Court held that the officer assessing an H&C application failed to properly assess the degree of the applicant's establishment in Canada. While I agree that such a failure would represent a reviewable error, no such error is demonstrated in the present case, where the Officer considered the evidence relevant to establishment but concluded that the level of establishment was not sufficient to warrant granting an exemption on H&C grounds.

[25] Referring to *Epstein v Canada (Citizenship and Immigration)*, 2015 FC 1201 [*Epstein*], a case involving an 82-year-old woman who applied for an H&C exemption based on her close connections to family members in Canada and lack of support in her country of origin, Ms. Tosunovska notes that Justice LeBlanc overturned the negative H&C decision on the basis that the officer failed to consider the applicant's age and dependency on her family in Canada. Ms. Tosunovska emphasizes the Court's finding that the officer in that case ignored the applicant's change in circumstances, namely that, because of her family's immigration to Canada, she would be significantly isolated if she were to return to Israel. She also relies on *Epstein* to support an

argument that it was unreasonable for the Officer to rely on the fact that her family had moved to Canada and not sponsored her to minimize the significance of their relationship.

[26] As with some of the other authorities relied upon by the Applicant, I agree that there are similarities between the facts in *Epstein* and those in the present case. However, in *Epstein*, Justice LeBlanc found that the officer had failed to grasp the essential point of the H&C application, which was the plea of an elderly woman to remain with her family in Canada as she waited for her permanent residence application to be processed. The officer had failed to consider her financial, emotional, and physical dependency on her family.

[27] The same cannot be said of the Decision in the case at hand. The Officer considered Ms. Tosunovska's financial dependence on her family and concluded that there was insufficient evidence to demonstrate that she lacked the personal financial means to meet her needs in Macedonia or that her family in Canada would be unable or willing to offer financial support if she were to return. That finding has not been challenged in this application. The Officer also recognized that Ms. Tosunovska was, to some degree, emotionally dependent on her family, but concluded that the evidence did not demonstrate that the emotional and physical impact of separation was such that it carried sufficient determinative weight. In so finding, the Officer noted that the relationship had been maintained in the past while the family was geographically separated.

[28] As with her submissions in relation to the best interests of the children factor, I find that Ms. Tosunovska's submissions on the establishment factor ask the Court to reweigh the evidence, which is not the Court's role in a reasonableness review.

(1) Is the Decision otherwise unreasonable?

[29] Other arguments raised by Ms. Tosunovska relate to findings made by the Officer which she submits were based on speculation rather than the evidence. She alleges that the Officer speculated that her distant relatives in Macedonia would be willing and able to support her if she was forced to return there. She notes that her only remaining family members in Macedonia are her late husband's second cousins. Ms. Tosunovska and these cousins live 5 km apart and do not communicate with any kind of regularity.

[30] However, the Decision notes the submission of Ms. Tosunovska's counsel that the few family members she had in Macedonia are not close to her and that there would be no one to check up on her if she moved back home. This appears to be the full extent to which that point was addressed in counsel's written submissions to the Officer. Letters from two of Ms. Tosunovska's Canadian relatives similarly state only that they have few relatives still living in Macedonia and that their family visits to that region are rare.

[31] The applicant in an H&C application has the burden to establish the facts supporting the request for an exemption. The Officer did not make a finding that Ms. Tosunovska's relatives in Macedonia would be willing to support her, but rather that there was insufficient material before the Officer to establish the contrary. There is no basis for the Court to interfere with this finding.

[32] Similarly, Ms. Tosunovska argues that the Officer engaged in speculation by concluding that she could establish a social life upon returning to Macedonia. However, the Officer's conclusion was that there was little information showing that she would not be able to participate in a religious community or enjoy friendships in Macedonia, where she had resided for the majority of her life. Again, this is a finding related to the sufficiency of evidence, which I cannot conclude to be unreasonable.

[33] Finally, Ms. Tosunovska argues that the Officer erred by referring to the possibility that her separation from her family could be mitigated through other immigration avenues, such as visas like the Grandparent Super Visa to allow further visits to Canada or an application for permanent residence through the Family Class Program. She submits that visits to Canada would not accomplish her objective, which is to live in Canada permanently with her family, not to visit here, and she argues that the Officer erred by failing to assess whether she was eligible for the Family Class Program and the likelihood that an application under the program would be successful.

[34] I find no error in the Officer's reference to visa programs which might permit further visits to Canada. While I recognize that this would not fulfil Ms. Tosunovska's goal of residing with her family permanently, the Officer was not making any suggestion to that effect. Rather, the Officer was commenting on how such avenues could allow Ms. Tosunovska to visit over an extended period of time, reuniting her periodically with her family and mitigating the hardship that might result from returning to Macedonia.

[35] With respect to the Family Class Program, Ms. Tosunovska states that this program is significantly different from what it had once been, operating now as a sort of lottery system. However, as acknowledged by her counsel in oral submissions, the Court must decide this application based on the material that was before the Officer. Documentation provided to the Officer in support of the H&C application included what the Officer described as a series of working papers, research studies, and articles published between 2003 and 2016 on the family reunification program, which described changes to the program and in some cases critiques of immigration policies.

[36] These documents include references to changes to immigration programs associated with family reunification, including elevated financial criteria for the immigration of family members and a cap on the number of applications per year. The Officer does not analyse the effect of these changes to immigration policies on Ms. Tosunovska's individual prospects of accessing these programs, finding rather that that it is beyond the scope of an H&C application to consider such public policy matters. I cannot conclude that the Officer was required to conduct such an analysis in order to consider that the possibility of family reunification through such programs was a factor mitigating the hardship that would result from separation. The Officer found there was insufficient evidence that she could not seek to apply under these programs.

VI. Conclusion

[37] In conclusion, I concur with the Respondent's submission that the circumstances presented by Ms. Tosunovska in her H&C application could well have supported the grant of an exemption under s 25 of IRPA, but that the nature of a reasonableness review in administrative

law does not allow the Court to substitute its own assessment of the evidence for that of the decision-maker. Ms. Tosunovska has not identified any errors by the Officer which would support intervention by the Court. Her application for judicial review must therefore be dismissed.

[38] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-2381-17

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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