Federal Court  Cour fédérale

Date: 20250627

Docket: IMM-13257-24

Citation: 2025 FC 1160

Toronto, Ontario, June 27, 2025

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

YEVHEN VOLOVETSKYI
TETIANA VOLOVETSKA
DANYLO-ILLIA VOLOVETSKYI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Yevhen Volovetskyi [Principal Applicant], his wife Tetiana Volovetska [Co-Applicant] and their dependent child, Danylo-Illia Volovetskyi [Minor Applicant] [collectively, the Applicants], are Ukrainian citizens who reside in Canada as part of the Canada-Ukraine Authorization for Emergency Travel [CUAET] Program. They seek judicial review of a

decision [Decision] of an immigration officer [Officer], dated May 1, 2024, rejecting their application for an exemption under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*] on humanitarian and compassionate [H&C] grounds. The Applicants allege that the Decision must be set aside as the Officer relied unreasonably on the existence of the current Administrative Deferral of Removals [ADR] in place for Ukraine and did not conduct a proper global assessment of all relevant H&C facts and factors. I agree. The Officer's suggestion that an applicant "may be negatively affected" by returning to a country that has been fighting a deadly war for over 3 years and who faces military conscription, hardly does justice to the hardship the adverse country conditions existing in Ukraine pose to the Applicants. The effect of an ADR should not be used to avoid conducting a proper hardship analysis which ensures the humanitarian and compassionate review such applications call for and deserve.

[2] Accordingly, this application is allowed.

[3] While the Respondent has proposed a question for certification pursuant to paragraph 74(d) of the *Act*, I decline to do so as the question need not be decided in order to resolve this application and is not a question of general importance.

II. Facts

A. *The Principal Applicant's Status*

[4] The Principal Applicant is a 46-year-old citizen of Ukraine who was living with the Co-Applicant and the Minor Applicant in Poland when Russia invaded Ukraine in February 2022

and war ensued. The Co-Applicant and the Minor Applicant obtained temporary status in the United States and relocated to Florida to live with the Principal Applicant's family. The Principal Applicant was unable to join them as he had been deported from the United States after he pled guilty to a charge of possession of child pornography and served jail time there.

[5] In February 2023, the Principal Applicant came to Canada under the CUAET Program which "offers Ukrainians and their family members free, extended temporary status and allows them to work, study and stay in Canada until it is safe for them to return home." The Principal Applicant did not disclose his criminal conviction in his CUAET application.

[6] The Principal Applicant obtained a work permit and was working as a cook in Canada when he tried to cross the border to visit his family in the United States and was refused entry due to his criminal conviction. The Principal Applicant has since been found inadmissible to Canada on grounds of criminality pursuant to paragraph 36(2)(b) of the *Act*. While the Principal Applicant is subject to a Deportation Order, given that the timing of his removal to Ukraine is unknown, he was released from detention with strict conditions.

[7] The Principal Applicant submitted a Pre-Removal Risk Assessment application on August 1, 2023, which was refused on April 29, 2024.

B. *The Status of the Co-Applicant and the Minor Applicant*

[8] On July 12, 2023, the Minor Applicant obtained a Temporary Resident Visa [TRV] under the CUAET Program. The Co-Applicant and Minor Applicant entered Canada on September 1,

2023 and obtained a Visitor Record valid until July 2025. The Co-Applicant obtained a Work Permit that will expire in April 2026.

C. *The Applicants' H&C Application*

[9] The Applicants submitted an H&C application in November 2023. At the time, the Principal Applicant had lived in Canada for one year and the Co-Applicant and Minor Applicant had been in Canada for 6.5 months. The H&C grounds asserted were establishment, the best interest of the Minor Applicant [BIOC], risk and hardship associated with adverse country conditions in Ukraine and the mental health issues of the Principal Applicant and Co-Applicant.

[10] The Applicants requested that they be granted Temporary Resident Permits [TRPs] if their H&C application was refused.

D. *The H&C Decision*

[11] The Officer concluded that based on a global assessment of the Applicants' circumstances, the Applicants' H&C considerations do not merit an exemption under subsection 25(1) of the *Act*.

[12] The Officer found little establishment based on the short amount of time that the family had been in Canada and their lack of familial ties, with the Officer giving positive consideration to the Principal Applicant's employment and the Minor Applicant's attendance at school and extracurricular activities.

[13] The Officer considered the Principal Applicant's criminal conviction to be "a significantly negative factor" in the weighing of H&C grounds based on the seriousness of the conviction and its connection to children.

[14] The Officer acknowledged the adverse country conditions in Ukraine stemming from the war and found that the Principal Applicant "may be negatively affected" by the adverse country conditions since he is not subject to the ADR. With respect to the Co-Applicant and the Minor Applicant, the Officer found that while they "would likely be negatively affected" by the adverse country conditions, they were not subject to removal in the near future as a result of the ADR and would be returned to Ukraine only when conditions have "substantially improved." The Officer found that if the Applicants' H&C application was not approved, it would not be unduly onerous or unexpected for them to have to renew their temporary status in Canada.

[15] The Officer considered that it was in the best interest of the Minor Applicant to remain in Canada due to the adverse conditions in Ukraine; however, the effect of the ADR was that the Minor Applicant is unlikely to be negatively affected by the adverse conditions. The Officer acknowledged the emotional and financial impact of the Minor Applicant's separation from his father but considered this to be a generalized risk faced by all Ukrainian families that would be temporary since the Minor Applicant and Co-Applicant could eventually return to Ukraine and be reunited when the war is over.

[16] The Officer considered the mental health conditions of the Principal Applicant and the Co-Applicant, both of whom had undertaken psychological assessments which show that they

meet the diagnostic criteria for Posttraumatic Stress Disorder [PTSD], and the fact that their conditions could worsen if they are forced to return to Ukraine. The Officer acknowledged that it was "possible" the Principal Applicant's mental health could worsen but found that the Co-Applicant's mental health would "likely not worsen" given that she would not have to return to Ukraine unless the conditions there had greatly improved.

[17] The Officer refused the Applicants' TRP requests for the same reasons.

III. Issues and Standard of Review

[18] The Applicants have raised the following issues challenging the reasonableness of the Decision:

A. Did the Officer fail to engage with the Applicant's argument regarding his criminal rehabilitation?
B. Was the Officer's conclusion on hardship pertaining to country conditions unreasonable?
C. Did the Officer err in assessing the mental health considerations arising from the evidence submitted by the Applicants?

[19] A reasonable decision is one which is "based on an internally coherent and rational chain of analysis" and is justified in relation to the factual and legal constraints applicable in the circumstances (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [*Vavilov*]). While a court must avoid reassessing and reweighing the evidence, it nevertheless must engage in a robust review. Courts must ensure that the decision under review is intelligible, justified and transparent (*Vavilov* at para 99), and that the decision maker did not fundamentally misapprehend or fail either to account for the evidence before it (*Vavilov* at paras

125-126) or meaningfully address the central issues and concerns of the parties (*Vavilov* at para 127).

IV. Analysis

A. *Did the Officer fail to engage with the Principal Applicant's argument regarding his criminal rehabilitation?*

[20] The Applicants submit that the Officer gave undue emphasis to the Principal Applicant's criminal conviction with "little regard" to the evidence of his rehabilitation.

[21] The Officer's reasons show that this is not the case.

[22] The Officer considered the Principal Applicant's criminal conviction, including evidence that the conviction dated back to 2012, and the fact that the Principal Applicant had not committed any further offences since that time. The Officer acknowledged the Principal Applicant's evidence that he was remorseful, as well as his evidence that he was innocent of the charge and had "accepted" a guilty plea in order to co-operate with the police. According to the Applicant, he was living in a house with a number of people when the offending materials were found on a computer in the house. The Officer considered this explanation but found there to be a lack of supporting documentary evidence to support the suggestion that the Principal Applicant was innocent of the charge.

[23] The Officer concluded:

> Overall, while I acknowledge that a significant period of time has passed since the applicant's criminal conviction, and that the applicant has not re-offended during this time, I find the serious nature of the [Principal Applicant's] criminal conviction, in particular the fact that it involved children, to be a significantly negative factor for consideration on this H&C application.

[24] The Applicants suggest that the Officer erred in the manner identified in *Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 [*Sivalingam*] by unreasonably ascribing the most significant weight to the very factor giving rise to the Principal Applicant's inadmissibility. I find this authority distinguishable on the basis that the error identified by Justice Grammond in *Sivalingam* was that the officer focused exclusively on the applicant's past criminal record and failed to engage with evidence, including the nature of his sentencing and expert evidence related to the applicant's rehabilitation (*Sivalingam* at para 10). In this case, the Decision shows that the Officer fully engaged with the mitigating factors advanced by the Principal Applicant relating to his rehabilitation and claim of innocence. Ultimately, the Applicants are arguing that the Officer should have weighed the evidence differently, which is not a basis for this Court's intervention (*Vavilov* at para 125 and *Braud v Canada (Citizenship and Immigration)*, 2020 FC 132 at para 52).

B. *Was the Officer's conclusion on hardship pertaining to country conditions unreasonable?*

[25] The Applicants submit that the Officer erred in relying on the existence of an ADR including as a mitigating factor to avoid an assessment of hardship, which was found to be a reviewable error in *Dziubenko v Canada (Citizenship and Immigration)*, 2024 FC 1282

[*Dziubenko*], a decision following a line of authority originating with *Bawazir v Canada (Citizenship and Immigration)*, 2019 FC 623 [*Bawazir*].

[26] The Respondent submits that the Officer accepted the Applicants would face hardship and did not rely on the ADR to "mitigate" that hardship. Rather, the Officer found that the Minor Applicant and Co-Applicant are unlikely to experience the hardship asserted because they will not be forced to return to Ukraine during the war. The Respondent argues that this is a "common sense" analysis that is supported by authorities such as *Leteyi v Canada (Citizenship and Immigration)*, 2022 FC 572 [*Leteyi*] and *Ndikumana v Canada (Citizenship and Immigration)*, 2017 FC 328 [*Ndikumana*].

[27] As I detail in the following paragraphs, I find that the Officer committed the two errors identified in *Bawazir* rendering the Decision unreasonable in its overreliance on the ADR.

(1) *The Officer side-stepped a hardship analysis by reason of the ADR*

[28] First, the Officer erroneously relied on the ADR to avoid conducting a proper hardship analysis related to the adverse country conditions in Ukraine and the hardship they pose personally to the Applicants (*Bawazir* at para 17, *Elshafi v Canada (Citizenship and Immigration)*, 2023 FC 266 at paras 17, 20, 27 [*Elshafi*]).

[29] The Respondent argues that the Officer committed no such error, as the Officer expressly considered the likely consequences of a negative H&C decision and the hardships that a return to Ukraine would entail. The Respondent relies on the following portion of the Officer's Decision:

> I acknowledge that if this H&C application of the applicants' is not approved, the [Co-Applicant and Minor Applicant] (and possibly the [Principle Applicant] if he is not removed from Canada due to his criminality), under the present ADR that is in place in Canada for Ukraine, would have to continue to renew their temporary status in Canada, such as through applications for further Work Permits, Temporary Resident Visas (TRVs), and/or Visitor Records. However, I do not find that having to renew their temporary status in Canada would either be an unexpected circumstance, or unduly onerous, for the applicants.

[30] Contrary to the Respondent's submission, I find that this excerpt shows that the Officer did in fact "sidestep" the hardship analysis by relying on the ADR. There is simply no analysis of the hardship based on the personal factors cited by the Applicants who submitted that a return to Ukraine would expose them to "grave hardship," including a shortage of food and water and a lack of access to health care and safe shelter, given that their home had been destroyed.

[31] I acknowledge that the Officer listed the adverse country conditions in Ukraine which include "bombardments, explosions and missile launches, destruction of housing and infrastructure, an overburdened and under-resourced health care system, a lack of basic supplies, a lack of employment, and possible forced enlistment in the armed forces for the [Principal Applicant]." However, with the exception of the potential forced enlistment of the Principal Applicant in the armed forces, the Officer's reasons are divorced from the Applicants' personal circumstances. This failure to conduct a proper hardship analysis is what the Court found to be an error in *Bawazir* (*Bawazir* at paras 17-18, 22; see also *Ibrahim v Canada (Citizenship and Immigration)*, 2022 FC 1194 at para 32 and *Omar v Canada (Citizenship and Immigration)*, 2021 FC 1201 at para 25) and what the Court considered an impermissible omission in the global H&C analysis required under subsection 25(1) of the *Act* in *Elshafi* (*Elshafi* at paras 17, 27).

[32] I do not consider the authorities of *Ndikumana* and *Leteyi* to be inconsistent in this regard. The officers in both these cases conducted a hardship analysis taking into account the adverse country conditions and the presence of a Temporary Stay of Removal [TSR] despite the applicants having failed to link their personal circumstances to adverse country conditions (*Ndikumana* at paras 24-25 and *Leteyi* at paras 8-11). The officers in these cases did not commit the error identified in this case, which is relying on the existence of an ADR to avoid conducting a hardship analysis based on adverse country conditions linked to the Applicants' personal circumstances altogether.

(2) *The Officer's H&C Analysis was "tainted" by the analysis of the ADR*

[33] The second error identified in *Bawazir* is in allowing an erroneous conclusion that adverse country conditions are essentially irrelevant because of the ADR to taint consideration of other H&C factors (establishment in *Bawazir* at para 19; the BIOC in both *Elshafi* at para 36 and *Dziubenko* at paras 8-9).

[34] I find that the Officer committed this error in analyzing the H&C factor relating to the mental health of the Principal Applicant and the Co-Applicant. The following excerpt from the Decision shows how the ADR tainted the Officer's analysis:

> The applicants' H&C materials indicate that the [Principal Applicant] and [Co-Applicant] have both been diagnosed with Post-Traumatic Stress Disorder (PTSD) and with Major Depressive Disorder, single episode, in partial remission.
>
> The applicants' H&C materials also indicate that the [Principal Applicant's] and [Co-Applicant's] mental health issues would likely worsen if they had to return to Ukraine.

> With respect to the [Principal Applicant], as it is possible that he will be removed from Canada to Ukraine due to his criminality, I accept that his mental health might worsen if [he] had to return to Ukraine.
>
> However, I note that I have previously found in this H&C decision that, due to the ADR that is in place in Canada for Ukraine, the [Co-Applicant and the Minor Applicant], would not have to return to Ukraine unless, and until, the conditions in Ukraine were to significantly improve. I find that once the conditions in Ukraine significantly improve, and the ADR that Canada has in place for Ukraine is eventually lifted, that the [Co-Applicant's] mental health would likely not worsen if the applicants h[ad] to return to Ukraine at that time.

The Officer's reasons fail to analyze the mental health risks faced by the Principal Applicant and the Co-Applicant if they were to return to Ukraine by unduly relying on the presence of the ADR (*Bawazir* at para 19 and (*Sutherland v. Canada (Citizenship and Immigration),* 2016 FC 1212 at paras 15-16). The Officer does not engage with the Applicants' psychological assessments, which detail the source of their PTSD, and the threat of their mental health worsening, nor does the Officer consider the mental health resources that will be available in Ukraine despite having acknowledged that general country conditions include a deteriorating healthcare system.

V. Certified Question

[35] The Respondent has proposed a question for certification under paragraph 74(d) of the *Act* on the basis that the case law is split on whether an H&C Officer may consider an ADR as a "mitigating factor" as part of their hardship analysis. The question reads:

> In assessing the hardship of returning to their country of origin, is it always unreasonable for an H&C officer to take into account that an ADR/TSR prevents the applicant from being removed until conditions in that country improve?

[36] I decline to certify this question given that I have found that the error committed by the Officer was in failing to conduct a proper hardship analysis by relying on the presence of the ADR. This case does not engage the question of whether, having conducted a proper hardship analysis based on the applicants' personal link to adverse country conditions, an officer may give less weight to those hardships for reasons related to the presence of an ADR. Accordingly, the proposed question need not be decided in order to resolve this application and is not a question of general importance (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36 and *Lai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FCA 21 at para 10).

VI. Conclusion

[37] This application is granted by reason that the Officer failed to conduct the necessary analysis of all of the H&C facts and factors and improperly treated the ADR in place for Ukraine as an overriding factor in denying an exemption under subsection 25(1) of the *Act* rendering the Decision unreasonable.

[38] There is no question for certification.

JUDGMENT in IMM-13257-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, the decision dated May 1, 2024 is quashed and the matter is remitted back for re-determination by a different decision maker; and
2. There is no question for certification.

"Allyson Whyte Nowak"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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