

Federal Court



Cour fédérale

Date: 20090922

Docket: IMM-4990-08

Citation: 2009 FC 950

Ottawa, Ontario, September 22, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ANASTASIYA BENYK

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] Mrs. Benyk came to Canada from the Ukraine in 1999 in order to visit her daughter and her two granddaughters. She came on a temporary visitor's visa. Ten years later she is still here.

[2] Had she not applied for permanent residency from within Canada on humanitarian and compassionate grounds, she may well never have come to the attention of the authorities. If we have

any system to verify that visitors leave the country when their visas expire it is observed in the breach.

[3] The Officer came to the conclusion that there were insufficient humanitarian and compassionate grounds to grant Mrs. Benyk's request. This is the judicial review of that decision.

[4] An application for a permanent resident visa must be made from outside the country. However s. 25 of the *Immigration and Refugee Protection Act (IRPA)* allows the Minister to waive any requirement on humanitarian and compassionate grounds. The best interests of children directly affected must be taken into account.

[5] As the Minister rarely makes these decisions personally, he has established a manual, IP-5, to serve as a guideline. Although the guideline is not law, it has been acclaimed over and over again by this Court. It falls upon the applicant to satisfy the decision maker that there would be unusual and underserved or disproportionate hardship involved in applying for a permanent resident visa from outside Canada. Since decisions are rendered on behalf of the Minister, and not by an independent tribunal, the Minister cannot seek judicial review of a decision which does not suit him. Consequently, the Court is somewhat at a loss in ascertaining what the Minister considers to be hardship. The cases that come to this Court on applications for judicial review are those in which the decision maker was of the view that there was no unusual, undeserved or disproportionate hardship.

THE FACTS

[6] When Mrs. Benyk, a widow, came to Canada, her daughter was in the midst of a messy divorce and was suffering from a brain tumor. Fortunately she is now in good health. The mother, the grandmother and the grandchildren, Anastasia and Samantha, 15 and 13 at the time the decision was made, have all lived under the same roof. If not the primary care giver, Mrs. Benyk is one of two primary care givers. Her daughter is a carpenter who works at trade shows. It is a requirement of her job that she often work evenings, and sometimes out of town. She does not quite meet the financial threshold required to sponsor Mrs. Benyk. Even if she did, the evidence on file indicates that at the time the decision was made in October 2008, the application would run four years from start to finish.

[7] The Officer weighed Mrs. Benyk's current circumstances in Canada against what they might be back in the Ukraine. There are some disturbing elements to that analysis. There is a suggestion that Mrs. Benyk is treating her daughter's house as a piece of the Ukraine. One would think she never left the house. However there are letters of support from her pastor and his wife, and from a non-Ukrainian neighbour, which indicate that she is far from housebound. As well, the conclusion that if she were to return to the Ukraine, where she has no place to live, she would be assisted by family may be unwarranted.

[8] However it is not necessary to come to a conclusion as to the degree of establishment in Canada or hardship if Mrs. Benyk were returned to the Ukraine. I am granting this judicial review on the grounds that the decision was unreasonable when it came to the best interests of the children.

[9] The Manual points out that the relationship between the applicant and a child may be a relationship with a grandparent who could be the primary caregiver. Factors which might be considered are the age of the children (13 and 15 at the time of the decision), the level of dependency, and the degree of the children's establishment in Canada (both were born and raised here).

[10] Other factors which should be considered are whether the relationship is an ongoing one as opposed to the simple biological fact of relationship; where the applicant is residing in relation to the children; whether there has been any previous period of separation; and family financial interdependence.

[11] The Officer jumbled together financial and emotional issues in the same paragraph. It was recognized that there are strong emotional ties, but the conclusion was that it would not be unusual, undeserved or disproportionate to throw out a grandmother who has lived with her grandchildren for eight years, day in , day out. What would be disproportionate: 9 years, 10 years or perhaps 11?

[12] The Officer implies that Mrs. Benyk's daughter could well get another job which would not require her to work nights or out of town. Given the current economic climate, Mrs. Benyk's daughter is fortunate to have a job at all.

[13] The family resides in Ontario. The Officer did not take into account s. 79(3) of the Ontario *Child and Family Services Act*, R.S.O. 1990, c. C. 11 which provides: "No person having charge of a child less than 16 years of age shall leave the child without making provision for his or her

supervision and care that is reasonable in the circumstances.” The record does not indicate that Mrs. Benyk’s daughter is in position to hire an outsider to stay with the children overnight. In my opinion the Officer’s decision was unreasonable.

[14] The Officer also pointed out that Mrs. Benyk knew that she was here without status and was running a risk. However the whole purpose of s. 25 of IRPA is to deal with people who are without status for one reason or another.

[15] It is a strange country in which we live. We are compassionate toward war criminals, murderers and rapists who risk persecution in their homeland. However we are prepared to throw out an old Baba, whose only offence was to overstay her visa to care for her daughter and her grandchildren.

ORDER

FOR THE REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is granted.
2. The matter is referred back to another officer for redetermination.
3. There is no serious question of general importance to certify.

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4990-08

STYLE OF CAUSE: *Anastasiya Benyk v. The Minister of Citizenship and Immigration*

PLACE OF HEARING: Toronto, Ontario

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REASONS FOR ORDER AND ORDER: HARRINGTON J.

DATED: September 22, 2009

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