Federal Court Cour fédérale

**Date: 20211208**

**Docket: IMM-5419-20**

**Citation: 2021 FC 1374**

**Ottawa, Ontario, December 8, 2021**

**PRESENT: The Honourable Mr. Justice Bell**

**BETWEEN:**

**NINA MENIUK**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] Nina Dmytrivna Meniuk ("Ms. Meniuk") is a 70-year-old female citizen of Ukraine. Ms. Meniuk's only daughter and two (2) grandchildren are Canadian citizens and reside in the Toronto area. From 2006 to 2017, Ms. Meniuk and her husband frequently visited their daughter and grandchildren in Canada. Four (4) Temporary Resident Visas ("TRV") were issued to Ms. Meniuk and her husband between 2005 and 2013. Ms. Meniuk's husband passed away in 2017.

Ms. Meniuk continued her visits and has remained in Canada continuously since December 2018. She possesses a valid TRV, which expires in January 2023.

[2] On August 15, 2018, Ms. Meniuk applied for permanent resident status based upon Humanitarian and Compassionate ("H&C") grounds pursuant to s. 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ["IRPA"]. On September 30, 2020, an Immigration Officer (the "Officer") refused her application (the "Decision"). Ms. Meniuk now brings an application for judicial review of that Decision pursuant to s. 72(1) of the IRPA.

[3] For the reasons set out below, I dismiss the application for judicial review.

## II. Basis of the H&C application

[4] In her application for permanent resident status, Ms. Meniuk relied upon her desire to be with family in Canada following her husband's death, her degree of establishment in Canada, the best interests ("BIOC") of her then 8 year-old grandson, Daniel, her poor psychological health arising from the prospect of returning to Ukraine and the adverse country conditions in Ukraine. I would summarize the adverse country conditions in Ukraine as including: the ongoing conflict between the government of Ukraine and separatists in the eastern part of the country, Russian influence in Ukrainian affairs, the high degree of street crime resulting from displacement of persons from the conflict zones and, fears of reprisals from a male person in Ukraine who had a strained relationship with her late husband.

## III. Decision under review

A. *Establishment and Ties in Canada*

[5] The Officer considered the fact that Ms. Meniuk had, as at the date of the hearing, resided in Canada for a period of two-and-a-half years, her volunteer involvement in a Toronto area church, the fact that she attended English classes in 2017 and 2018, and the positive letters of support accepted into evidence. The Officer found that there was insufficient evidence to show that Ms. Meniuk had achieved an exceptional degree of establishment in Canada.

[6] The Officer considered Ms. Meniuk's strong bond with her daughter and grandchildren in Canada. It also considered the fact that she has a TRV expiring in January 2023, which allows her to visit her family in Canada for extended periods of time. The Officer also noted that while in Ukraine, Ms. Meniuk can maintain contact with her family through various electronic modes of communication. The Officer also noted that Ms. Meniuk could seek permanent residence through a family-class sponsorship. The Officer concluded that all of the above evidence suggests that family ties would not be severed if the application were refused.

B. *Best Interests of the Child*

[7] The Officer considered the best interests of Ms. Meniuk's 12-year-old grandson, Daniel. Ms. Meniuk contended that they share a special bond and that their separation would be traumatic for both. A psychological assessment prepared in December 2016 indicated that Ms. Meniuk's absence from Daniel's life would result in "disproportionate psychological distress for Daniel […] given his young age".

[8] The Officer accepted the evidence of the important connection shared between Ms. Meniuk and her grandson. He accepted that a separation would be difficult for both. The Officer gave little weight to the psychological assessment conducted in 2016, given that the level of Daniel's emotional development and the degree of his interdependence with his grandmother had likely changed between the date of its preparation in 2016 and the date of the decision in 2020. The Officer confirmed that Ms. Meniuk could maintain contact through visits and other modes of communication. The Officer explained that Daniel would remain in the loving care of his parents in the event Ms. Meniuk were to return to Ukraine. The Officer concluded that Ms. Meniuk's return to Ukraine would not have a significant negative impact on Daniel's best interests.

[9] With respect to Ms. Meniuk's own psychological health, the Officer gave little weight to a report from 2017 that had not been updated as at the date of the hearing.

C. *Adverse Country Conditions*

[10] Ms. Meniuk contended before the Officer that Ukraine's weak economy would negatively affect her ability to re-establish herself on return to that country, and that she has no family or network of friends in Ukraine. She also claimed, that as a result of the armed conflict in eastern Ukraine, many people relocated to her home town of Odessa, which has resulted in an "increase in street crime". She also indicated that she might be at risk from one of her neighbors in Ukraine who allegedly assaulted Ms. Meniuk's husband in the past.

[11] The Officer found that the state of the economy in Ukraine would not negatively impact Ms. Meniuk on return. He noted that she receives a fixed pension every month, that she owns a

condominium and that her daughter and son-in-law provide her with additional financial support. The Officer also observed that Ms. Meniuk presented little evidence with respect to the cost of living in Ukraine.

[12] The Officer found insufficient evidence to establish that Ms. Meniuk would not have support available to her on her return to Ukraine. While the Officer accepted that Ms. Meniuk's daughter and grandchildren reside in Canada, he noted there was little evidence to establish that Ms. Meniuk has no viable ties in Ukraine, where she has lived, studied and worked, for over 60 years.

[13] The Officer found that should Ms. Meniuk return to her home town of Odessa, she would not, on a balance of probabilities, be negatively affected by the armed conflict in eastern Ukraine. The Officer noted that there is also little objective evidence to suggest that the armed conflict is likely to spill over to other parts of Ukraine, and that Odessa is located 900 km away from the conflict zone. The Officer also noted that there is insufficient evidence of any unrest in Ms. Meniuk's home city of Odessa.

[14] The Officer found there to be little or no evidence to demonstrate that Ms. Meniuk's neighbor in Ukraine has any interest or intention to harass her on her return to Ukraine. On that issue, the Officer was unable to conclude that Ms. Meniuk's husband experienced mistreatment at the hands of this neighbor.

## IV. Relevant Provisions

[15] The relevant provision of the *IRPA* is s. 25(1):

| ***Immigration and Refugee Protection Act***, SC 2001, c 27 | ***Loi sur l'immigration et la protection des réfugiés***, LC 2001, ch 27 |
| --- | --- |
| **Humanitarian and compassionate considerations — request of foreign national** | **Séjour pour motif d'ordre humanitaire à la demande de l'étranger** |
| 25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected. | 25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché. |

V. Issues raised by Ms. Meniuk and standard of review

[16] Ms. Meniuk challenges the reasonableness of the decision as it relates to the application of *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [“*Kanthasamy*”], family circumstances and family separation, the best interests of her grandson, Daniel, her own psychological health, and the adverse country conditions in Ukraine. The adverse country conditions include the violence in eastern Ukraine, Russian influence in Ukraine, street violence in her hometown of Odessa and perceived threats from a neighbour who had a strained relationship with her late husband. She adds that the Officer failed to respect the principles of procedural fairness in his treatment of the best interests of the child and his consideration of the psychological evidence. Essentially, Ms. Meniuk attacks every finding made by the Officer.

[17] The parties agree that the merits of the Officer’s decision is subject to review on the reasonableness standard (*Vavilov* at para 25). None of the exceptions to the presumption of reasonableness review apply.

[18] “A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). To set aside a decision, the reviewing court must be convinced that there are sufficiently serious shortcomings in the decision, such that any superficial or peripheral flaw will not suffice to overturn the decision (*Vavilov* at para 100). Most importantly, the reviewing court must consider the decision as a whole, and must refrain from conducting a line-by-line search for error (*Vavilov* at paras 85 and 102).

[19] Ms. Meniuk, however, contends that the correctness standard applies to the determination of whether the Officer applied the correct legal test. I disagree. *Vavilov* is clear that all aspects of an administrative decision are to be reviewed on the reasonableness standard (*supra*, at para 25). Whether a decision-maker applied the correct legal test is to be treated as an element of reasonableness review (*Németh v Canada (Justice)*, 2010 SCC 56, [2010] 3 SCR 281 at para 10). In the majority of cases however, the decision will be unreasonable when the decision-maker fails to apply the correct legal test (*Vavilov* at para 111; *Cezair v. Canada (Citizenship and Immigration*), 2019 FC 1510 ["*Cezair*"] at para 13).

[20] Ms. Meniuk also raises procedural fairness issues as it relates to the treatment of psychological reports. These, if properly advanced, are subject to review on a correctness standard (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43).

## VI. Analysis

### A. *Does the decision meet the hallmarks of reasonableness?*

#### (1) Legal Test of *Kanthasamy*

[21] Ms. Meniuk contends that the Officer failed to apply the correct legal H&C test. She submits that the Officer failed to apply broad equitable considerations. Rather, she says, he considered her circumstances from a lens of hardship (or lack thereof) instead of compassion, contrary to the instructions of the Supreme Court in *Kanthasamy,* at para 33. She contends that her desire to remain with her only family following the death of her spouse should "excite in a

reasonable person in a civilized community a desire to relieve her of her misfortunes" (*Kanthasamy* at para 13).

[22] *Kanthasamy* does not eliminate the notion of hardship from H&C assessments; it remains a relevant and important factor to consider (*Kanthasamy* at paras 23 and 33; *Cezair* at para 16; *Shackleford v. Canada (Citizenship and Immigration),* 2019 FC 1313 at para 11). I am unable to conclude that the Officer, by considering the degree of hardship that Ms. Meniuk would face on her return to Ukraine, fell into reviewable error. This issue of hardship is impossible to avoid given the arguments advanced by Ms. Meniuk.

[23] When applying the reasonableness standard, the reviewing court must be cognizant of the fact that judicial review does not compel one specific result (Law Society of New Brunswick v. Ryan, 2003 SCC 20, [2003] 1 SCR 247 at para 56). The role of this Court is not to determine whether the decision-maker made the correct decision, but rather, to determine whether the decision bears the hallmarks of reasonableness (Vavilov at paras 96 and 99). Different decision-makers might assess the same facts and the same evidence, apply the same legal test, and still reasonably come to different conclusions (Li v. Canada (Citizenship and Immigration), 2020 FC 754 at para 68).

(2) Assessment of primary basis of Ms. Meniuk's claim

[24] Ms. Meniuk contends that the Officer's reasons are devoid of any substantive consideration of the primary basis of her H&C application; namely, her desire to remain in Canada with family because of the death of her spouse. This argument is without merit. The

Officer's decision demonstrates he was clearly aware of both Ms. Meniuk's desire to remain in Canada and of her spouse's death. He considered these and other factors. That Ms. Meniuk might disagree with the weight given by the Officer to her spouse's death is not a basis for intervention (*Begum v. Canada (Citizenship and Immigration*), 2013 FC 265, 429 FTR 117 at para 20).

(3) Best Interests of Ms. Meniuk's grandson, Daniel

[25] Ms. Meniuk contends the Officer failed to be alert, alive or sensitive to the best interests of her grandson, Daniel. Ms. Meniuk contends that the Officer failed to consider, to any extent, what was in Daniel's best interests. She contends that the Officer erred by applying a hardship-based analysis rather than assessing whether it was in Daniel's best interest for her to remain in Canada. She contends that the Officer applied an approach that required Daniel to demonstrate that his basic needs would not be compromised by removal, contrary to the jurisprudence of this Court (*Williams v. Canada (Citizenship and Immigration)*, 2012 FC 166 at paras 63-64). She submits that a lack of hardship cannot serve as a valid substitute for a BIOC analysis (*Osun v. Canada (Citizenship and Immigration)*, 2020 FC 295 at paras 20-21).

[26] Contrary to Ms. Meniuk's assertion, I am satisfied that the Officer was mindful of Daniel's best interests. He referred to the psychological opinion that separation from his grandmother could cause Daniel psychological distress. The Officer accepted that Daniel enjoyed his grandmother's presence and that a physical separation would undoubtedly be difficult for him. The Officer also considered the fact that Ms. Meniuk is not a primary caregiver for Daniel, that she holds a valid TRV until 2023, and that she may be able to apply for

permanent residence via a family sponsorship. These factors all demonstrate the Officer was fully engaged in his BIOC assessment. This Court has rejected the notion that consideration of the BIOC simply requires that the officer determine whether the child's best interests favours non-removal, as this will almost always be the case (*Zlotosz v. Canada (Citizenship and Immigration*), 2017 FC 724 at para 22; *Garraway v. Canada (Immigration, Refugees and Citizenship*), 2017 FC 286 at para 46). I am of the view that the Officer reached a reasonable conclusion that Daniel would not be significantly impacted by the Ms. Meniuk's removal.

[27] Ms. Meniuk further contends that it was unreasonable and procedurally unfair for the Officer to dismiss the psychological assessment of Daniel because it was prepared four (4) years prior to the date of the decision. She submits that it was unreasonable for the Officer to draw a negative inference from evidence, which was recent at the time of the H&C application. She contends that an officer cannot rely on delay in processing an application to militate against the interests of a child (*Noh v. Canada (Citizenship and Immigration)*, 2012 FC 529 at para 66). Ms. Meniuk submits that the Officer, having delayed in rendering a decision for two (2) years, was required to request an updated assessment before rejecting.

[28] I am satisfied that it was neither unreasonable nor procedurally unfair for the Officer to place little weight on the psychological assessment because it was dated four (4) years prior to the decision. The onus is on an applicant to produce updated evidence. An officer has no duty to request additional or updated information (*Rodriguez Zambrano v. Canada (Citizenship and Immigration*), 2008 FC 481, 326 FTR 174 ["*Rodriguez*"] at para 39). Ms. Meniuk had plenty of time to provide an updated report but failed to do so. It was reasonable for the Officer to find that

the psychological impact of separation from a grandparent is most likely different for an 8-year-old than for a 12-year-old. The assignment of weight given to the evidence is the domain of the Officer. The fact that Ms. Meniuk disagrees with this finding does not mean that it was unreasonable (*Kooner v. Canada (Citizenship and Immigration*), 2019 FC 1201 at para 36).

(4) Treatment accorded to Applicant's own psychological report

[29] Ms. Meniuk also contends that it was unreasonable and procedurally unfair for the Officer to assign little weight to her 2017 psychological assessment. As previously argued with respect to the psychological assessment of her grandson Daniel, she submits that it was unreasonable to consider the assessment as outdated, given that it was filed with the application in 2018. She again contends that she should not suffer from the delay in processing her claim.

[30] The Officer concluded that given the lack of evidence that Ms. Meniuk continues to suffer from mental health issues in 2020, he was unable to place significant weight on the assessment. As previously indicated, the onus is on an applicant to produce updated evidence. An officer has no duty to request additional or updated information (*Rodriguez, supra,* at para 39). It is trite law that an officer, like a judge, may accept some, none or all of a witness's evidence. Where an officer chooses to assign little weight to such a report he or she must provide a clear and reasoned explanation for doing so (*Sutherland v. Canada (Citizenship and Immigration*), 2016 FC 1212 at para 24; *Rainholz v. Canada (Citizenship and Immigration)*, 2021 FC 121 at para 47). I am satisfied the Officer did just that in the circumstances. I cannot conclude it was unreasonable for him to place little weight on the 2017 psychological assessment.

[31] Ms. Meniuk also contends that the Officer imposed an unduly high threshold of hardship as it relates to her psychological report. She says the Officer required her to show a serious risk to her life. In doing so she says he erred by applying a s. 97 of the *IRPA* standard to an H&C application (*Pinter v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 296, 44 Imm LR (3d) 118 at para 5).

[32] Contrary to Ms. Meniuk's assertion, the Officer did not require her to demonstrate that removal to Ukraine would result in a "significant deterioration of her mental health". The Officer simply indicated that he was "unable to place full weight on the conclusion that the applicant's return to Ukraine at the present time would result in a significant deterioration of her mental health". The Officer was simply being responsive to the assessment, in which the psychologist concluded that a removal would result in "direct permanent undue and underserved hardship" on Ms. Meniuk, and that it would be "highly detrimental to her mental health".

[33] Considering the above, I find that the Officer's treatment of the psychological assessment of Ms. Meniuk was neither unreasonable nor unfair.

(5) Family separation, remote connection and possibility of sponsorship application

[34] Ms. Meniuk contends the Officer unreasonably dismissed her concerns about family separation by suggesting that family members could continue to visit one another, remain in contact remotely, and that she could eventually be sponsored for permanent residence.

[35] I am of the view that it was neither unreasonable nor inconsistent with a compassionate approach for the Officer to find that Ms. Meniuk could continue to travel between Ukraine and Canada to visit her family. The Officer had no evidence before him to indicate that Ms. Meniuk would suffer any hardship if she were to travel between the two countries. To the contrary, he had evidence that Ms. Meniuk is blessed with excellent health and that she has been travelling regularly between Ukraine and Canada since at least 2006.

[36] Ms. Meniuk contends that the Officer unreasonably assumed she would be admitted on her temporary resident visa in the future, or that it would be renewed after it expires. She also says the Officer unreasonably referred to the possibility of a sponsored application for permanent residence. I disagree with Ms. Meniuk's categorization of the Officer's observations as assumptions. These were factors he put into the mix arising from her arguments regarding the hardship separation would cause. These were reasonable factors for the Officer to consider in the circumstances. I agree with the Respondent's contention that Ms. Meniuk's thesis is that she is entitled to permanent residence in Canada and that the Officer unreasonably failed to recognize that an H&C application was the most expedient method for her to acquire that status. Such arguments by Ms. Meniuk contradict the fundamental principle that immigration is a privilege and not a right (*Canada (Minister of Employment and Immigration) v. Chiarelli,* [1992] 1 SCR 711, 90 DLR (4th) 289 at pages 733-734).

(6) Evaluation of country conditions

[37] Ms. Meniuk contends the Officer unreasonably found there was insufficient evidence that she faces a risk of harm in Ukraine from her neighbor. She contends that the Officer focused on

what was not included in the statements provided by witnesses of the attacks on her husband in Ukraine instead of what was included, namely that the attacks did occur. She cites *Navaratnam v. Canada (Citizenship and Immigration)*, 2015 FC 244 at para 9. She also says the Officer unduly focused on the lack of evidence that the armed conflict in eastern Ukraine caused an influx of displaced persons to Odessa. She contends she produced evidence of generalized risk of crime and poor security conditions in Ukraine, which were unrelated to the ongoing armed conflict. She contends that the Officer erroneously associated the two in discounting the evidence of crime and poor security.

[38] The Respondent contends Ms. Meniuk failed to tie her personal circumstances to the presumed negative country conditions. The Respondent submits that an applicant must produce sufficient evidence that he or she would be personally affected by the conditions (*Webb v. Canada (Citizenship and Immigration*), 2012 FC 1060, 417 FTR 306 at para 17). I agree.

[39] Ms. Meniuk's argument concerning the Officer's conclusion about the potential threat from her neighbour is without merit. Independently from whether a conflict occurred between the neighbor and Ms. Meniuk's husband, the Officer reasonably found that there was insufficient evidence that the neighbor would have any interest or intention to harm Ms. Meniuk on her eventual return to Ukraine.

[40] The Officer also reasonably assessed the generalized country conditions in light of the situation in Odessa, where the Applicant lives in Ukraine. An officer is expected to assess how an applicant's particular circumstances relate to the broader country condition evidence, in terms

of the degree of risk or extent of harm they may face (*Arsu v. Canada (Citizenship and Immigration*), 2020 FC 617 at para 16). The Officer did just that.

[41] The Officer found that police protection was reasonably available in Ukraine. I agree with Ms. Meniuk that such a finding does not address the question about whether an applicant would encounter hardship upon return (*Pacia* at para 13). However, the Officer's finding that state protection would be available to Ms. Meniuk did not replace his analysis of whether she would face a risk to her security upon her eventual return. The Officer's observation about state protection was, in my view, independent of his conclusions regarding her risk of harm. He essentially was saying there was minimal risk, but, if a problem arises, state protection is available.

(7) General observations

[42] While I have attempted to respond to each of the allegations of "unreasonableness" advanced by Ms. Meniuk, I do so hesitatingly. The silo approach taken by Ms. Meniuk in presenting her case, as well as my effort to address each concern, militates against the global approach that should be taken to H&C applications for relief. One unreasonable finding, presuming one exists, does not render a decision unreasonable. Reasons must be read as a whole. An H&C determination is highly discretionary. There is no "rigid formula" that determines the outcome (*Sivalingam v. Canada (Citizenship and Immigration*), 2017 FC 1185 at para 7).

[43] I would conclude these observations by stating that while I have much sympathy for the Applicant, H&C relief is, in my view, exceptional, and is not to be considered an alternative

immigration stream. Something more than a sympathetic case is required to justify relief on H&C grounds (Canada (Public Safety and Emergency Preparedness) v. Nizami, 2016 FC 1177 at para 16; *Shackleford, supra*, at para 16).

## VII. Conclusion

[44] I find that Ms. Meniuk has not met her burden of showing that the Officer's decision is unreasonable. I am satisfied the decision meets the hallmarks of reasonableness as set out in *Vavilov*. The Officer considered each issue raised by Ms. Meniuk in light of the evidence offered. He assessed the evidence and the submissions, and made a determination. His decision demonstrates a clear grasp of the issues and is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker. The decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Vavilov* at paras 86 and 102 to 104; *Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[45] For these reasons, the application for judicial review is dismissed.

[46] Neither party proposed a question to be certified for consideration by the Federal Court of Appeal, and none arises from the record.

**JUDGMENT in IMM-5419-20**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-5419-20 |
| **STYLE OF CAUSE:** | NINA MENIUK v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
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