Federal Court  Cour fédérale

Date: 20220513

Docket: IMM-3039-21

Citation: 2022 FC 696

Vancouver, British Columbia, May 13, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

GALINA POLINOVSKAIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] In this application for judicial review, the applicant seeks to set aside a decision of a senior immigration officer dated April 27, 2021, refusing her application for permanent residence in Canada with an exemption on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*).

[2] At the time of her application for H&C relief, the applicant was an 81 year-old citizen of Russia. She was divorced from her husband and had no family in Russia. She entered Canada in 2016 as a visitor. Since then, she has applied for and obtained visitor records to extend her stay.

[3] The applicant's daughter, Vlada, is a Canadian citizen. She lives in Montréal.

[4] Mother and daughter are close. After Vlada came to Canada as a student in the mid-2000's, she returned annually to Russia to visit her mother. In 2008, she filed an application to sponsor the applicant to come to Canada, but withdrew it after being diagnosed with a serious medical illness.

[5] Vlada suffers from a rare and serious autoimmune illness for which there is no known treatment. It affects the liver. When the disease progresses to liver failure, the only option is a transplant. Vlada was on a waiting list for a liver transplant from a matching donor when the applicant filed her application for H&C relief.

[6] In addition to supporting evidence about her daughter's illness, the applicant filed evidence about the hardships she would experience in the small village in Russia in which she lived before visiting Canada, owing to her age, crime and other conditions. She also filed evidence and supporting letters from the members of her religious community in Montréal.

[7] The officer's reasons denying the application for H&C relief considered the applicant's establishment in Canada, adverse country conditions and hardship, and medical considerations.

I. Legal Principles

[8] The standard of review of the officer's decision is reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at para 44. The reasonableness standard was described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15. The reviewing court starts with the reasons of the decision maker, which are read holistically and contextually with the record that was before the decision maker: *Vavilov*, at paras 84, 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at paras 28-33.

[9] The Court's review considers both the reasoning process and the outcome: *Vavilov*, at paras 83 and 86. A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, at paras 24-36.

[10] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada, if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations. The H&C discretion in subsection 25(1) is a flexible and responsive exception to

the ordinary operation of the *IRPA*, to mitigate the rigidity of the law in an appropriate case: *Kanthasamy*, at para 19.

[11] Humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the [*IRPA*]": *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338, at p. 350, as quoted in *Kanthasamy*, at paras 13 and 21.

[12] The discretion in subsection 25(1) must be exercised reasonably. Officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 74-75; *Kanthasamy*, at paras 25 and 33.

[13] The onus of establishing that an H&C exemption is warranted lies with the applicant: *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360, at paras 35, 45 and 61. Lack of evidence or failure to adduce relevant information in support of an H&C application is at the peril of the applicant: *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635, at paras 5 and 8.

II. Analysis

[14] The applicant made several arguments to support her position that the officer's decision was unreasonable.

[15] The first submission was that the officer failed to apply the *Chirwa* standard to the facts. At the hearing, the applicant submitted that the Court, as a proxy for a member of the community mentioned in *Chirwa*, should examine the facts and determine whether they would excite, in a reasonable person, a desire to relieve the misfortunes of the applicant. According to this argument, the compelling circumstances of the applicant should enable this Court to conclude that the H&C application should have been granted and therefore the officer's decision should be set aside and the matter sent back for redetermination.

[16] This submission is incorrect in law because it asks the Court to apply *Chirwa* to the applicant's circumstances. To do so would engage in correctness review. Put another way, an applicant for judicial review of an H&C decision cannot come to the Court and re-argue the merits of the decision. The merits are for the officer making the decision. The Court's role on judicial review is to ensure that the decision was made lawfully, that is, in accordance with the legal and factual constraints that applied to it and in a manner that was intelligible, transparent and justified. The Court can only intervene if it concludes that the decision was unreasonable as described most recently in *Vavilov* and in the cases applying its principles.

[17] I turn to the rest of applicant's submissions. The applicant relied heavily on *Majkowski v Canada (Citizenship and Immigration)*, 2021 FC 582. In that case, an H&C decision denied

relief to a 90-year-old man whose prior residence was in the United States. Due to his age, he was finding it increasingly difficult to live alone and take care of himself without support. He struggled to meet his living expenses in the United States and had to sell his house and other assets to sustain himself. He had nowhere to live in the United States and could not afford a nursing home. His friends had passed away or moved away to live with their families. His remaining family was all in Canada.

[18] Justice Fothergill set aside the negative H&C decision. He concluded that the officer failed to engage in any meaningful way with the applicant's advanced age, his level of dependency on his family, his vulnerability and his potential isolation and hardship if he were required to re-establish himself in the United States. The officer's findings did not reflect the evidence as a whole and the officer failed to grasp the essential point of the request for H&C relief and did not properly assess the evidence having regard to the applicant's personal circumstances: *Majkowski*, at para 21.

[19] In the present case, the applicant submitted:

- the officer made the same error as in *Majkowski*, by failing to grasp the essential point of her request for H&C relief,
- the officer improperly raised her eligibility under another immigration stream as a bar to relief, thereby fettering the exercise of discretion under subsection 25(1), similar to an argument made in *Majkowski*. Specifically, the applicant contended that she was not in fact eligible for a super visa, or at minimum her eligibility was

uncertain given the requirement to be selected and to obtain expensive medical insurance given her age,

- the officer focused on the absence of evidence from the applicant about her prior experiences in Russia, rather than the impact on her of current adverse country conditions in that country, and
- the officer failed to give any consideration to the explicit humanitarian representations in a letter from the Rabbi at the Jewish Russian Community Centre of Montreal.

[20] The respondent disagreed. The respondent submitted that the officer's decision reasonably assessed establishment, family ties, financial circumstances, country conditions in Russia, hardship and medical conditions. The respondent distinguished *Majkowski* on the facts: the applicant in the present case has a pension from her former position as a professor in Russia, owns an apartment that could be sold and has financial savings. In addition, there was no evidence of any change in her health while she was in Canada that would affect her ability to re-establish herself in her long-time home in Russia.

[21] With respect to eligibility for a super visa, the respondent noted that the applicant obtained a temporary resident visa and extensions. She could apply for additional extensions. The respondent noted that H&C relief is not an alternative means of immigration into Canada.

[22] The respondent emphasized that the H&C relief is exceptional and a discretionary remedy and it was up to the officer to make the determination. According to the respondent, the

officer provided a well-reasoned decision that was not unreasonable, even acknowledging that the factual circumstances were sympathetic.

[23] I have concluded that the decision must be set aside as unreasonable, for two reasons.

[24] First, at the core of this H&C application was the impact of the separation of the applicant from her daughter. This issue arose in the officer's reasons in at least two important places: in the assessment of adverse country conditions and hardship to the applicant, and with respect to "medical considerations" related to Vlada's illness and possible transplant surgery.

[25] When considering country conditions in Russia and hardship to the applicant, the officer acknowledged that the applicant and her daughter clearly had a close and supportive relationship. The officer was sympathetic to the desire that the two stay together as the applicant grows older so they could take care of each other. The officer found that a refusal of the H&C application and potential separation "would undoubtedly result in emotional hardship for both parties, as well as potentially impact the psychological support provided for one another". The officer accepted that Vlada could not sponsor her mother because of the financial requirements and limited number of sponsorship applications accepted. However, the officer referred to the super visa immigration program, designed for extended stays of up to two years at a time for parents and grandparents of Canadian residents. The officer found that the applicant had provided minimal submissions that such an avenue would be unavailable or inapplicable. This "alternative way of reuniting in Canada soften[ed] the hardship of a refusal" of the H&C application. At the very end of the

officer's reasons, the officer referred to the super visa program as a "mitigating factor" to the adverse country conditions in Russia.

[26] When assessing medical considerations, the officer referred to a letter from Vlada explaining that the presence of her mother in Canada gave her strength during her illness. The officer gave positive weight to the close and supportive bond between mother and daughter, recognizing that it "may prove important during this difficult time for Vlada in order to support her emotionally and practically". However, the officer found that a refusal of the H&C application "would not signify an end to their close and supportive relationship. Despite a refusal, the applicant would be eligible to apply to extend her stay in Canada on a semi–permanent basis". This latter passage could only be a reference to the applicant's eligibility to apply for a super visa.

[27] As is apparent, in both parts of the assessment, the officer identified and relied on a perceived alternative way for the applicant to stay in Canada (the super visa application) and used it as the sole factor to eliminate or diminish the effects of separation on the applicant and her daughter. In short, the officer's assessment was predicated on the belief that the applicant would not really have to return to Russia to live and Vlada would not have to suffer alone through her illness, transplant surgery and recovery without the emotional and day-to-day support of her mother, because the applicant was eligible to apply for a super visa.

[28] In my opinion, the officer's analysis in both places was flawed. The applicant did not hold a super visa. There was no factual basis in the record for the officer's assumption that she

would obtain one if she applied. The officer found that any adverse conditions in Russia and the emotional hardship both women would "undoubtedly" suffer if separated would disappear, or be sufficiently mitigated, by something that did not exist and that the applicant could only apply for. In short, the officer's reasoning on the core issue in this H&C application was based on a false premise (that the applicant would certainly obtain a super visa) and had no basis in the evidence, which raises concerns about its intelligibility and justification: *Vavilov*, at paras 100-101, 102-104, 126 and 128. In addition, it was an error to find that mere eligibility to apply for a super visa was equivalent to, or a suitable alternative for, granting the permanent residency that the applicant requested: see *Bernabe v. Canada (Citizenship and Immigration)*, 2022 FC 295, at paras 4 and 33 (citing *Rocha v Canada (Minister of Citizenship and Immigration)*, 2022 FC 84, at para 31; *Greene v Canada (Minister of Citizenship and Immigration)*, 2014 FC 18, at paras 9-10); *Antoun v Canada (Citizenship and Immigration)*, 2022 FC 612, at para 13. See also *Hosrom v Canada (Citizenship and Immigration)*, 2022 FC 365, at paras 58-60 (citing *Luciano v Canada (Citizenship and Immigration)*, 2019 FC 1557, at paras 43-50; *Torres v Canada (Citizenship and Immigration)*, 2017 FC 715, at para 9). Although the applicant had an overall onus to adduce evidence to support her application, it was the officer who raised and relied heavily on the possible super visa application without evidence and without providing the applicant with an opportunity to comment.

[29] Second, I am persuaded that the officer's reasons did not properly assess the hardship on the applicant related to her potential return to Russia. Assessing hardship to the individual on her return to the country of origin is a critical aspect of an H&C assessment when such hardship is raised by the applicant's circumstances and her position on the application: see e.g., *Ahmed v*

Canada (Citizenship and Immigration), 2022 FC 618, at paras 35-36; *Zhang v. Canada (Citizenship and Immigration)*, 2021 FC 1482, at paras 14, 30-33; *Bawazir v Canada (Citizenship and Immigration)*, 2021 FC 1343, at paras 26-31. The officer discounted the impact of country conditions in Russia by finding that there was "little accompanying information, such as personal past experiences . . . to connect the general conditions . . . to the applicant's own personal circumstances". Near the conclusion of the H&C reasons, the officer found that adverse country conditions in Russia did not warrant any significant weight due to the "incomplete context given on the applicant's life in Russia prior to coming to Canada", as well as the super visa program. I agree with the applicant that the officer failed to conduct the necessary assessment of hardship to the applicant and did not engage with the evidence that was in the record. That analysis that was not precluded or prevented by the absence of unspecified information about the applicant's past experiences in Russia before 2016. The presumption that the officer considered all the evidence does not, in itself, discharge the officer's obligation to assess the hardship to the applicant based on the evidence in the record about the country conditions in Russia and their potential impact on her, looking forward. It was an error in law not to conduct that assessment. See also *Aboubacar v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 714, at para 12, quoted in *Kanthasamy*, at para 56.

III. Conclusion

[30] Applying *Vavilov*, I conclude that the decision was unreasonable and must be set aside. Neither party proposed a question to certify for appeal, and no question will be stated.

JUDGMENT in IMM-3039-21

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision dated April 27, 2021 is set aside and the matter is remitted for redetermination by a different officer. The applicant shall be permitted to file updated or additional evidence and/or submissions for the redetermination.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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