

Federal Court



Cour fédérale

Date: 20211125

Docket: IMM-254-21

Citation: 2021 FC 1305

Ottawa, Ontario, November 25, 2021

PRESENT: Madam Justice Walker

BETWEEN:

LYUDMILA MOLCHANOVA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a citizen of Kazakhstan. She came to Canada in 2019 to live with her daughter following the death of her husband. Shortly thereafter, the Applicant filed an application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds. A senior immigration officer refused her application on January 4, 2021 (the Decision) and the Applicant now seeks judicial review of the Decision. She argues that the officer failed to reasonably assess her advanced age and solitary life in Kazakhstan and wrongly identified her as a citizen of Russia.

[2] For the reasons that follow, the application will be granted.

I. Overview

[3] The Applicant is 80 years old. Although born in Russia, she lived in Kazakhstan for most of her life. One of her two daughters immigrated to Canada in the mid-1990s and became a Canadian citizen in 2004. Over the years, the Applicant and her husband visited Canada a number of times to see her daughter and son-in-law.

[4] Beginning in 2001, the Applicant's daughter made a number of attempts to sponsor her mother and father to join her in Canada but was unsuccessful.

[5] In 2018, the Applicant's husband of 57 years died leaving her to live alone in Temirtau, Kazakhstan as their second daughter lives in the United States.

[6] On June 3, 2019, the Applicant arrived in Canada using a temporary residence visa (TRV) to join her daughter and son-in-law in Québec. She has since lived with the couple and has made acquaintance with a number of their friends.

[7] On July 31, 2019, the Applicant applied for permanent residence in Canada on H&C grounds. She based her application on her age and establishment in Canada and the adverse effects on her of a forced return to Kazakhstan where she would be without support or companionship. The Applicant included in her H&C application her own submissions,

submissions from her daughter, letters of support from her daughter's friends in Canada, and Canadian and Québec income tax information for her daughter and son-in-law.

[8] In the Decision, the officer considered the Applicant's personal circumstances, including her age and loneliness in Kazakhstan since her husband's death, and her sense of love and welcome in Canada. The officer acknowledged the Applicant's evidence that her presence in Canada with her daughter and son-in-law has had a positive effect on her well-being but noted there was no medical evidence of any existing condition that could only be met in Canada. The officer found that the Applicant has not been long in Canada and had developed some ties through her daughter but had shown little involvement in the community. Overall, the officer accorded the Applicant's establishment in Canada modest weight.

[9] With regards to adverse country conditions, the officer acknowledged that the Applicant no longer has family members living in Temirtau, Kazakhstan but stated that her sister lives in Russia and would be able to assist her in reintegrating into that country. In this regard, the officer referred to a January 1995 agreement between Russia and Kazakhstan regarding their respective citizens' ability to obtain citizenship in the other country (1995 Citizenship Agreement). The officer also noted that the Applicant is a retiree after a successful career as a senior government economist, has a pension from that position and owns an apartment in Temirtau, all of which would mitigate some of the challenges of reintegrating following a two-year absence. In addition, while the Applicant's mobility may be limited at her age, she is familiar with how to access the free healthcare systems in Russia and Kazakhstan.

[10] In conclusion, the officer gave only modest weight to the H&C factors advanced by the Applicant and was not persuaded that those factors were sufficient to warrant an exemption under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

II. Analysis

The Applicant's affidavit

[11] The Respondent first objects to the admissibility of the Applicant's affidavit of March 23, 2021 in support of this application on the basis that the affidavit was translated by the Applicant's son-in-law. There is no evidence that the son-in-law is a competent and independent interpreter as required by Rule 80(2.1) of the *Federal Courts Rules*, SOR/98-106. Further, as a relative of the Applicant, her son-in-law should not be involved in any translation of documents related to her application to the Court.

[12] I agree with the Respondent. The Applicant's affidavit is not admissible as it has not been reliably translated in compliance with Rule 80(2.1). The exhibits to the affidavit that are contained in the Certified Tribunal Record (CTR) are unaffected as they are properly before the Court.

Reasonableness of the officer's analysis of establishment/personal circumstances

[13] The Applicant makes a number of arguments challenging the merits of the Decision, all of which are subject to review for reasonableness (*Canada (Minister of Citizenship and*

Immigration) v Vavilov, 2019 SCC 65 at paras 10, 23 (*Vavilov*); *Ahmed v Canada (Citizenship and Immigration)*, 2020 FC 777 at paras 13, 37-39). Where the Court reviews an administrative decision for reasonableness, its role is to examine the reasons given by the decision maker and determine whether the decision “is based on an internally coherent and rational chain of analysis” and is “justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85).

[14] The Applicant argues that the officer mischaracterized the basis of her H&C application by analysing the application narrowly based on establishment and adverse country conditions. In fact, the Applicant’s request for H&C relief was based on advanced age and the absence of any support and companionship for her in Temirtau. In the Applicant’s opinion, this mischaracterization or misunderstanding led the officer to make reviewable errors in their analysis of: her personal circumstances; the letters of support from her daughter’s friends; the absence of medical documentation of her loneliness; the relevance of the Applicant’s ownership of an apartment in Temirtau; and the previous unsuccessful sponsorship attempts by her daughter.

[15] I do not find the Applicant’s arguments persuasive.

[16] The Applicant has not identified any serious shortcomings in the officer’s assessment of the basis of the H&C application, her personal circumstances or the evidence relating to her life in Canada. The analysis in the Decision is not robotic, contrary to the Applicant’s assertion. Although the officer undertook their analysis under the headings used in the standard form H&C

decision, the content of the analysis is determinative and demonstrates the officer's focus on the information and submissions provided by the Applicant.

[17] The officer acknowledged clearly and with compassion the loneliness experienced by the Applicant after her spouse's death, stating that she had lost a "husband, companion and confidant". The officer gave some weight to the circumstances that led her to join her daughter in Canada and her sense of well-being once she arrived in Canada. The officer also reviewed the letters from her daughter's friends but gave them modest weight because the friends had not spent a great deal of time with the Applicant and their support was based on friendships with the daughter. Finally, the officer did not overlook medical evidence of any condition or depression suffered by the Applicant, who acknowledges that loneliness is not an illness.

[18] I also find that the officer did not err in considering the Applicant's ownership of an apartment in Temirtau. The Applicant argues that her ownership of the property was not before the officer. However, in her very recent application for a TRV, the Applicant referenced her apartment as evidence supporting her intention to return to Kazakhstan. The content of the TRV application was not extrinsic evidence as it was supplied by and known to her (*Reza Azali v Canada (Citizenship and Immigration)*, 2008 FC 517 at para 26; *Moïse v Canada (Citizenship and Immigration)*, 2019 FC 93 at paras 9-10).

[19] The officer did not ignore the daughter's prior attempts to sponsor the Applicant to Canada. The fact that her daughter has been unsuccessful in prior sponsorship applications does not alone warrant special relief. This argument suggests a broad availability of H&C relief

contrary to the caveats expressed by Justice Abella in *Kanthisamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paragraphs 14, 23 (*Kanthisamy*). The fact that her daughter could not sponsor the Applicant due to an inability to meet the minimum income requirements and the failure to be selected in sponsorship lottery quotas are disappointments suffered by many applicants. The provisions of section 25 of the *IRPA* are not an alternative immigration route.

[20] In summary, I find it was reasonably open to the officer to conclude that the Applicant's age and solitude in Kazakhstan did not constitute special or unusual circumstances within the parameters established by the Supreme Court in *Kanthisamy*. The Applicant's opinion that her evidence of being left alone and unhappy at an advanced age was ample and should have been accorded more weight is a request that the Court re-weigh the evidence before the officer. It is well established that this is not the role of the Court on judicial review (*Vavilov* at para 125; *Ou v Canada (Citizenship and Immigration)*, 2021 FC 268 at para 31). The Applicant has established no basis upon which the Court should intervene in the officer's analysis bearing in mind the highly discretionary nature of an H&C decision (*Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 18).

Country conditions for the Applicant in Kazakhstan/Russia

[21] The officer's consideration of the adverse country or return conditions the Applicant may face is, however, problematic. In this regard, I agree with the Applicant. I find that the officer's failure to properly identify the Applicant's citizenship, and the findings that appear to result from that failure, is a determinative error and requires redetermination of the H&C application.

[22] The Respondent argues that the officer mentioned Kazakhstan a number of times in the Decision and clearly knew that the Applicant's country of residence was Kazakhstan. However, the officer begins their review of the H&C application in the Decision by stating that the Applicant "is a 79 year old citizen of Russia". This assertion is incorrect. The Applicant's passport indicates she is a citizen of Kazakhstan, as do the numerous immigration documents contained in the CTR.

[23] The result of the officer's error is an analysis that considers at times Russia, at times Kazakhstan, and at other times the two countries on a combined basis and suggests that the Applicant may return and live in either country. The officer's analysis in this regard is confusing and without justification. It leads the officer to downplay the obstacles the Applicant may face should she decide to move to Russia to be with her sister. For example, the officer makes reference to the 1995 Citizenship Agreement and appears to assume it will be beneficial to the Applicant. The officer sets out no reasons for their assumption, nor do they relate the terms of the Agreement to the Applicant's situation. More troubling is the officer's failure to address the fact that the Agreement is over 25 years old and that its application appears on its face to be limited to a one-year period from the date of its entry into force.

[24] I find that the officer's error regarding citizenship and country of return is significant and results in a decision that does not meet the hallmarks of a reasonable administrative decision established in *Vavilov*. The analysis in the Decision does not demonstrate a rational chain of reasoning as it is not clear that the officer fully understands the Applicant's evidence and where she will likely reside should she leave Canada.

Procedural fairness

[25] As a corollary, the Applicant challenges the fairness of the officer's process in reaching the negative Decision based in part on their reliance on the 1995 Citizenship Agreement. She argues that the Agreement was extrinsic evidence and the officer was required to provide notice to her of concerns arising from the Agreement. As I have found the officer's substantive analysis in the Decision is not reasonable and must be reconsidered, I will state only that it remains unclear on the evidence before me whether the 1995 Citizenship Agreement can be properly considered as extrinsic evidence or was within the documents readily and publicly available to the Applicant and the officer.

III. Conclusion

[26] The application is granted.

[27] No question for certification was proposed by the parties and none arises in this case.

[28] With the consent of the parties, the style of cause in this application is hereby amended to reflect "The Minister of Citizenship and Immigration" as the Respondent.

JUDGMENT IN IMM-254-21

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to reflect the Minister of Citizenship and Immigration as the correct respondent.
2. The application for judicial review is granted.
3. No question of general importance is certified.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-254-21

STYLE OF CAUSE: LYUDMILA MOLCHANOVA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HEARD BY VIDEOCONFERENCE

DATE OF HEARING: NOVEMBER 8, 2021

JUDGMENT AND REASONS: WALKER J.

DATED: NOVEMBER 25, 2021

APPEARANCES:

M^e Nataliya Dzera FOR THE APPLICANT

M^e Jocelyne Murphy FOR THE RESPONDENT

SOLICITORS OF RECORD:

M^e Nataliya Dzera FOR THE APPLICANT
Barrister and Solicitor
Montréal, Quebec

Attorney General of Canada FOR THE RESPONDENT
Montréal, Quebec