Date: 20081212

Docket: IMM-2673-08

Citation: 2008 FC 1368

Toronto, Ontario, December 12, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ANATOLIY DUBOVTSEV
OLGA DUBOVTSEVA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a negative decision of a PRRA officer, dated April 30, 2008, refusing the applicants' request, on humanitarian and compassionate grounds, to have their applications for permanent residence processed inland. For the reasons that follow, I am of the view that the application must be dismissed.

Background

[2] Mr. Dubovtsev has worked steadily since his arrival in Canada, and for the same employer since 2001. Mrs. Dubovtseva has not worked in Canada save for a one-month period in 2005, which ended abruptly when she suffered a severe workplace injury which has left her permanently cognitively disabled and unsteady on her feet. Since the incident she is in receipt of workers' compensation payments. According to a doctor's letter dated February 10, 2008, her condition is chronic and will not improve. The physician writes that "Ms. Dubovtseva suffered a catastrophic head injury with multiple permanent sequelae. She needs constant care and supervision."

[3] The applicants also led evidence that neither of them is psychologically healthy. No doubt this has been largely, if not entirely caused by the injury to Ms. Dubovtseva and its consequences.

[4] The officer found that there was no evidence of significant community involvement or other factors that would indicate a degree of establishment beyond that expected of persons who have resided and worked in Canada since November 1999.

[5] The officer relied on documentary evidence to conclude that the applicants would be unlikely to face a serious risk on account of their ethnicity and religious affiliation upon return to Kazakhstan. She also described the existence in Kazakhstan of a social security system – again on the basis of documentary evidence - to which the applicants could potentially have recourse should Mr. Dubovtsev be unable to secure employment on his return. The officer considered the availability of housing, given the applicants' claim their house was damaged by fire in 2001. She

looked as well at their family ties and the best interest of children who would be affected by the applicants' deportation. While acknowledging that the applicants share a household with their daughter and grandchildren, the officer was nonetheless of the view that the absence of any detailed information in this respect stood in the way of a finding of unusual, undeserved, or disproportionate hardship.

[6] The most extensive portion of the officer's reasons relates, understandably, to Ms. Dubovtseva's medical circumstances. The officer canvassed the material on file relating to her accident and condition, and acknowledged evidence that she is unable to work, drive or take public transit, and suffers from personality changes brought on by trauma to the brain. She accepted as well the evidence that Ms. Dubovtseva has reached "maximum recovery". The officer nonetheless noted that information regarding Ms. Dubovtseva's day-to-day needs and requirements was lacking, making it difficult to conclude that these needs and requirements could not be met in Kazakhstan. The officer gave little weight to dated information on medical services in Kazakhstan, noting that in any event, it did not establish that general medical care was unavailable. Finally, the officer acknowledged the doctor's opinion that Ms. Dubovtseva is unable to travel on account of her unsteadiness, but noted that her medical fitness and physical ability to leave Canada can be raised and evaluated when actual removal preparations are underway, and she refers in this respect to operational manual ENF 10.

Issue

[7] The applicants raise a single issue – the reasonableness of the officer's decision.

Analysis

[8] The applicants submit that the officer's determination of establishment in Canada was unreasonable. While I am prepared, on the facts of this case, to accept that establishment was impaired by the injury to Ms. Dubovtseva, that injury does not account for the absence of evidence to show more than an expected degree of establishment.

[9] The officer notes and credits the applicants with the fact that Mr. Dubovtsev has an admirable work history in Canada. She also notes their reference to church involvement, but observes that there were no letters of support from a church or church leaders. She further notes that there is a dearth of information to indicate a level of community involvement or integration that might support a finding of significant establishment in Canada. Given the absence of evidence, other than that mentioned above, it cannot be said that the officer's decision on establishment was unreasonable.

[10] It is also submitted that the officer's decision was unreasonable because she failed to assess the applicants in light of their exceptional profile. By this is meant the significant injury to Ms. Dubovtseva. A reading of the officer's decision indicates that she did review and consider all of the medical evidence presented to her. The jurisprudence is clear and well established – the onus is on the applicants to bring forward all relevant evidence necessary to make their case. It is clear from the reasons that, unfortunately, the applicants failed to provide sufficient evidence to establish that they ought to be exempted from the usual requirements of the Act. The following selected passages from the officer's reasons illustrate this failure:

- "While "details of any treatment/care currently being received by Ms. Dubovtseva" were specifically requested in a letter dated 22 January 2008, these were not provided".
- "…no clear information was provided as to what actual care or treatment the female applicant currently receives from either medical professionals or her family in Canada".
- "...it is unclear what her day-to-day needs are in terms of care and treatment and so it is difficult to determine what her requirements are so as to see if such would be available to her in Kazakhstan".
- "The February 2008 letter from the female applicant's family doctor … likewise provided little detail on her current care or treatment schedule …".
- "I note that while counsel undertook in October 2006 to provide a letter with a personalized assessment of lack of healthcare for the female applicant's needs, no such information has been provided".
- "I have insufficient current evidence before me to establish that the applicant would be unable to access medical care or treatment in Kazakhstan were it required".
- "[The physician] states that she could not tolerate any long travel, but does not give details related to this as to why, how long, etc.".
- "…no specific information has been provided as to what medications or other treatment she is receiving, who she is being treated by and how often".

The officer's reasons are replete with similar statements and observations concerning the lack of evidence, other than general statements as to the condition and health of Ms. Dubovtseva.

[11] The applicants submitted that the officer should have "inferred" from the evidence before her that Ms. Dubovtseva could not be removed from Canada and suggested that this fact, in itself, supported a positive H&C application. Whether or not the inability to travel, in itself, warrants a positive H&C determination is not a matter for this Court on this application. What is clear, however, is that the officer was entitled to expect clear, convincing and detailed evidence to support that claim. It simply was not provided by the applicants, in spite of the fact that detailed evidence had been requested and was promised by them.

[12] Lastly, there was a submission made by the applicants that the officer had raised the bar so high in an H&C application that it would never be able to be met. It was submitted that an H&C application is not the extraordinary remedy that the officer has made it. First, this officer, in my view, has not raised the bar any higher in this decision. Second, an H&C application is extraordinary. If accepted, the applicants would not be required to apply for status from outside Canada. Application from abroad is the norm; application in-country is extraordinary.

[13] For all of the foregoing reasons, and although the injury to Ms. Dubovtseva and the consequences for the applicants are truly lamentable, this application must be dismissed.

[14] As was noted by the officer in her reasons, and by respondent's counsel at the hearing, the applicants will have an opportunity to present evidence, if it is available, that Ms. Dubovtseva's health is such that she cannot withstand the air travel to Kazakhstan. If they choose to do so, they are strongly encouraged to ensure that the evidence provided is precise, detailed, and current.

[15] Neither party proposed any question for certification, nor is there any on the facts presented.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and

2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2673-08
STYLE OF CAUSE:	ANATOLIY DUBOVTSEV and OLGA DUBOVTSEVA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
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