

Date: 20090604

Docket: IMM-5351-08

Citation: 2009 FC 588

Toronto, Ontario, June 4, 2009

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

NADIYA KROHMALNIK

Applicant

and

**THE MINISTER OF CITIZENSHIP, IMMIGRATION
and MULTICULTURALISM**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Nadiya Krohmalnik seeks judicial review of the negative decision made in relation to her application for a humanitarian and compassionate exemption.

[2] For the reasons that follow, I find that the immigration officer erred in the assessment of Ms. Krohmalnik's application, with the result that the decision is unreasonable. As a consequence, the application for judicial review will be allowed.

Background

[3] Ms. Krohmalnik is a 32-year-old Ukrainian citizen, who arrived in Canada on a visitor's visa some 11 years ago. In 2003, Ms. Krohmalnik married Haim Krohmalnik, a Canadian citizen. The couple had a son, David, that same year. Unfortunately, Mr. Krohmalnik died the following year.

[4] Mr. Krohmalnik had attempted to sponsor Ms. Krohmalnik. There is some disagreement between the parties as to what happened to that application, but it is common ground that it was not successful.

[5] After her husband died, Ms. Krohmalnik filed an application for a humanitarian and compassionate exemption, together with an application for a Pre-removal Risk Assessment. Both applications were rejected by the same officer. Ms. Krohmalnik's application for judicial review in relation to her negative PRRA was heard at the same time as this application, and is the subject of a separate set of reasons.

[6] David Krohmalnik has two adult half-brothers, Neil and Daniel, who are the children of a previous relationship of their father's. Ms. Krohmalnik says that Neil and Daniel share a loving and supportive relationship with their younger half-brother. She also claims that she and her son have a close relationship with her late husband's parents and sister, and visit them regularly. Ms. Krohmalnik contends that she and her late husband had agreed to raise David in her husband's

Jewish faith, and that she and David share religious holidays and other family occasions with her husband's family.

[7] Ms. Krohmalnik's H&C application was based upon her establishment in Canada, David's best interests, and the risk that she says that she and David would face in Ukraine based upon their Jewish surname, the perception that she had betrayed her roots by marrying a Jew, and David's own Jewish faith. Ms. Krohmalnik also says that she would be at risk in Ukraine because she is a woman who would face discrimination amounting to persecution in the workplace.

Analysis

[8] While Ms. Krohmalnik has raised several issues on this application, it is only necessary to address the issues of the officer's treatment of David's best interests and the risk allegedly posed by anti-Semitism in Ukraine.

[9] There were three aspects to Ms. Krohmalnik's H&C submissions as they related to the best interests of her son. Firstly, Ms. Krohmalnik says that it would not be in David's best interests to be separated from his father's family, with whom he enjoys a close and loving relationship. Secondly, she submitted that because of her own limited knowledge of Jewish traditions, customs, language and history, she would not be able to raise David in his father's faith, without the assistance of her late husband's family. Finally, Ms. Krohmalnik stated that as a Jewish child with an identifiably Jewish name, David would be at risk in Ukraine, because of the widespread anti-Semitism in that country.

[10] Although David is a Canadian citizen, the officer recognized that Ms. Krohmalnik was his sole caregiver, and that it would be in his best interests to go to the Ukraine with his mother. While acknowledging that David has a relationship with his late husband's family, the officer found there to be insufficient evidence on which to find that separating the families would amount to unusual, undeserved or disproportionate hardship. Finally, the officer considered the country condition information relating to the situation of Jews in Ukraine, finding there to be insufficient evidence of risk in that regard.

[11] Nowhere in the officer's reasons does the officer explicitly address the issue of the Krohmalnik family's wish to raise David in the Jewish faith, and the effect that separating him from his father's family would have in relation to the fulfillment of that desire. The only statement in the officer's analysis that could potentially relate to this issue is the officer's statement that "[I]f returned to Ukraine with [Ms. Krohmalnik], [David] would not be deprived of cultural and linguistic references thanks to her presence and that of her family".

[12] If the above statement is intended to address this issue, it is perverse in light of Ms. Krohmalnik's own lack of knowledge of Judaism, and her family's evident antipathy to people of the Jewish faith. If, instead, the comment is intended to address David's ability to integrate into Ukrainian society, then no consideration appears to have been given by the officer to what was clearly a material issue relating to David's religious upbringing, with the result that the officer was not "alert, alive and sensitive" to David's best interests. Either way, the decision is unreasonable.

[13] Insofar as the issue of risk is concerned, the analysis in the H&C decision was similar to that contained in the officer's PRRA decision. The officer noted the existence of a large and vibrant Jewish community within Ukraine. While accepting that there had been an increase in acts of violence against Jews in 2007, the officer observed that the government had responded with the creation of a special unit within the Ukrainian Security Service to combat religious hatred.

[14] The officer then concluded that "[D]espite the incidents of anti-Semitism in Ukraine, the sources do not show that all individuals of [the] Jewish religion or those associated with them face a particular risk or hardship in that country. Furthermore, the sources indicate that the Ukrainian government continues taking steps to fight this problem".

[15] There are several difficulties with the officer's findings in relation to the risk issue as it related to anti-Semitism in Ukraine.

[16] Firstly, the officer's statement that "the sources do not show that *all individuals of [the] Jewish religion or those associated with them* face a particular risk or hardship in that country" is very troubling. It is clearly not necessary for an H&C applicant to demonstrate that every member of the applicant's religious group who is living in the country in question has been subject to persecution, in order to establish risk-related hardship. By making the statement cited above, it appears that the officer may have placed much too heavy a burden on Ms. Krohmalnik in relation to the issue of risk.

[17] The second concern is with the officer's findings with respect to the frequency of anti-Semitic attacks, and the steps taken by the Ukrainian government to fight the problem of anti-Semitism.

[18] There was recent evidence before the officer in the form of a 2008 Amnesty International report dealing with racial discrimination in Ukraine, which paints a much gloomier picture of conditions for Jews in Ukraine than did the older evidence referred to by the officer. This report documents the alarming rise in violent attacks against religious minorities, including Jews, over the previous two years. This report also notes that these attacks were carried out not just by members of the public, but also by public officials such as police officers.

[19] Although the officer does not make an explicit finding that state protection is available to members of the Jewish minority in Ukraine, such a conclusion is implicit in the officer's statement that the government is taking steps to combat the problem of Anti-Semitism in that country. While this statement may be true, as far as it goes, there was evidence before the officer which raised serious questions as to whether these steps have resulted in adequate state protection being available to members of the Jewish community.

[20] That is, the 2008 Amnesty International report concludes by observing that "The failure to apply existing legislation, combined with the failure of the police to acknowledge the gravity of racially motivated crimes and to respond adequately, have led to a situation of *virtual impunity* for the perpetrators" [my emphasis]. The report then goes on to state that "The police must play a

positive role in combating racial discrimination, yet in Ukraine people are at risk of human rights violations at the hands of the police because of their racial, ethnic or religious identity”.

[21] It is clearly the role of the H&C officer to weigh the available information relating to the issues of risk in determining whether an applicant would face unusual, undeserved or disproportionate hardship in his or her country of origin. However, where, as here, there is important evidence that runs directly contrary to the officer’s finding on a central issue, there is an obligation on the officer to analyse that evidence, and to explain why he or she prefers other evidence on the point in question: *Cepeda-Gutierrez v. Canada (M.C.I.)* (1998), 157 F.T.R. 35 (F.C.T.D.). The failure of the officer to do so means that the decision lacks the justification, transparency and intelligibility required of a reasonable decision.

Conclusion

[22] For these reasons, the application for judicial review is allowed.

Certification

[23] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a different H&C officer for re-determination; and
2. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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