Federal Court  Cour fédérale

Date: 20161201

Docket: IMM-5818-15

Citation: 2016 FC 1333

Ottawa, Ontario, December 1, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

OLGA VIKTORIVNA YURIS
(A.K.A. OLGA YURIS)
LEV SERGIYOVYCH YURIS
(A.K.A. LEV YURIS)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Yuris and her son Lev, the applicants, are citizens of Ukraine. They arrived in Canada on January 22, 2015, *via* the United States [US] after having entered the US on visitors' visas. On entry into Canada they made a claim for protection.

[2] Their claim was joined with the claim of Sergiy Yuryevich Yuris, Ms. Yuris's husband and Lev's father. Mr. Yuris had arrived in Canada directly from Ukraine on a Canadian visitor's visa on January 15, 2015. Their claims for protection were advanced on the basis that Mr. Yuris is a gay man and that Ms. Yuris is a lesbian and that, as a result of their sexual orientation, they were subject to persecution in Ukraine. They allege their marriage was entered into to camouflage their true sexuality.

[3] Their claims for protection were denied by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB]. As Ms. Yuris and Lev had entered Canada pursuant to the Safe Third Country Agreement with the US they were not eligible to appeal the negative decision to the Refugee Appeal Division [RAD]. Mr. Yuris was eligible to file an appeal with the RAD and was successful.

[4] The applicants were scheduled for removal from Canada in December 2015, and sought a deferral of their removal pending a determination of their outstanding Humanitarian and Compassionate [H&C] application. The deferral request was denied and it is that decision that is before the Court for judicial review.

[5] The applicants argue that the Inland Enforcement Officer [Officer] committed a reviewable error in refusing the deferral application. Specifically, the application raises the following issues:

A. Did the Officer apply the wrong test?

B. Did the Officer ignore relevant evidence?

C. Did the Officer fail to consider the generalized risk the applicants face?

[6] I am sympathetic to the factual circumstances that have resulted in the applicants being dealt with in a procedurally different manner than Mr. Yuris. However, having reviewed the parties' written submissions and having considered their oral arguments, I am not persuaded that the Officer committed a reviewable error. The application is dismissed for the reasons that follow.

II. Standard of Review

[7] The parties submit, and I agree, that the correctness standard applies to the question of the identification of the correct test to be applied by the Officer (*Kastrati v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1141 at para 10, *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at paras 21 and 27 and *Pathmanathan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 353 at para 28). With respect to the Officer's decision to deny the deferral request, it is well-established in the jurisprudence that the applicable standard of review is reasonableness (*Kampemana v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 1060 at para 32).

III. Analysis

A. *Did the officer apply the wrong test?*

[8] The applicants argue that a positive deferral decision was justified in this case based on: (1) their outstanding H&C application; (2) the hardship in Ukraine based on Ms. Yuris' sexual

orientation; (3) the separation of the family; and (4) Lev's best interests including consideration of his psychological state and the timing of removal. The applicants submit that despite the evidence, the request was denied because the Officer adopted "an irreparable circumstance" threshold as opposed to the "compelling individual circumstances" threshold established in the jurisprudence. They argue that the Officer's adoption of a higher threshold resulted in a flawed assessment of the evidence. I disagree.

[9] The authority of an Officer to defer the execution of a removal order is limited (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*] at paras 49, 67 and 68). In his concurring judgment Blais J.A. was was in agreement with the majority on this point (*Baron* at paras 80-81).

[10] An Officer is to consider whether there are compelling circumstances or exceptional reasons in considering a deferral of removal (*Prasad v Canada (Minister of Citizenship and Immigration)*, 2003 FCJ No 805 at para 32 and *Baron* at para 51).

[11] In this case, the Officer stated in the concluding paragraph of the decision that "[y]ou have not provided sufficient evidence indicating that you face an irreparable circumstance that would justify deferral of your removal ..." The language used in this summary statement raises the question of whether the Officer applied the correct test. However, I note that the Officer correctly articulated the test at the outset of its analysis.

[12] Where a legal test is correctly articulated and applied elsewhere in a decision, a Court might conclude that the misstatement, particularly where it occurs in a summation statement does not amount to a reviewable error (*Kedelashvili v Canada (Minister of Citizenship and*

Immigration), 2010 FC 465 at para 9 and *Ali v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1231 at para 16).

[13] At the outset of the Officer's analysis, the Officer noted that the "… deferral of removal is a temporary measure intended to alleviate exceptional circumstances". The Officer then proceeded to: (1) note that Ms. Yuris' alleged risks in Ukraine had previously been assessed; and (2) that the outstanding H&C application will be considered on its merits. The Officer also addressed the question of family separation, the psychological evidence setting out the challenges Lev is experiencing as a result of the scheduled removal as well as the timing of the removal on Lev's education.

[14] There is no indication that the Officer misapplied or misapprehended that test in conducting the analysis. The use of the term "irreparable circumstances" in summarizing the evidence does not support a conclusion that the Officer erred when the reasons are read as a whole. I am similarly not convinced that the Officer conducted a flawed assessment of the evidence as a result of misapprehending or misapplying the test. The analysis demonstrates that the Officer not only correctly articulated the legal test but applied the test in a reasonable manner when undertaking the analysis that followed. In my opinion, the Officer did not err by applying the wrong test.

B. *Did the Officer ignore relevant evidence?*

[15] The applicants argue that the Officer failed to treat Lev's immediate interests fairly and sensitively. The applicants note that while the Officer addressed the psychological evidence the meaning of that evidence was misconstrued. It is submitted that the Officer failed to address the

evidence of Lev's negative reaction to the prospect of returning to Ukraine. In written submissions, the applicants advanced the view that the Supreme Court of Canada's decision in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, [2015] 3 SCR 909 – a decision rendered in the context of an H&C application and relating to the best interests of the child – also applies in the deferral context. Applicants' counsel acknowledged this argument in oral submissions but choose not to advance it in this case.

[16] An Officer considering a child's interests in a deferral context is not conducting a full assessment of those interests as it is done in an H&C context under subsection 25(1). The obligation to consider the child's interests in the deferral context is at the low end of the spectrum (*Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 at para 16). Similarly, consideration of a child's best interests in a deferral context "… should be focused on the short-term best interests of the child …" (*Mkhonta v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 991 at para 30 citing *Khamis v Canada (Citizenship and Immigration)*, 2010 FC 437).

[17] The Officer recognized the challenges of the removal process. She noted that Lev did not enter the country with his father and lives apart from his father but acknowledged the existence of a close relationship. The Officer also recognized the psychological report "… attesting to the challenges that Lev is experiencing as a result of scheduled removal to Ukraine". This assessment suggests that the Officer did not ignore or fail to address Lev's reaction to returning to Ukraine, as the applicants argue.

[18] In addition to considering Lev's short-term best interests based on the evidence put forward, the Officer also addressed the outstanding H&C application and the allegations of risk in Ukraine. The Officer set out a reasoned basis for concluding that neither justified the granting of a deferral. The Officer did not ignore or fail to address the relevant evidence.

C. *Did the Officer fail to consider the generalized risk the applicants face?*

[19] The applicants rely on *Abioye v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 348 [*Abioye*] to argue that the Officer erred in concluding that no new evidence of risk had been submitted and the risk identified in the deferral application had been previously assessed. They submit that the numerous country documents pointed to the generally difficult conditions in Ukraine, and the worsening treatment those of a non-traditional sexual orientation face as extremism grows in Ukraine.

[20] I am not convinced that *Abioye* assists the applicants. In that case, the RPD made no finding in regard to the claimant's sexual orientation and the Court found that the country condition evidence disclosed that "… the situation had profoundly worsened". In this case, the RPD did make an express finding in regard to Ms. Yuris' sexual orientation, concluding that she failed to place enough credible and trustworthy evidence before the RPD to establish her claim. Similarly, there was no evidence to suggest a significant or profound change in country conditions.

[21] In advancing her request for deferral, Ms. Yuris did not place any new evidence before the deferral Officer. In light of the RPD's prior finding and in the absence of any new evidence

of risk, it was reasonably open to the Officer to conclude that the allegations of risk had been previously considered. The Officer did not fail to consider the generalized risk the applicants faced.

IV. Conclusion

[22] The Officer did not err in considering the evidence or in identifying and applying the appropriate test in the context of the request for deferral. 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).

[23] The parties have not proposed a question of general importance and none arises.

JUDGMENT

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

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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