Federal Court		Cour fédérale

Date: 20100412

Docket: IMM-5422-08

Citation: 2010 FC 386

Ottawa, Ontario, April 12, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

OLEKSANDR ANTONOVIVH MIKHNO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of the decision of an immigration officer (the officer), dated October 29, 2008, which refused the applicant's application under subsection 25(1) of the Act to have his application for permanent residence processed from within Canada on humanitarian and compassionate (H&C) grounds.

[2] The applicant requests:

1. An order quashing the decision refusing the applicant's application brought pursuant to subsection 25(1) of the Act for exemption from section 11 of the Act to have an application for permanent residence processed from within Canada on H&C grounds or in the alternative;

2. A declaration that the applicant meets the requirements of subsection 25(1) of the Act for exemption from section 11 of the Act and that the applicant's application for permanent residence be processed from within Canada on H&C grounds or in the alternative;

3. To refer the matter back to Citizenship and Immigration and/or any other appropriate authority with a direction that the same panel or in the alternative, any other panel of Citizenship and Immigration and/or any other appropriate authority should declare that the applicant meets the requirements of subsection 25(1) of the Act for exemption from section 11 of the Act and that the applicant's application for permanent residence be process from within Canada on H&C grounds; or

4. An order referring the matter to the appropriate authority for redetermination by a different officer in accordance with the law.

Background

[3] The applicant is a citizen of the Ukraine. He came to Canada in 2000 and subsequently claimed asylum based on his status as a Jewish person. His ex-wife and daughter remain in the Ukraine. In December 2002, his refugee claim was rejected. The Refugee Board found the applicant

not credible and not to be Jewish or perceived to be Jewish. The applicant did not challenge this decision.

[4] The applicant has not left but has settled into life in Canada. Indeed, in support of his H&C claim, the applicant says he has now adapted well to the Canadian way of life and would face significant hardship if forced to go back to the Ukraine.

[5] The H&C application was submitted in June of 2003, but was updated as recently as 2008.

[6] In 2006, the applicant requested a pre-removal risk assessment (PRRA) which was also based on risks to Jewish persons in the Ukraine. In December of 2008, the applicant received the decisions denying the H&C application and the PRRA application. The applicant has sought judicial review of both decisions.

[7] The applicant alleges that he began working as an auto mechanic within one month of his arrival in Canada and worked for two different employers in that field until 2005 when he started his own business as a construction contractor. He did not submit any documents regarding his business, but reported income of $29,991 in 2007. He also alleges to have done volunteer work for the Jewish Russian Community Center.

[8] The applicant married a permanent resident in October 2007 and submitted his tenancy agreement as evidence of their co-habitation.

[9] The officer's decision rejecting his application considered both his degree of establishment in Canada and potential hardship if returned to the Ukraine.

[10] Regarding his establishment, the officer largely accepted his evidence of his gainful employment and integration into the Canadian workforce, but noted that his work experience in Canada and his previous experience would help him to get re-established in the Ukraine where he would not be deprived of cultural and linguistic references. The officer also noted that his lack of a work permit in Canada since 2006 indicated disregard for Canadian laws.

[11] The officer felt that the applicant still had significant family ties in the Ukraine. The officer noted his marriage and his stated desire to have a child, but noted the lack of evidence regarding the nature of his relationship. There was no sponsorship or even letter of support from his new wife. The officer also noted that he got married while aware of his immigration status and of the possibility of separation. In total, the officer felt that the elements of establishment did not justify granting the special H&C exemption.

[12] Regarding the risks of returning to the Ukraine as a Jewish person, the officer found that the applicant had not demonstrated the possibility that he would face a personal risk that would amount to unusual, undeserved or disproportionate hardship. The officer noted that while the applicant had submitted evidence of the general situation in the Ukraine, he had not explained how the general documentary evidence related to his personal situation. The officer finally considered the strength of the applicant's other evidence and the Board's determinations regarding his testimony and

credibility. Finally, the officer reviewed additional evidence under the heading, country conditions, which indicated incidents of racism and the government's reactive measures.

[13] The officer finally concluded that on the whole, the evidence did not suggest that there were sufficient H&C grounds to grant an exemption from the requirements of subsection 11(1) of the Act.

Issues

[14] The issues are as follows:

1. What is the standard of review?
2. Did the officer commit a reviewable error?

Applicant's Written Submissions

[15] An application for an H&C exemption entitles the applicant to a determination on a fair and objective basis and one that is in line with the objectives of the Act. The reviewing officer has a duty to consider all possible sources of hardship the applicant may face.

[16] In reviewing the hardship the applicant may face in the Ukraine, the officer erred by focusing on issues raised at the Board, instead of the issues raised by the applicant in his PRRA application. In particular, the officer misconstrued or misapplied the affidavits and letters from the

applicant's friends and relatives and the country reports that spoke of human rights abuses. The officer also favoured the Board's finding that the applicant was not Jewish over the evidence of a childhood friend who deposed that he was. The officer also improperly challenged the authenticity of another letter in assigning it little probative value. This was an indirect challenge to the applicant's credibility and should have warranted an oral hearing.

[17] The officer also made errors in assessing the applicant's establishment in Canada. The officer did not properly consider the effect that his leaving would have on the applicant's wife. The officer may be an expert in the area of risk assessment, but is not an expert in assessing emotional hardship.

Respondent's Written Submissions

[18] An H&C decision is unreasonable only if there is no reasonable line of analysis that could lead to the officer's conclusion or if the officer's decision does not fall within the range of possible, acceptable outcomes. H&C decisions involve a fact specific weighing of many factors. Courts ought not interfere in the weight given to the different factors.

[19] The respondent submits that hardship based on alleged risk was reasonably assessed by the officer. The applicant raised the same allegations as were handled by the Board, but did not adduce sufficient evidence to address its findings. For example, the Board found the applicant less than credible. Yet the applicant did not submit evidence refuting that allegation. The officer also

determined that the applicant's evidence did not adequately address the issue of his Jewish nationality. The officer also correctly noted that the general documentary evidence did not address the applicant's personal circumstances, nor did the applicant provide any explanation. There was no issue with credibility that would require an oral hearing.

[20] The officer's assessment of the applicant's establishment was also reasonable. The officer considered all of the applicant's ties to and establishment in Canada and it was open for the officer to conclude that on the whole, it did not dictate a positive decision.

Analysis and Decision

[21] **Issue 1**

What is the standard of review?

The standard of review for H&C decisions is reasonableness (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, [1999] S.C.J. No. 39 (QL)).

[22] Findings of fact made within an H&C decision, if challenged, are subject to the standard of review imposed by paragraph18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[23] The Supreme Court in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12 (QL), recently referred to the impact of these legislative instructions.

> 46 More generally, it is clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the Federal Courts Act.

As such, a factual conclusion by the officer will only be interfered with if the applicant establishes that it was made in error and made in a perverse or capricious manner or without regard for the material.

[24] **Issue 2**

Did the officer commit a reviewable error?

An H&C review under section 25 of the Act offers an individual special and additional consideration for an exemption from Canadian immigration laws that are otherwise universally applied. The purpose of the high degree of discretion conferred by the legislation is to allow flexibility to approve deserving cases not anticipated by the Act.

[25] The denial of an H&C application does not involve the determination of an applicant's legal rights. H&C applicants seek a discretionary benefit in the form of a special exemption from the normal requirement that all persons seeking admission to Canada must make their application before entering Canada. Applicants thus have a heavy burden to discharge in order to satisfy the Court that a rejection of a claim under section 25 was unlawful (see *Gautam v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 686 at paragraphs 9 and 10, 167 F.T.R. 124, per Evans J.).

[26] The reasonableness of the ultimate denial of an H&C application will only be overturned by reviewing courts in two situations:

1. Where there exists no reasonable line of analysis that could have lead to the officer's conclusion; or

2. Where the conclusion does not fall within the range of possible, acceptable outcomes.

(see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9 (QL) at paragraph 47, *Thandal v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 489, [2008] F.C.J. No. 623 (QL) at paragraph 7, *Zambrano v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 481, [2008] F.C.J. No. 601 (QL) at paragraph 32).

[27] In attempting to establish that one of the above tests has been met, an applicant may, as a first step, point to a perceived error or misconstruction in the written reasons provided by the officer. Yet, reviewing courts will understand that the written reasons of immigration officers are not required to be perfect and need not withstand microscopic legal scrutiny (see *Boulis v. Canada (Minister of Manpower and Immigration)*, [1974] S.C.R. 875).

[28] The Supreme Court in *Baker* above, also expressed the non-judicial nature of H&C decisions and the importance of substance over formality in the conveyance of reasons for the decision to the applicant (paragraphs 43 and 44).

[29] Proving the existence of a real error, omission or misconstruction by itself will not discharge the burden before the applicant. In other words, an error simpliciter cannot be a reviewable error

when reviewed on the reasonableness standard. The applicant must ultimately establish that one of the above tests is met before the reviewing court will interfere.

[30] After thorough review of the decision and the material, I have concluded that the applicant has failed to meet either of the tests above and the applicant has not shown any error in the decision.

[31] The first error in the decision alleged by the applicant is the officer's reference to the Board's decision. This was not an error. The officer would have been derelict in her duties had she not considered the very reasons why the Board had determined that the applicant did not face persecution in the Ukraine.

[32] It was prudent and reasonable to consider the applicant's evidence in light of the Board's conclusions to see if any of their concerns had been addressed or if the applicant's situation had changed.

[33] A prime concern for the Board was the applicant's credibility. In particular, the Board did not accept his claim to be a Jewish person. It was open for the officer to view the matter before her as a matter of evidence rather that credibility. Yet, the applicant did not submit any objective evidence of his background to address this. The officer did consider the letter from Liliana Tomovic, a childhood friend of the applicant, which simply repeated the applicant's assertion that he was of Jewish decent. However, it was open to the officer to give the evidence little weight, in light of the fact it did not come from an uninterested source and because the letter otherwise did not

provide any new information and seemed to merely repeat the applicant's allegations. In my opinion, the applicant has not given the Court any reason to even suspect that it was an error for the officer to favour the Board's finding.

[34] The second error in the decision alleged by the applicant is that the officer misconstrued the corroborative evidence. There was no misconstruction. Clearly, the officer understood what the letters were saying and how they assisted the applicant's case. Indeed, the applicant does not suggest such an error, but challenges the amount of probative weight afforded to the letters by the officer.

[35] The amount of weight the officer gives to a piece of factual evidence is entirely within the purview of the officer. It is a determination of fact and will not be set aside unless found to be perverse or capricious.

[36] As noted above, the officer had valid reasons for affording little probative value to the letter of Liliana Tomovic. There is simply no basis for finding the result perverse or capricious. The letter from the applicant's ex-wife in the Ukraine was similarly afforded little probative value. Again, the officer stated her reasons for this determination as follows: the author was an interested party, the letter discussed an incident of persecution but did not identify the aggressors, nor the reasons for the harassment. The officer also noted that she was only presented with a translation and no evidence to show that it was sent from the Ukraine.

[37] While another decision maker may have chosen to grant more weight to the letters, the applicant has not given the Court any basis to find this officer's determination perverse or capricious so that this Court would interfere.

[38] The third error the applicant points to is the assessment of the hardship that would be faced by the applicant's wife if he were to leave. However, an officer conducting an H&C application need not consider hardship faced by anyone but the applicant and any children affected. Nonetheless, it appears as though the officer spent significant time assessing the applicant's relationship with his wife. The officer made the observation that although the applicant had provided documentary evidence of their marriage and co-habitation, there was no evidence of any hardship faced by his wife if he were to leave. The wife had not provided any evidence and had not sponsored the applicant's immigration. It was not an error on the officer's part to notice such things.

[39] On the whole, the officer accepted that the applicant had established himself in Canada as one would expect a person to after eight years, but did not conclude that such establishment warranted a special exemption from the rules. Overall, the conclusion was reasonable.

[40] Finally, the applicant challenged the officer's overall assessment of the country conditions in the Ukraine on the basis that her overall conclusion was unreasonable. I find no basis for this challenge. As with other aspects of this decision, the officer's conclusions on the country conditions were a determination of fact. The officer adequately referenced documentary evidence which suggested that there had been an increase in acts of violence against persons based on their religious

views, but also adequately explained her conclusion that the applicant had not demonstrated the possibility that he would face a personal risk in the Ukraine that would amount to unusual and undeserved or disproportionate hardship. It is not enough for the applicant to point to the contrary evidence and assert that the decision maker should have ruled in his favour.

[41] Though not specifically argued as a separate issue, the applicant made the argument that it was wrong not to have afforded him an oral hearing. In my view, however, credibility was not a central issue in this hearing that would warrant an oral hearing.

[42] Credibility of evidence is always and will always be an issue in the assessment of H&C applications. Not all issues of credibility warrant oral hearings. An officer can reasonably find that an applicant has simply not provided enough evidence to corroborate an assertion without conducting an oral hearing. This will especially be the case when the matter could be resolved easily with supporting written or documentary evidence.

[43] As noted in *Baker* above:

> 34 I agree that an oral hearing is not a general requirement for H & C decisions. An interview is not essential for the information relevant to an H & C application to be put before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children's Aid Society and from her psychiatrist. These documents were before the decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining

> the content of the duty of fairness into account, the lack of an oral hearing or notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

[44] Thus, H&C applications will usually not require an oral hearing unless the issue of credibility is central and cannot easily be resolved any other way, but through an in person assessment.

[45] While the officer did question the authenticity of the letter from the Ukraine, it is unclear how an oral hearing would have resolved the matter. If evidence proving the letter's authenticity existed, the applicant could have submitted it. Likewise, if there was evidence further substantiating any hardship faced by the applicant's wife, he could have and should have submitted it.

[46] For the reasons above, I would dismiss this application for judicial review.

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

JUDGMENT

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

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

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

11.(1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11.(1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
. . .	. . .
25.(1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	25.(1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

. . .	. . .
113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	a) le demandeur d’asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n’étaient alors pas normalement accessibles ou, s’ils l’étaient, qu’il n’était pas raisonnable, dans les circonstances, de s’attendre à ce qu’il les ait présentés au moment du rejet;

The *Federal Courts Act*, R.S.C. 1985, c. F-7

18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l’office fédéral, selon le cas :
. . .	. . .
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5422-08
STYLE OF CAUSE:	OLEKSANDR ANTONOVIVH MIKHNO - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 3, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	O'KEEFE J.
DATED:	April 12, 2010

APPEARANCES:

Richard Odeleye	FOR THE APPLICANT
Laoura Christodoulides	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Babalola, Odeleye Toronto, Ontario	FOR THE APPLICANT
Myles Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT