Federal Court  Cour fédérale

Date: 20120605

Docket: IMM-7911-11

Citation: 2012 FC 684

Ottawa, Ontario, June 5, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ALLA RYZAK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a citizen of Israel who was born in Belarus on January 11, 1957. She entered Canada in April 1998 as a temporary resident. She has been conditionally subject to deportation since November 1998. Her refugee claim was abandoned in May 1999. An application for an in-Canada exemption on humanitarian and compassionate grounds was denied in May 2001. An application for judicial review of that decision was dismissed in July 2003. A second application for an exemption was dismissed in February 2003 followed by a negative Pre-removal Risk

Assessment in February 2005. A third application for an exemption was filed in July 2006 and a fourth in October 2011, which remains pending.

[2] The decision to dismiss the third request for an exemption on September 16, 2011 is the subject of this application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. For the reasons that follow, the application is dismissed.

DECISION UNDER REVIEW:

[3] The officer found insufficient evidence that the applicant's removal would result in unusual and undeserved or disproportionate hardship. The officer considered the interests of the applicant's Canadian daughter, who was born on May 19, 2000 and is developmentally delayed. The daughter is enrolled in a special education program and under treatment by a speech therapist. The applicant is the sole caregiver for the child. The officer also considered a psychological report about the problems that could result from relocation. While he acknowledged that relocation to Israel would result in some setbacks for the child, the officer found insufficient evidence that similar services would not be available in Israel.

[4] The officer also considered that the applicant's mother tongue is Russian and that neither she nor her daughter speak Hebrew. Noting the large Russian-speaking population in Israel which includes a number of professionals, the officer found that there was insufficient evidence that the child's needs could not be met by Russian-speaking service providers in Israel.

[5] The officer considered the applicant's older daughter, who became a permanent resident in 2002. He acknowledged the relationship between the applicant, the younger daughter, the older daughter, and the older daughter's children, but found that the applicant and the younger daughter could maintain frequent contact with the older daughter and her children by using various communication media such as voice and visual services over the internet and email as well as social networks. The officer recognized that this would be difficult.

[6] Although the officer noted the applicant's clean civil record, he also noted that such a clean record is expected from all members of society regardless of immigration status.

[7] The officer considered the applicant's reliance on social assistance, which she collected in 1998, in 1999, and continuously from 2000 until October 2010, when she was transferred to the Ontario Disability Support Program, which she continues to collect. He noted the applicant's statement that she had worked as a chef in the past when she had a work permit, but found that employment details were lacking. Her application for a work permit was refused in 2006.

[8] The officer considered the applicant's statement that she is unable to work because she is caring for her daughter and that she will find a job as soon as her status is regularized. He found little evidence to suggest that arrangements had been made for her daughter's care if the applicant does find work. He also noted that the applicant was on social assistance before her daughter was born and during periods in which she had a valid work permit. Finally, the officer noted that the applicant had worked for several years in Israel and therefore found insufficient evidence that she would not be able to provide for herself and her daughter if she relocated to Israel.

[9] The officer considered the claim that the applicant had nowhere to live if she returned to Israel, but found that the inconvenience of securing new accommodations did not amount to hardship. The officer also considered the applicant's volunteer involvement with an unnamed religious institution and her periodic attendance at English second language classes, as well as the history of unrest in Israel, but found that these did not establish undue and unusual or disproportionate hardship.

ISSUE:

[10] The sole issue is whether the officer's decision is reasonable.

ANALYSIS:

Standard of review

[11] Applications for exemptions from the visa requirement are reviewable on the reasonableness standard: *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18. Reasonableness in this context does not mean what the Court considers fair. The Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR190 at para 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59.

Is the decision reasonable?

[12] As stated by Justice David Stratas in his paper *Some Thoughts on Advocacy in Judicial Review Proceedings* presented at the Law Society of Upper Canada conference "The Six Minute Administrative Lawyer 2011", Toronto, February 24, 2011, the courts are constrained by the reasonableness standard. He went on to say:

> We cannot interfere just because we think the tribunal should have accepted the argument. We cannot interfere just because we think the tribunal reach the wrong result. Instead, counsel's burden under the reasonableness standard is higher. Counsel must show us that the tribunal reached a result that was completely *outside the range* of outcomes available to the tribunal. [Emphasis in the original]

[13] In this matter counsel for the applicant was unable to provide the Court with much assistance. The applicant's written submissions are exceptionally brief. She submits that the officer failed to fully consider the evidence before him and that he "appeared to find every reason possible to deny the application." She relies on the Court's decision in *Yu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 956 and the affidavit submitted on her stay motion in November 2011, which was successful.

[14] At the hearing, counsel quoted a sympathetic comment regarding the merits of the applicant's case made by the judge who granted the stay. It was inappropriate for counsel to have done so. The comment was made *per incuriam* in the context of a motion in which the Court has an equitable jurisdiction that it does not have on an application for judicial review. On a stay motion the Court has a broad discretion to find that the three elements of the test are met. On judicial review, the Court must make an independent decision on the merits of the application applying the

standards of correctness and reasonableness as defined by the jurisprudence. While empathy for an individual's situation is presumptively a consideration in determining whether the hardship incidental to deportation is unusual, undeserved and disproportionate; the Court cannot rely on empathy to find reviewable error when the decision is within the range of acceptable outcomes.

[15] Here, the applicant has not identified any issues or evidence that pre-date the decision and that the officer failed to consider. The interests of the applicant's child were fully considered, including the report from Dr. Pilowsky. All of the evidence was referenced and analyzed in the officer's decision, and there is no merit to the applicant's argument that it was not fully considered. That is an argument going to the weight to be given to the evidence, a decision to be made by the officer and not by the Court on review.

[16] It was reasonable for the officer to rely on 2010 and 2011 letters from the applicant's daughter's school rather than a 2005 psychological report. Nothing in the application record or the stay motion record contradicts the officer's finding that there was insufficient evidence that the daughter would not have access to the necessary support in Israel, a modern developed state with advanced educational and other services.

[17] The case of *Yu*, above, relied upon by the applicant, dealt with an application made outside of Canada by a failed skilled worker applicant who had *de facto* family members in Canada willing to support her. The officer's decision was found to be unreasonable because it failed to consider the close bond between the applicant and her twin sister, who was a Canadian permanent resident, as well as the fact that the twin's cancer had gone into remission largely because of the applicant's

care. The decision had made no mention of any of the relevant humanitarian and compassionate factors. That is not the case here.

[18] Although the applicant's affidavit from the stay motion claims that it was unreasonable for the officer to assume that her daughter speaks Russian as well as English, the officer obtained that information from the submissions provided. Moreover, there was no evidence to indicate that the applicant could not obtain services in English in Israel.

[19] With respect to establishment, the applicant failed to explain her lengthy reliance on social assistance. In her submissions she states that she cannot work because she must care for her daughter. Given the applicant's lengthy history of taking social assistance payments even prior to the birth of her daughter, it was reasonable for the officer to consider that this explanation was inadequate.

[20] In a post-decision letter the applicant states that she cannot work because she suffers from chronic pain and other health problems related to her weight. But that explanation was not before the officer. Evidence in the record as to the reasons why the applicant is now on Ontario Disability Support also post-dates the decision. It is trite law that in a judicial review application the only material that should be considered is the evidence that was before the decision maker, save in certain narrow exceptions none of which are applicable here: *Canadian Tire Corporation v Canadian Bicycle Manufacturers Association*, 2006 FCA 56 at para 13.

[21] Applicants for an exemption on humanitarian and compassionate grounds bear the burden of providing sufficient evidence to justify their request. This was the applicant's third request and it is reasonable to assume that she was aware of her burden. Despite this, and despite being represented by counsel throughout, the applicant did not provide sufficient evidence of the hardship or other difficulty that she would experience in Israel. In these circumstances, the officer's decision was well within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[22] No serious questions of general importance were proposed and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No question is certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7911-11
STYLE OF CAUSE:	ALLA RYZAK AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
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